

Sakaziro v. ROP, 7 ROP Intrm. 279 (Tr. Div. 1999)

**IWONG SAKAZIRO, MELANI NGIRTURONG,
CHEVRON MELUS, through his guardian, Melani Ngirturong,
CHARLATAN MELUS, through his "guardian, Melani Ngirturong,
CLIFFORD MELU, SESILIL LLENGAI, RENGUUL MASAHIRO,
ISAAC MASAHIRO, KLANG NGIRCHOKEBAI, OKABE
NGIRCHOKEBAI, through his guardian, Klang Ngirchokebai,
GIBBONS MASAHIRO, NOBUKO ONGKLUNGEL, HOWARD
LERNER and KOKEMERANG KAMESANG,**

Plaintiffs,

v.

**REPUBLIC OF PALAU, NGARDMAU STATE, and
PALAU BOARD OF HEALTH,
Defendants.**

CIVIL ACTION NO. 317-97

Supreme Court, Trial Division
Republic of Palau

Decided: April 23, 1999

BEFORE: JEFFREY L. BEATTIE, Associate Justice.

On the morning of September 1996 a group of people left M-Dock in Koror for a trip to Ngardmau in a boat owned by the Republic of Palau and used by the Palau National Hospital. On the same morning, another group of people left the Ngardmau State dock for a trip to Koror in the Ngardmau State boat. Neither boat ever arrived at its destination. The boats collided off the Ngardmau coast, killing five people. This action was filed by various passengers who were injured in the collision who claim that the negligent operation of the boats caused the collision.

The hospital boat, as it was referred to during trial, left Koror at about 8:00 a.m. It was a thirty-three foot boat powered by two 225 horse power outboard engines. The hospital boat was driven by Jones Hosei, and he had four passengers on board, including two employees of United States Public Health. The purpose of the trip was to visit a health care facility in Ngardmau.

The Ngardmau State boat left the dock at approximately 8:30 a.m. It was a 23 foot boat powered by a 200 horsepower outboard engine. Ulysses Yakuchil was the boat driver, and he had twenty passengers on board.

The hospital boat was traveling at approximately 35 miles per hour and was following the contours of the mangrove shoreline, staying close to the shore. As it approached the area of Ngardmau known as Bkul a Chelid, the shore line jutted out towards the sea, creating a point and making it impossible to see to the north until the boat rounded the point. When the hospital

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rounded the point heading north, Hosei saw the Ngardmau State boat heading towards him southbound, about 100 yards away.

The speed of the Ngardmau boat was about 25 miles per hour, so the two boating were closing at a speed of approximately 60 miles per hour. When the Ngardmau boat driver saw the hospital boat coming towards him, he moved to his left, towards shore. At the same time, the hospital boat also moved towards shore, so the boats remained on a collision course. At the last moment, the Ngardmau driver turned to his right, but at the same time, the hospital boat turned to its left and the two boats collided head on, with the starboard bow of the hospital boat striking the portside bow of the Ngardmau boat. The **L280** hospital boat traveled over and across the Ngardmau boat after impact. Many people were thrown into the sea, some in an unconscious state.

Fortunately, some other boats came upon the scene shortly after the collision, and the occupants of those boats assisted in rescuing the injured. Heroic efforts were also made by some of the passengers on the boats involved in the collision with the result that there were no drownings. The injured passengers were loaded into the hospital boat and taken to the hospital in Koror.

LIABILITY

It is clear, and indeed not disputed, that Hosei was operating the hospital boat in the course and scope of his employment. He was employed by the Republic of Palau as the hospital boat driver. Also, Yakuchil was operating the Ngardmau State boat pursuant to his job as boat driver for Ngardmau State. Thus, any negligence on the part of the boat drivers is imputed to their employers, Republic of Palau and Ngardmau State respectively under the doctrine of *respondeat superior*.

