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Torts--Consent as a Defense in Civil Actions Arising Out of Mutual Affrays, The Kentucky Rule

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TORTS—CONSENT AS A DEFENSE IN CIVIL ACTIONS ARISING OUT OF MUTUAL AFFRAYS, THE KENTUCKY RULE.

This note deals only with actions arising out of *mutual* combats, and does not purport to include those involving fights between the parties where one is the aggressor and the other defends himself, even though in defending himself he becomes the aggressor.

Generally speaking, if an individual consents to an injury to himself by another, that consent, when given by a capable person, bars any recovery by the injured party in a civil action for damages.[1] The familiar, long established maxim, *volenti non fit injuria*, ordinarily operates to deny relief to the complainant.

However, where two or more parties voluntarily engage in a mutual combat in anger, two divergent viewpoints on the question of whether consent to fight defeats a civil action for damages have been adopted. England and a majority of the states which have faced the issue hold that consent to fight is no defense, and each may recover from the other for all injuries incurred in the fight.[2] A small, but well-reasoned minority view is that the act of each is unlawful, and relief will be denied both in a civil action in the absence of force exceeding the consent given.[3]

Kentucky, now a staunch member of the minority, first evinced a bit of credence in that idea by dictum appearing in a case[4] of assault and battery. There, the court, although it reversed a judgment for the plaintiff on other grounds, stated that it deemed it not improper to add a statement of the applicable jury instructions. Among the proposed instructions is:

> "If defendants used more force than was necessary, or than reasonably appeared to them to be necessary under the circumstances and surroundings, to to save themselves from an assault then about to be inflicted on them by plaintiff the defendants are liable to plaintiff therefor, although they were acting in their self-defense or under apparent necessity, as defined in the instructions."[5]

True, this cannot be dogmatically stated to be a direct approbation of the present minority view, as the court failed to speak of *consent*

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[1] PROSSER, TORTS sec. 18 (1941), 4 AM. JUR. sec. 83 p. 172; 6 C.J. sec. 16 p. 805.

[2] PROSSER, TORTS sec. 18 (1941), see notes, 6 A.L.R. 388 (1920), 30 A.L.R. 199 (1924), 47 A.L.R. 1092 (1927), 4 AM. JUR. sec. 84 p. 173.

[3] PROSSER, TORTS sec. 18 (1941), see notes, 6 A.L.R. 388, 393 (1920), 30 A.L.R. 199 (1924), 4 AM. JUR. sec. 85 p. 174.

[4] *See* Beavers v. Bowen, 26 Ky. L. Rep. 291, 293-294, 80 S.W 1165, 1167 (1904).

[5] *Ibid.*

throughout the opinion, but, it might be reasonably inferred from the court's proposition that unless the defendant had used more force than was reasonably necessary, the plaintiff could not recover.

The court removed all existing doubt as to its position on the issue seven years later when, without qualification, it sanctioned the minority view.[6] There, the parties, whose lifelong friendship had suddenly ceased because of difficulties arising out of the courtship of the son of one and the daughter of the other, opened their knives and proceeded to whittle away at each other. The plaintiff received a severe cut near the heart and the defendant was marked on one leg in the ensuing battle. In an action for assault and battery, the defendant pleaded self-defense and filed a counter claim for damages for his injuries. The court, after stating that consent to engage in a mutual combat would not be available to either as a defense to a criminal prosecution, affirmed a judgment denying relief to either party. After citing other authorities, among them, *Galbraith* v. *Fleming*,[7] the court said:

> "In Goldnamer v. O'Brien, 98 Ky. 569, 33 S.W 831, 17 Ky Law Rep. 1386, 36 L.R.A. 715, 56 Am. St. Rep. 378, this court after referring to the conflict of authority on the question said: 'While we readily appreciate the argument that, so far as the state is concerned, no consent can be pleaded in justification, we have not been able to understand how in a civil suit, in which the party consenting alone is interested, compensation can be allowed by the law. If both parties to the action are violators of the law, must the mouth of one be closed, and the complaint of the other heard? The parties stand on an exact equality before the law, and, if one wrongfully consented to beat another, the other as wrongfully consented to be beaten.' "[8]

The court, not content to rest upon precedent alone, proceeded:

> " we do not see why in a civil action the rule should not apply that the law will refuse relief or an award of damages to him who voluntarily engages in a thing forbidden by law. The fight being unlawful, and both being equally to blame for the fight, it is

[6] Lykins v Hamrick, 144 Ky 80, 137 S.W 852 (1911).

