

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX AT KINGSHILL

GEORGE G. O'REILLY, III,	)	
	)	CIVIL NO. 939/1992
Plaintiff,	)	
	)	ACTION FOR DAMAGES
vs.	)	
	)	
FORBES-OSAKA, INC., d/b/a HONDO'S,	)	<u>NOT FOR PUBLICATION</u>
	)	
Defendant.	)	<u>NOT FOR UPLOAD</u>
	)	

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CABRET, J.

MEMORANDUM OPINION
(July 16, 1996)

This negligence action was tried by the Court without a jury on November 28, 1995. Plaintiff, George O'Reilly, III, a thirty-six-year-old construction worker, seeks to recover compensation for pain and suffering, lost wages, and costs of medical bills for injuries sustained when he tripped and fell down the stairs at defendant's business establishment. Defendant denies negligence and alleges that plaintiff's contributory negligence was the cause of his injuries.

FACTUAL BACKGROUND

The plaintiff filed this action following an event which allegedly took place in the early morning hours of February 1, 1992, at Hondo's Night Club in Christiansted, St. Croix. According to plaintiff's complaint, while he was "in Hondo's, he was served and consumed alcoholic beverages to the extent of inebriation such that his equilibrium and navigation skills were awry." (Complaint ¶ 5). Additionally, plaintiff's complaint states that as he was leaving the night club, and attempting to navigate his way down the stairs, he fell down the stairs suffering personal injuries. As a result of this fall, plaintiff was taken to the hospital in an ambulance, where he remained for 12 days while doctors surgically repaired his severely broken ankle.

Plaintiff alleges that Hondo's is negligent in that 1) it continued to serve him alcohol when it knew or should have known that he was intoxicated; 2) its stairs constituted a dangerous condition, as plaintiff, who was intoxicated, had to use the stairs to leave; and 3) it failed to provide railings to assist plaintiff, knowing he was intoxicated. Plaintiff further alleges that he suffered injuries and incurred medical bills as a direct and proximate cause of defendant's negligence. The defendant asserts that it is not liable to the plaintiff for any alleged injuries because the proximate cause of plaintiff's injuries was the fact that he had consumed alcohol to the point of intoxication at an establishment other than defendant's.

ANALYSIS

A. DUTY

Generally, in an action for the recovery of damages for injuries resulting from the alleged negligence of the defendant, the plaintiff must show that the defendant has failed to exercise the proper care in the performance of some legal duty which the defendant had, and, that the breach of said duty was the proximate cause of the injury. RESTATEMENT (SECOND) TORTS §281 (1965).¹ It is a well-established rule that a possessor of land has a duty to see that the land is safe for the reception of a visitor, and will be subject to liability for physical harm caused to his invitees by a condition on the land. RESTATEMENT (SECOND) TORTS §343 (1965). Comment "d" to section 343 states that "[a]n invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." *Id.* However, liability is limited to those conditions that the possessor of land knows or should know about.²

¹ The Court notes that, according to 1 V.I.C. §4, in the absence of local laws to the contrary, the principles of the Restatement on the Law provide the rules of decision. See *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030 (3d Cir. 1987).

² §343 of the Restatement provides that a possessor of land is liable to his invitees if he:

a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an

(continued...)

In this case, plaintiff's status as an invitee is clearly established, as defendant is the owner of Hondo's, a night club licensed to sell alcoholic beverages, and on the night of February 1, 1992, plaintiff was a patron consuming alcohol and listening to music. As an invitee, plaintiff was entitled to expect that Hondo's would take particular precautions for the safety of himself and other patrons.

Defendant contends, however, that it is not liable to plaintiff because plaintiff had been a patron of Hondo's long before the accident, and the condition of the stairs was known or obvious to plaintiff. §343A of the RESTATEMENT (SECOND) TORTS permits the imposition of liability even for known or obvious dangers when the possessor should anticipate the harm.³ At trial, the evidence showed that the condition of the stairs had been deteriorating for a period of three to four years. Clearly, if Mr. O'Reilly knew of the condition, in the exercise of reasonable care over a three to four year period, the condition of these stairs should have been discovered by the defendant. The defendant, having knowledge of

(...continued)

unreasonable risk of harm to such invitees, and
b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
c) fails to exercise reasonable care to protect themselves against the danger.