The Court finds that both boat operators were negligent and that their negligence caused the collision, resulting in the injuries suffered by plaintiffs. The hospital boat driver failed to exercise reasonable care when he chose to stay close to the shoreline, thereby choosing a route that presented him with an obstructed view. There is no reason why he could not have approached the Bkul a Chelid area from a point further from shore, in which case he would have had a clear view of the course ahead of him at all times. It is true that the water is a little deeper closer to shore, but at the time of the accident the tide was very high, so there was no danger of hitting any rocks or coral heads by traveling further from shore. Indeed, the expert testimony was that, based upon the tide charts for the accident date, the water was deeper at the time of the accident than it was when the Court and counsel visited the scene during trial. At that time, the water was deep enough to allow boats to travel over the shallow reef area away from the mangrove shore, and the Court observed several boats doing so.

Having made the decision to travel close to the shore so his view was obstructed, Hosei was negligent in not reducing his speed as he approached the blind curve so that he would have more time to react if he saw another boat as he rounded the blind point as he approached Bkul a Chelid. Moreover, when he did see the Ngardmau boat, he was negligent in failing to reduce his

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speed enough to give himself more time to react. Hosei testified that he reduced his engine speed “just a little” when he saw the Ngardmau boat. Reasonable care required a substantial decrease in speed and continued throttle adjustments as long as the boats remained on a collision course. Instead, Hosei essentially maintained his approximate normal speed and tried to avoid collision by maneuvering the boat, even when the other boat maneuvered in the same direction. Finally, at the last minute, Hosei turned to the left. Reasonable care and the customary rules of the sea in Palau required him to steer to the right or, if that option was blocked by the shoreline, to slow down in anticipation of the oncoming boat turning to the right, which it did.

The Ngardmau State boat operator was negligent in initially steering his boat to his left when he saw that he was on a collision course. In the exercise of reasonable care, he should have followed the customary practice and steered right so as to set a course which would have him pass the hospital boat on his right. He also failed to exercise reasonable care by not reducing his speed significantly when he saw he was on a collision course. He, ¶281 too, tried to avoid collision only by maneuvering and not by reducing speed so as to give himself more time to assess the situation and react accordingly. If both boats had reduced their speed by only fifty percent, they would have had twice as much time to take measures to avoid a collision. Moreover, if there were a collision, the impact would have occurred at only half the speed.

For the foregoing reasons, the Court finds that the negligent conduct of each boat driver was a substantial factor in causing the collision which resulted in the injuries to plaintiffs. Because there were not two or more distinct harms involved -- that is, there was just a single collision -- and there is no reasonable basis for determining the contribution of each operator’s negligence to the collision, the Republic of Palau and Ngardmau State are jointly and severally liable for any injuries suffered by plaintiffs. *See Restatement of Torts (Second)*, § 433A comment i.

DAMAGES

The wheel of fortune dealt different injuries to the various plaintiffs, and the nature and severity of the injuries received by any passenger was determined randomly. In some cases, the evidence showed that two passengers were sitting side by side and one received only minor injuries, while the other was killed. For the most part, the Court will discuss the damages suffered by each plaintiff separately, keeping in mind 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.” 22 Am. Jur. 2d, *Damages* § 260 at 209.¹ The Court has considered

¹ The Republic of Palau has submitted copies of various decisions of the trial division of this court in which damages for pain and suffering have been awarded and argues that the court should be guided by those decisions in determining the amount of damages to be awarded to the plaintiffs in this case. Plaintiffs objected, arguing that it is improper for the Court to consider damage awards in other cases when setting damages in this case. The Court agrees. Each case stands on its own unique facts and circumstances, and damages should be determined based upon those facts and circumstances, not ones present in other cases. The cases cited by the ROP are largely, if not entirely, cases in which jury verdicts in other cases were reviewed in order to determine on appeal whether an excessive verdict was entered. *See e.g. Wilson v. Beebe*, 743

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all the evidence and has assessed what it believes to be fair and reasonable compensation for the pain and suffering of each plaintiff. Some of the relevant factors considered were the nature and extent of the injuries, the age of the victim, and the change in lifestyle caused by the injuries.