[7] 60 Mich. 403, 27 N.W 581 (1886) This is probably the leading case for the minority view. There, in approving the instructions of the lower court, the court said: " if the plaintiff voluntarily engaged in the fight in the first instance for the sake of fighting, and not as a means of self-defense, he could not recover unless the defendant beat him excessively or unreasonably. This was as favorable to the plaintiff as the law will admit. The law does not put a premium upon fighting, and one who voluntarily enters into a quarrel will not be afforded relief for his own wrong in damages if he comes out second best. While the voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of the law."

[8] Lykins v Hamrick, 144 Ky. 80, 83, 137 S.W 852, 853 (1911).

> hard to see upon what principle the law should in a civil action make a settlement between wrongdoers. It is a wise rule of the law to leave the wrongdoer where it finds him, and it seems to us that the rule applies equally to violations of the law by fighting as to other violations."[9]

In 1923, the court, by dictum, reaffirmed its position when it stated that the following instruction given by the lower court was correct:[10]

> " if it believes from the evidence that at the time and on the occasion of the difficulty described in the evidence, plaintiff, Choate, and Charlie McNeil [defendant] each voluntarily and mutually entered into said conflict and difficulty, then the law is for the defendant, and the jury will so find."[11]

Legal writers have traced the majority rule to what is commonly accepted as its embryo in an early English case.[12] That decision may have been somewhat justified at that time by a prevailing idea of the need for the protection of the interests of the crown from invasion by combatants who were guilty of a breach of the peace. However, if one were angered sufficiently to fight, it is rather difficult to believe that he would stop and consider that he would be required to respond in damages for any injuries inflicted on his opponent. This has become trite, no doubt, and serves but slightly, if at all, as a deterrent to prospective duelists. Yet it seems to be the public policy argument on which the majority of the states appear content to rest their decisions. The cliche that *times change and so do ideas* might be dusted off and quite appositely submitted to the majority, for few of us would make such a naive contention that we would, in a fit of anger, stop and consider the element of damages and refrain from fighting because of such.

While the ratiocination of the majority proceeds upon the theory that the *consent* to fight is unlawful, and, therefore, not available to either as a defense, the minority has advanced one step further and called the *fighting* itself unlawful.[13] As fighting is an unlawful breach of the peace, the view of the minority and of Kentucky is to deny relief to one who voluntarily engages in a thing forbidden by the law, where both parties are equally to blame. Kentucky has in-

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[9] *Ibid.* at p. 83-84, 137 S.W 852, 854.

[10] *See* McNeil v. Choate, 197 Ky. 682, 683, 247 S.W 955 (1923).

[11] *Ibid.*

[12] PROSSER, TORTS sec. 18 (1941), Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace,* 24 COL. L. REV. 819, 825-826 (1924), Note, 73 U. OF PA. L. REV. 74, 77 (1924). This case referred to here is Matthews v. Ollerton, 1693, Comb. 218.

[13] For a typical rationalization of the minority view see note 7, *supra.*

For a typical rationalization of the majority view see Willey v. Carpenter, 64 Vt. 213, 23 Atl. 630 (1892).

timated[14] and other states[15] have held that if the consent given be exceeded, then the guilty party must respond in damages for the excessive force. The minority prefers to leave the wrongdoer where found, and abhors the thought of compensating a party for the commission of an unlawful act. In a civil suit, only the parties themselves are interested, and it seems contrary to sound principles of jurisprudence to reward a party because he is the less skillful pugilist and comes out of a mutual affray after absorbing a few more well-placed blows than he is able to land on his opponent. The minority regards the whole affair as tainted with unlawfulness and, in a civil action, refuses relief to either participant, unless the consent given be exceeded.