³ §343A entitled "Known or Obvious Dangers," provides:

1) A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge and obviousness.

the condition, should have anticipated the harm and taken steps to protect its invitees against the danger. As such, this Court finds that the defendant owed the plaintiff a duty to maintain its premises despite the fact that plaintiff had been a longtime patron.

B. BREACH

Plaintiff's claim for damages is predicated on the fact that the defendant, as a possessor of land, had a duty to exercise reasonable care to ensure that the premises were safe for use by him. Plaintiff alleges that the defendant knew or should have known that defendant's property presented an unreasonable risk of harm to the plaintiff in the absence of railings. Plaintiff also alleges that the defendant breached its duty of care by failing to maintain the stairs in a safe condition.

In support of his claim, plaintiff offered the testimony of Rosie Mackay, an expert in the field of safety engineering. At the request of plaintiff, Ms. Mackay conducted an inspection of the stairs at Hondo's. When asked by counsel whether there was anything about the stairs that were unsafe, Ms. Mackay testified that during her inspection, she found a two to two and one-half inch lip on the last step, which she characterized as a "trip hazard." (Transcript at 57). She further stated that pictures which Mr. O'Reilly had shown her, which were taken shortly after the accident, showed the steps in "terrible disrepair with a lot of

cracking." *Id.* Plaintiff argues that the "lip" on the last step, and the cracked condition of the stairs, is a hazard, making it more likely that someone would fall. In light of the uncontroverted testimony, the Court finds that the evidence presented establishes that the stairs at the defendant's business establishment were in disrepair and created a dangerous condition at the time of Mr. O'Reilly's fall.

Ms. Mackay also stated that OSHA⁴ requires owners, lessors, managers and agents to follow the safety and hazards regulations for buildings, and that Hondo's was required to place a proper railing on its premises pursuant to said law. Ms. Mackay went on to testify that there was no railing in the area where plaintiff fell, but she did remember seeing a little wrought iron gate used for ingress and egress at Hondo's, which when closed, could be considered a railing. However, she further stated that the iron gate itself could not sustain the 200 pounds that a railing is required to sustain, in the event that someone falls, bumps into it or leans against it. (Transcript at 68). Mr. O'Reilly testified that if there had been a railing in place, he would not have slipped. Ms. Mackay also testified that she did not know whether a railing would have prevented plaintiff's fall, but she said that the statutory purpose of having a railing is to

⁴ V.I. CODE ANN. tit. 24, §35 (1993).

assist people in the event that they trip or fall or lose their balance. (Transcript at 72).

Based upon the evidence, the Court concludes that Hondo's had a duty to ascertain the condition of the stairs and, to either repair the stairs or warn its invitees about the actual conditions of the stairs. The Court further finds that Hondo's breached that duty by failing to either repair the stairs or to warn its invitees about the risks inherent in the stairs, in light of the dangerous condition that they were in. Additionally, the Court accepts the testimony of Ms. Mackay and finds that the gate could not be used interchangeably as a railing. As such, the Court concludes that the defendant breached its duty to maintain a proper railing, as required by OSHA.

C. CAUSATION

Defendant contends that there is insufficient evidence to establish that plaintiff's injuries were caused by defendant's negligence. Specifically, in his Rule 50 motion,⁵ counsel for defendant argued that because there had been no expert medical testimony on the issue of causation, plaintiff's case should be dismissed. However, this Court finds that as a general rule, lay testimony is sufficient to support a finding of proximate causation in a negligence action when the causal relation is not so esoteric

⁵ FED. R. CIV. P. 50

and would be obvious to a layperson. See *Connally v. Chardon*, *Unpublished Op.*, Civil No. 78-52 (D.C.V.I. August, 4, 1978).