Plaintiffs have asked for additional damages for emotional distress. In assessing damages, the Court considers the mental anguish caused by a victim's injuries, such as anguish over a forced change in life style, to be part of the victim's pain and suffering. Additional damages may be proper for emotional distress caused by the shock and trauma of the accident and observing friends and loved ones in various states of pain and observing their grievous injuries. This is especially true where, as here, the injured people are not strangers to each other but in fact are fellow members of a small, close knit 1282 community and, in many cases, are members of the same family. However, these damages are only available for the immediate emotional disturbance and cannot be recovered for subsequent brooding over the incident. See *Restatement of Torts (Second)*, § 436(2) comment c.

Iwong Sakaziro

Iwong was a passenger on the Ngardmau boat and suffered grievous injuries as a result of the collision. She was taking her child, Stephanie, to the hospital. Stephanie was about three years old at the time and was lying down with her head on Iwong's lap. The first thing Iwong remembers after the crash was that she was lying down in the boat, crying out for Stephanie. She saw Stephanie, who was not injured, at her feet. She also saw blood on her legs and was in a great deal of pain.

Both of Iwong's legs were broken, with the femurs being completely severed just above the knees. Also, one knee cap was broken and she had cuts on her legs. She was required to undergo various surgical procedures, including the placement of pins and rails in her legs, repair of soft tissue, and the placement of a wire loop on her left knee cap. She spent 104 days in the hospital.

After a period of rehabilitation in which she started in a wheelchair and then walked with leg braces, she can now walk, although her walk is stiff legged because her knees bend only slightly. She needs knee replacement surgery on both knees and, although she is ambivalent about facing up to having the surgery, the Court believes she will have it done due to the improvement it will provide to her pain and quality of life.

Iwong's medical expenses to date have all been paid for by the ROP. However, the knee replacement surgery will have to be performed off island. There is conflicting evidence concerning the cost of the knee replacement surgery. It is clear that the cost can vary depending upon where the procedure takes place and whether both knees are done at the same time. Considering all of the evidence, the Court finds that, at the present time, the reasonable cost of a

F.2d 342, 348 (6th Cir. 1984) ("Of course every award for injuries must be determined by its own facts. Therefore, similar cases should not be relied upon by a factfinder when determining the amount of a plaintiff's damage award. However, analogous cases may be reviewed at the post-trial or appellate stage to determine whether a damage award is within a given range.")

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knee replacement is \$17,000. For two knees, the cost would be \$34,000. Moreover, the knee replacement would only last for about 15 years, so Iwong, who is 38 years old, would need a second round of replacements. The cost of the future surgery should be discounted to present value. *See Restatement of Torts (Second)* § 913A. Using a discount factor of 5%, which the Court finds is reasonable, the present value of \$34,000 paid fifteen years from now is \$16,354.58. Thus, the Court finds that Iwong is entitled to special damages in the amount of \$50,354.58 for her medical expenses.

Iwong clearly has endured much pain and suffering as a result of her injuries. Her quality of life has taken a turn for the worse, as she can no longer participate in sports as she once did. Nor can she fully enjoy activities with her children, like playing volleyball with her son. She can't fully perform her household chores either. She testified that she feels useless. Her range of activity should improve after knee replacement surgery, but the extent of the improvement is not certain, and that surgery itself will generate more pain. Considering all of these factors, the Court finds that \$100,000 is reasonable damages for her pain and suffering.

Iwong has suffered some emotional distress as well. The Court finds that \$5,000 is a reasonable amount of damages for her emotional distress.