It might be suggested to the majority that it is doubtful whether it is common knowledge among laymen that they can or cannot be held civilly liable for fighting in their particular locale, until the conclusion of a suit. If so, how can the possibility of civil damages discourage members of the public from fighting? Although the majority would vigorously deny any inference of such result, it, in effect, under its thin cloak of deterrence, might, in some instances, be said to place a premium upon wrongdoing. To clarify this premise, if a party voluntarily enters a fight, he is guilty of a breach of the peace, and therefore, a wrongdoer. But, even if he should discover, to his momentary dismay, some latent talent for fisticuffs in his opponent, he may, notwithstanding his wrongful act, collect as much or more than his skilled adversary in a subsequent civil action.

Kentucky, by unequivocally adopting the minority view in the *Lykins* case,[16] reached what is considered by legal writers as the preferred result, although the Kentucky precedent is somewhat novel and unique. No other member state of the minority has relied on an abortion case in which consent defeated recovery in a civil action. True, perhaps the leading case is cited and serves as ample precedent for those devoted to *stare decisis*.[17] Generally speaking, however, an abortion is probably more distasteful to the ordinary individual and it usually carries a heavier sentence than fighting at criminal law. Therefore, a distinction might well be made between the effect of consent in civil actions based on abortions and in those based on mutual affrays, as probably no court would hold that consent would be a defense to a civil action for the taking of a life.

This writer has neither the intent nor desire to minimize the importance which the law does and should attach to the public peace as well as to the life and person of the citizen; but, the protection of these paramount principles should and does primarily lie

[14] See note 4, *supra*.

[15] See note, 6 A.L.R. 388, 391 (1920).

[16] See note 6, *supra*.

[17] The case referred to here is Galbraith v Fleming, 60 Mich. 403, 27 N.W 581 (1886).

within the criminal law field. From it should come any protective remedies if the present ones are found inadequate or too lax. A detailed discussion of this problem would bring to the fore the problem of the function of the civil law. Is it used to supplement and aid the criminal law, or is it a separate branch designed to cure the ills in a field all its own? The minority would seem to indicate that they consider each as designed to care for its own particular problems, and the civil side maintains a *laissez faire* attitude toward supplementing the criminal law, at least as to this particular problem.

A comparison of the rules suggests that although the fundamental principles relied on by the two types of jurisdictions are so opposed as to appear irreconcilable, the final result from a pecuniary standpoint may be similar, as some of the states of the majority side permit the introduction of evidence of mutual consent in mitigation of damages,[18] and some, if not all, of the minority recognize the principle that if the consent given be exceeded, the guilty party is liable for such force as is determined to be excessive by a jury.[19] Thus, where the parties fight in anger by mutual consent, if the consent is not exceeded, the majority permits both parties to recover for all injuries received and the minority denies recovery of anything to either. Following this further, where the consent is exceeded, the minority would allow the party on whom the excessive force was used to recover for the excessive force, and the majority would doubtlessly also permit him a greater recovery than his adversary, although he would still have to pay for whatever injuries he might be responsible for causing to the other. Hence, the final pecuniary results are not so far apart as one would surmise at a fleeting glance. It is simply the idea of a civil court of law occupying its valuable time by effecting settlements between evildoers, equally in the wrong, which detracts from the dignity and true purpose of civil jurisprudence. Broadly speaking, the true aim of civil jurisprudence is to render equal justice to the litigating parties, and this can be aptly achieved by leaving equal wrongdoers where found.

In conclusion, considering the problem from the viewpoint of the parties to the action, it probably matters little which rule is adopted, as the final results are not so distinguishable as to arouse any great concern. This may serve as an answer to the apparently immovable conflict of authority. If the object of the complainant be pecuniary in nature, he would probably find himself in practically the same shape in both jurisdictions. If his primary aim be the assuagement of his ego through nominal damages, it still matters little which rule is adopted as neither side would deny that both are wrongdoers. Neither rule will, as has been previously suggested, act as a deterrent to fighting and thereby protect the public's interest

[18] See note, 6 A.L.R. 394 (1920).

[19] See note, 6 A.L.R. 388, 393-395 (1920).

more than the other. But, considering the problem from the court's viewpoint, the process of going to trial will usually involve more costs and time than dismissing the case without ever submitting it to a jury. If for no other reason than to rid the courts of the degrading task of effecting petty settlements among wrongdoers, it is submitted that this is ample reason to deny relief to either party.

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