

KERMAN YAMADA and LEORA YAMADA, Plaintiffs-Appellants

v.

**TRUST TERRITORY OF THE PACIFIC ISLANDS
and RAMON ROSARIO, Defendants-Appellees**

Civil Appeal No. 313

Appellate Division of the High Court

Ponape District

November 3, 1980

Appeal from granting of a motion for dismissal entered as to the Government, in a complaint alleging that plaintiff was shot by a police officer. The Appellate Division of the High Court, per curiam, held that even though the plaintiffs alleged negligence on the part of the Government, since the plaintiff's claim in substance arose from an assault and battery, it was within one of the statutory exceptions to claims allowed against the government, and therefore the granting of the motion to dismiss was affirmed.

Trust Territory—Suits Against—Sovereign Immunity

In a complaint alleging injury to the plaintiff through his having been shot by defendant policeman, motion to dismiss the Government as a defendant was properly granted, where the plaintiffs' claim in substance arose from an assault and battery, even though the plaintiffs alleged negligence on the part of the Government. (6 TTC § 252(5))

Before BURNETT, *Chief Justice*, and NAKAMURA,
Associate Justice

PER CURIAM

In *Salons v. Trust Territory*, Civil Appeal No. 311, in which claim was made for injuries sustained when plaintiff was shot by a police officer, we affirmed an Order of the Trial Court dismissing as to the Government pursuant to 6 TTC Sec. 252(5). We reach the same result in this matter.

The complaint in this action differs from that in *Salons* only in that there is here alleged negligence on the part of the Government. Even if we assume such negligence, we

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cannot avoid the conclusion that the claim arises out of assault and battery.

The test is not the theory upon which the plaintiffs elect to proceed or how artfully the pleadings may have been drawn. Rather, the decisive factor is whether, in substance and essence, the claim arises out of assault and battery. *Nichols v. United States*, 236 F. Supp. 260 (1964).

As the Court in *Santa v. Johnston*, 7 T.T.R. 133 (Tr. Div. 1974) noted, the exception of assault and battery would be meaningless if it could be circumvented by alleging negligent supervision of employees. Whatever theory is advanced must inevitably rest upon the intentional act of the police officer. As such, the Court has no jurisdiction to consider it.

The Courts of the United States have reached the same conclusion. ". . . regardless of the artistry of his pleading the plaintiff's claim in substance and essence arose out of an assault and battery." *Coffee v. United States*, 387 F. Supp. 539 (D.C. Conn. 1975).

And see *Pennington v. United States*, 406 F. Supp. 850 (D.C.N.Y. 1976).

Accordingly, the Trial Court correctly concluded that it had no jurisdiction and dismissed as to the Trust Territory. The Order is AFFIRMED.

The matter is remanded to the Trial Court for further proceedings with respect to the claim against the individual defendant Rosario.