1283 Howard C. Lerner

Lerner was a passenger on the hospital boat and is fifty-eight years old. The first thing he remembers after the collision is being underwater, trying to get to the surface. He was unable to reach the surface because he was under the boat. Clarence Ksano, a carpenter for the hospital and a passenger on the boat, jumped into the water and pulled Lerner out, just as he had given up and was convinced he was going to die. Ksano saved Lerner's life, but he had serious injuries.

Lerner was having great difficulty breathing and was in extreme pain due to the fact that he had broken seven ribs, some of which had punctured his right lung and caused the lung to collapse. At the hospital, a chest tube had to be inserted into his chest cavity to drain fluid, a painful procedure. Also, a catheter was inserted into his penis, but the hospital did not have the right size, which caused the medical team to make several attempts before they succeeded in inserting the catheter tube. This procedure was extremely painful. Lerner also had lacerations on his scalp and his hand, which were sutured at the hospital.

The next day, a trauma team from the Guam Naval Hospital arrived with a Med Evac plane, and Lerner was flown to a U. S. military hospital in Okinawa. He received further treatment in Okinawa and remained there for two weeks before returning to his home in Maryland, United States. His flight back home was extremely uncomfortable because, due to the side effects of the morphine he was taking, he had not regained the use of his bowels. When he arrived in Maryland, he was immediately hospitalized for another two days.

When he returned to his home, he was still in a great deal of pain, so much that he could not lie back on his bed, could not get around the house unassisted, and could not shower or use the toilet unassisted. He forced himself to return to work on November 4, 1996, but he initially

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had to spend half of his work day resting. Eventually, after two years, he regained the degree of productivity that he had had prior to the accident. He still has an aching feeling in his chest, a feeling of pressure on the chest. He avoids lifting heavy objects out of concern that he may exacerbate the injuries he received.

Taking all of the foregoing into account, the Court finds that \$90,000 is a reasonable amount of damages to compensate Lerner for his pain and suffering resulting from injuries caused by the negligence of defendants' boat operators. Lerner has suffered some emotional distress as well. The Court finds that \$5,000 is a reasonable amount of damages for his emotional distress.

Gibbons Masahiro

Gibbons was a passenger in the Ngardmau State boat. The first thing he remembers after the collision is waking up in the water. He was unable to swim to the boat due to an injury to his left arm. He was assisted to the boat by his brother, Renguul, and taken to the hospital.

Gibbons suffered a broken left ulna and his left radius was dislocated from his elbow. He had three surgical procedures done at the Palau Hospital, including a skin graft and the placement of a screw plate onto his ulna. He also had a painful bruise on his left shoulder tip, as well as some cuts over his left eye.

His biggest problem was the dislocation of his radial head -- the end of the arm bone called the radius was torn free from the ligament that normally holds the end in place at the elbow. This caused him loss of mobility in his arm -- he could not straighten it 1284 or fully rotate it from a palm up to a palm down position when holding his arm out in front of him. One doctor at the hospital recommended radial head surgery, in which a part of the end of the bone is cut off, giving full extension of the arm. The same doctor testified that an alternative procedure is ligament repair surgery in which the surgeon attempts to repair the damaged anular ligament which normally holds the radius in place. He testified that there is a reasonable difference of opinion in the orthopedic medical community over which is the better procedure.

Gibbons got a second opinion from a doctor who recommended the ligament reconstruction surgery, so he went to the Philippines and had that surgery. Unfortunately, it was not too successful, and Gibbons still has a limited range of motion in his left arm. His flexion is 65 degrees instead of a normal 45 degrees. His extension range is 140 degrees instead of a normal 180 degrees. His pronation and supination is 45 degrees instead of 90 degrees.

Gibbons life has changed due to his injuries. He used to be an avid boater and spear fisherman. Now, his loss of arm strength and mobility has made it impossible for him to use a normal size spear gun, so he uses a small one. Also, he has a fear of the water now and has given away his boat and only fishes close to shore. He used to be one of the best fishermen in Ngardmau, but now he can no longer make that claim.