The undisputed testimony presented at trial was that plaintiff was walking down the stairs, stopped to speak with a friend, and that as he was proceeding down the last two steps, he fell. Plaintiff testified that after he fell down, he tried to get back up, but could not, which is when he thought that he had broken his ankle. Massai Henry, plaintiff's friend, who witnessed the fall, testified that he thought plaintiff had broken his ankle because of the way it was all twisted up. Finally, the evidence established that plaintiff was immediately taken to the hospital in an ambulance where he was treated for a broken ankle.

Plaintiff has presented sufficient evidence to establish the requisite causal relation between defendant's negligence and his injuries. Accordingly, the Court concludes that Hondo's, by failing to maintain the stairs in a safe condition, and failing to provide a proper railing, directly and proximately caused plaintiff's injuries.

D. CONTRIBUTORY NEGLIGENCE

The Court also finds that plaintiff was contributorily negligent. A plaintiff is contributorily negligent if he or she is also at fault, that is, plaintiff's conduct falls below the standard to which [the plaintiff] should conform for his own protection. *RESTATEMENT (SECOND) TORTS* §463 (1965). The contributory

negligence of a plaintiff may be, either an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or conduct which in [other] respects falls, short of the standard to which the reasonable man should conform in order to protect himself from harm. RESTATEMENT (SECOND) TORTS §466 (1965).

In this case, the defendant claims that plaintiff's intoxication was the direct and proximate cause of his injuries. At trial, plaintiff denied that he was intoxicated and testified that he only had three drinks throughout the entire evening. However, plaintiff's own complaint asserts in numerous instances that he was intoxicated. In fact, plaintiff predicates the defendant's negligence, in part, upon an allegation that Hondo's knowingly served him too much alcohol to the point that he became intoxicated and could not navigate the stairs in question.

Since the filing of the complaint and through the trial, plaintiff completely abandoned any allegiance to his original claims of intoxication. At trial, plaintiff denied ever reading the complaint filed in 1992 until three years later when his present counsel took over the case. However, in his Affidavit in Support of Motion for Default,⁶ plaintiff averred that he had reviewed the original complaint and that its allegations were true. Based upon the Complaint and plaintiff's testimony at trial, this

⁶ Defendant's Exhibit 2.

Court finds that the defendant has presented sufficient evidence to establish that plaintiff was drinking on the night of the accident and that his consumption of alcohol contributed to the cause of his accident.

E. ASSUMPTION OF RISK

Additionally, defendant contends that it is not liable for Mr. O'Reilly's injuries because Mr. O'Reilly assumed the risk when he used the stairs. Assumption of risk is an affirmative defense which has traditionally been considered an absolute bar to recovery. See RESTATEMENT (SECOND) TORTS §496A (1965). The plaintiff is not barred from recovering damages because of his fault. Rather, because he voluntarily exposed himself to an obvious or known danger, the plaintiff is regarded as having consciously relieved the defendant of any duty which otherwise might have been owed the plaintiff. *Keegan v. Anchor Inns, Inc.*, 16 V.I. 635 (3d Cir. 1979); see also *Smollet v. Skayting Dev. Corp.*, 793 F.2d 547 (3d Cir. 1986). The plaintiff's conduct is akin to consent and turns on the plaintiff's decision not to hold the defendant liable for the consequences of otherwise tortious conduct. Consent cannot be inferred merely from the fact that the plaintiff engaged in negligent conduct; there must be some other independent proof of consent. *Id.*

"This affirmative defense requires the defendant to bear the burden of showing that the plaintiff knew the risk, appreciated

its character, voluntarily chose to confront the risk, and that such a choice was reasonable." *Petitte v. Bodkin Dev. Corp.*, 23 V.I. 254, 58-59 (D.V.I. 1987). If the defense is made out, it negates any duty of care owed by the defendant, because the defendant's conduct is not considered the legal cause of the plaintiff's injuries. *Id.* at 59.