Defendants claim that Gibbons could have avoided the loss of mobility of his arm if he

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had followed the advice of the first doctor and had the radial head cut instead of having the ligament reconstruction surgery. That may be true, but it was not unreasonable of Gibbons to follow the advice he received from the second doctor, advice which the evidence shows had reasonable support in the medical profession. Defendants further claim that Gibbons did not do all of the exercises which he was told to do to help rehabilitate his arm. However, none of the doctors who testified said that his condition would have been any better if he had not stopped doing his exercises.

Taking all of the above into account, the Court finds that \$90,000 is a reasonable amount of damages to compensate Gibbons for his pain and suffering.

Gibbons also claims damages for lost income from spear fishing, but the Court finds the evidence insufficient to support a finding that he would have made any specific amount of money in the future from fishing if he had not been injured. Indeed his fishing income before the accident was sporadic -- he did not sell any fish in June, July or August of 1996 and did not have records of income from other months. Also, when his expenses of fishing are taken into account, it appears that his net income was minimal.

Gibbons claims damages for anxiety and headaches, but he had been treated for those ailments even before the accident, and it is uncertain whether and to what extent the accident caused or exacerbated these conditions. Gibbons has suffered emotional distress, however, due to the accident, and the Court finds that \$5,000 is a reasonable amount of damages for such distress.

Gibbons received \$5,310.60 from an insurance policy maintained by the Republic of Palau as a benefit of his employment by the Land Court. Because the defendant maintained the insurance, it is not subject to the collateral source rule and such sum will be deducted from the damages awarded to Gibbons. *Restatement of Torts (Second) § 920A*.

1285 Clifford Melus

Melus is 22 years old and was a passenger on the Ngardmau boat. His son, Chevron, about 2 years old, was on his lap. He was struck by the hospital boat and knocked into the sea. When he got back to the Ngardmau boat, he saw his best friend, Celestine, motionless in the boat with his head split open and brain matter coming out. Ulysses, the boat driver, dove into the water and saved Chevron.

Melus suffered a broken rib on his right side. He also had fiberglass imbedded in his back. He missed a month of work due to his injury, and the Court finds he is due \$200 in lost wages. For his pain and suffering, the Court finds that \$10,000 is fair compensation. For emotional distress, the Court finds that the sum of \$5,000 is fair and reasonable.

Melani Ngirturong

Ngirturong, who is Melus' wife, was a passenger in the Ngardmau boat. Her 11 month

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old son, Charlatan, was on her lap. The collision knocked her into the water, but she held on to Charlatan and put him back into the boat. She then began a frantic search for Chevron, which ended when Ulysses dove into the sea to get him. Ngirturong had a sore back for two weeks after the accident.

The Court finds that \$3,000 is a fair and reasonable sum for her pain and suffering and \$6,000 is a fair and reasonable sum for her emotional distress, considering all the evidence.

Charlatan and Chevron

Fortunately, these infant children were not physically injured in the crash. They undoubtedly suffered some emotional distress from the trauma of the accident, however, and the Court finds that \$3,000 is a fair and reasonable sum for damages for each child.

Kokemerang Kamesang

Kamesang, who is 88 years old, was a passenger on the Ngardmau boat. She had some aches and pains after the crash, including a bruised knee, but was relatively unscathed. She now suffers from back pain, shortness of breath and other ailments, but the evidence does not establish that these problems were caused by the boat crash. Indeed, she was treated for most or all of these problems before the crash, and it is just as likely that the aging process is the cause. Unfortunately, her sister, Tekoi, was a passenger on the same boat and was killed in the accident.

Considering all the evidence, the Court finds that \$6,000 is a fair and reasonable amount of damages for Kamesang's pain and suffering. The Court finds that \$6,000 is a fair and reasonable sum for damages for her emotional distress.