Hondo's claims that Mr. O'Reilly assumed the risk of injury is based solely on the fact that Mr. O'Reilly had been a patron of Hondo's for years and knew of the condition of the stairs. Plaintiff testified that he had been going to Hondo's off and on for at least four years, and that the stairs had always been in disrepair. Plaintiff further testified that he noticed a change in the condition of the stairs among the first few times he visited Hondo's and at the time of the accident. *Tr.* at 26. While this Court found that plaintiff was negligent insofar as his consumption of alcohol contributed to his accident, his negligent conduct alone is not tantamount to the consent or waiver required for application of the assumption of risk doctrine.

This Court recognizes that there are circumstances where the dangers are so obvious and so great that it would be unreasonable for any person to encounter it. However, this Court is not inclined to conclude that Mr. O'Reilly assumed the risk of injury by simply using the only means of ingress and egress available at defendant's business establishment. As the court in *Lady Goodall v. Virgin Islands Dev. Corp.*, 26 V.I. 178 (Terr.Ct.

1991), stated, "[t]o apply the assumption of risk doctrine in this case would be to emasculate completely any duty of the owner to properly maintain its premises." *Lady Goodall*, 26 V.I. at 182. The Court, therefore, determines that Mr. O'Reilly's knowledge of the condition of the stairs, in and of itself, does not justify the conclusion that Mr. O'Reilly assumed the risk of injury. Furthermore, the defendant, relying solely upon plaintiff's knowledge of the stairs, has failed to make the requisite showing to establish its assumption of risk defense.

However, as the Court has found plaintiff to be contributorily negligent due to his consumption of alcohol, and reaffirms its determination of defendant's negligence, the degree of fault between the parties will be apportioned as follows: plaintiff's contributory negligence is 33% and defendant's negligence is 67%.⁷

⁷ It should be noted that the Virgin Islands has enacted a comparative negligence statute found at V.I. CODE ANN, tit. 5, §1451(a) (Supp. 1995), which removes the absolute bar to recovery imposed by the common law doctrine of contributory negligence. 5 V.I.C. §1451(a) provides in pertinent part:

any action based upon negligence to recover for injury to person or property, the contributory negligence of the plaintiff shall not bar a recovery, but the damages shall be diminished by the trier of fact in proportion to the amount of negligence attributable to the plaintiff.

Id.

Accordingly, plaintiff's award will be reduced in proportion to his degree of negligence, that is, his failure to act reasonably under the circumstances.

F. DAMAGES

With the question of liability determined, the Court now addresses the issue of damages.

(1) Lost Wages

Plaintiff has submitted a claim for lost wages, stating that he can no longer perform his previous duties of a construction foreman. Plaintiff seeks lost wages in the amount of \$80,580.00. In support of his claim for lost wages, a 1991 tax return statement, 1991 & 1992 Unemployment Compensation W-2 forms and pay stubs from September 1991 were admitted into evidence.⁸ Additionally, plaintiff testified that he had been laid off from his job as a construction foreman and had been receiving unemployment compensation for about one month prior to the accident. A claim for "lost income cannot be based on conjecture and must be supported by something more than the plaintiff's own self-serving statements, particularly when such statements are ambiguous and uncertain." See *Connally v. Chardon*, Unpublished Op., Civil No. 78-52 (D.C.V.I. August 4, 1978) (citing *Medunic v. Lederer*, 533 F.2d 891 (3d Cir. 1976) and *Gordon v. Trovato*, 338 A.2d 653 (Pa.Super. 1975)). This Court finds that plaintiff's claims to lost wages must be denied because plaintiff was

unemployed at the time the accident occurred and he presented no evidence as to what the labor market conditions were at the time his accident occurred.