Klang Ngirchokebai

Ngirchokebai, who is 73 years old, was a passenger on the Ngardmau boat. She was traveling with her four year old son, Okabe, on her lap. She and Okabe were both thrown into the sea by the collision. After Ngirchokebai was thrown into the water, she began a frantic search for Okabe. The water was too deep to stand in, and she had her eyes closed to keep the water out. She found her son by touch, and then reached up and felt the bottom of the boat. She eventually made it to the surface and got back on the boat, where she saw Celestine and Beketaut, both fatally injured.

Ngirchokebai hit her head on something after the collision and now suffers from headaches. She also experiences pain in her right knee and left shoulder. Although she 1286 had surgery after the accident, it was to remove a tumor she had before the crash. Considering all of the evidence, the Court finds that \$6,000 is a fair and reasonable sum for damages for her pain and suffering. The Court also finds that she has lost income from farming in the amount of \$5,000 since the accident. The evidence is not sufficient to make a finding of future lost income because plaintiff put on no evidence of the life expectancy of a 73 year old woman. The Court finds that \$6,000 is a fair and reasonable sum for her emotional distress.

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Okabe

Fortunately, Okabe did not suffer physical injuries. The Court finds that \$3,000 is a fair and reasonable amount for his damages for emotional distress.

Sesilil Llengai

Llengai, who is 75 years old, was a passenger on the Ngardmau boat. She bruised her knee in the collision. After the crash, she saw Ibukel, a passenger on the boat who lived with her. She was cut from her forehead all the way to her chin. Llengai went over to her and saw that she was dead.

The Court finds that \$6,000 is a fair and reasonable sum for damages for her pain and suffering. The Court further finds that \$6,000 is a fair and reasonable sum for damages for her emotional distress.

Renguul Masahiro

Renguul, who is 46 years old, was a passenger on the Ngardmau boat. He was relatively unscathed from the accident. He was thrown into the water by the impact of the collision and the first thing he remembers is regaining consciousness in the water. Although he complains of back pain, the evidence does not establish that the pain stems from the accident. It appears likely that it is a result of his curvature of the spine, a condition not attributable to the accident. He had pain in his foot after the crash.

Considering all the evidence, the Court finds that \$3,000 is a fair and reasonable sum for damages for Renguul's pain and suffering. The Court further finds that \$6,000 is a fair and reasonable sum for damages for emotional distress.

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Isaac Masahiro

Isaac, who is 37 years old, is the brother of Gibbons and Renguul and was a passenger on the Ngardmau boat. The first thing he remembers after the collision is waking up in the water. He climbed in the back of the boat, as he was only slightly injured, having a bump on his head. He missed a month's work, but did not put on any evidence regarding the amount of income he lost. He complains of back pain, but it appears that, like his brothers, his back pain is not due to the accident but to curvature of the spine.

Considering all the evidence, the Court finds that \$3,000 is a fair and reasonable sum for damages for pain and suffering. The Court further finds that \$6,000 is a fair and reasonable sum for damages for emotional distress.

Nobuko Ongklungel

Ongklungel, who is 75 years old, was a passenger on the Ngardmau boat. She was talking to Tekoi at the time of the collision. After the impact, she had some of the boat's plywood wreckage on her back, along with the bodies of Ibukel and Tekoi. She screamed for Ibukel and Tekoi to get off of her, but they, of course, did not. She pulled on Ibukel's hand, which was dangling down in front of her, and 1287 Ibukel's body was pulled down next to her. Ibukel's head was cut open from the back to the mouth.

Ongklungel suffered minor injuries, including a cut above her left eye and a bruised leg. She also complains of pain in her knee and back, but she had those problems before the crash and it was not established that these lingering pains are a result of the accident. Considering all the evidence, the Court finds that \$3,000 is a fair and reasonable amount of damages for her pain and suffering. The Court further finds that \$6,000 is a fair and reasonable amount of damages for her emotional distress.

Judgment will enter in accordance with the foregoing.