(2) Medical Bills

In support of plaintiff's claim for medical bills, several invoices were admitted into evidence at trial totaling \$19,908.77. Plaintiff testified that these invoices covered the costs of treatment for the surgical repair of his broken ankle, and infection, and the removal of the surgical hardware.⁹ In order to recover the cost of medical treatment, a plaintiff must establish that the medical treatment provided was medically necessary and appropriate for the injuries sustained. 22 Am. Jur. 2d, Damages §204 (1988). However, nonexpert testimony may be competent to prove a causal link between an accident and the injury where the connection is a matter of common knowledge. *Fiorini v. Whiston*, 635 N.E.2d 1311 (Ohio App. 1993); see also *Wood v. Elzoheary*, 462 N.E.2d 1243 (Ohio App. 1983).

Plaintiff's testimony regarding the accident and the immediate treatment received at the hospital satisfies his burden with respect to the costs for the initial treatment, wherein metal rods and screws were placed in plaintiff's ankle, and the surgery removing the same. However, plaintiff presented no testimony from

⁹ Plaintiff's Exhibits 2-19.

either a treating physician, or a medical consultant, to establish a causal connection between the broken ankle and the infection for which he also seeks to recover. Without expert medical testimony, the Court is unable to determine that the treatment of the infection and costs incurred for same were reasonably necessary or even related to the accident and the initial treatment. *Santana v. Mack*, 889 F.Supp. 223 (D.V.I. 1995); *Bell v. Stafford*, 680 S.W.2d 700 (Ark. 1984). Accordingly, plaintiff is only entitled to recover \$10,552.38, representing the costs associated with the treatment for the initial injury and the surgery necessary to remove the hardware.¹⁰

(3) Pain and Suffering

Plaintiff is also entitled to recover damages for past and present pain and suffering sustained as a result of this accident. This Court finds that as a direct result of falling on defendant's ill-maintained stairs, plaintiff broke his ankle, which according to plaintiff, was and continues to be highly painful. Additionally, plaintiff testified that corrective surgery was performed where pins, screws and metal rods were placed in his ankle, which were removed two years later.

Plaintiff also testified about a painful and frustrating inability to stand on his feet for any great length of time. The

¹⁰ The \$10,552.38 for medical bills represents the sum total of Plaintiff's Exhibits 2-4 and 15-18.

Court accepts the uncontradicted testimony of plaintiff, his mother, his sister and his friend, who all stated that because of his almost constant pain and discomfort, plaintiff's lifestyle has undergone a significant change. Further testimony from plaintiff and his family and friends showed that he has gained a lot of weight, and is presently physically unable to do the things he used to do, such as babysitting, lifting weights and exercising. Moreover, the testimony established that since the accident, plaintiff has become a lethargic and depressed person.

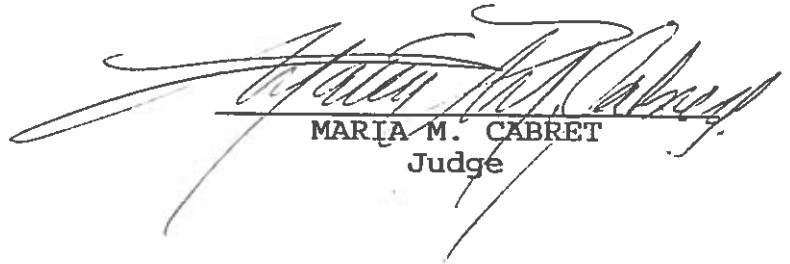
However, plaintiff offered no expert medical testimony to describe the extent of the injury or the prognosis of any future pain and suffering. As such, plaintiff cannot be compensated for future pain and suffering because the Court is unable to determine the extent of plaintiff's recovery or the length of time that it will take plaintiff to fully recover. Having considered all of the testimony, which clearly indicates that plaintiff's enjoyment of life has diminished considerably as a result of his injuries, the Court concludes that plaintiff is entitled to recover for past and present pain and suffering in the amount of \$75,000.00.

CONCLUSION

For the reasons stated, this Court concludes that plaintiff is entitled to recover damages in the total sum of \$85,552.38 for injuries sustained as a result of the negligence of the defendant. Based upon this Court's finding of contributory

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negligence on the part of the plaintiff, said recovery must be reduced by 33%. Judgment shall enter accordingly.



MARIA M. CABRET
Judge