

YCHITARO, Appellant,
v.
LOTIUS, Appellee
Civil Action No. 192
Trial Division of the High Court
Truk District
January 19,1965

Appeal from judgment of District Court awarding \$1,000.00 in damages to plaintiff, father of student child who drowned as result of defendant teacher's negligent operation of motorboat. The Trial Division of the High Court, Chief Justice E. P. Furber, held that father could sue as personal representative of deceased. The Court further held that Truk customary law on liability for negligence resulting in death was unclear and that rules of American common law were controlling. The Court also held that teacher was liable for negligence which was proximate cause of death of child but that damages must be limited to present value in dollars of services which next of kin may have reasonably expected from deceased, reduced by the additional expense of raising her.

Modified and affirmed.

1. Torts-Wrongful Death

Teacher who permits students to over-crowd boat which he is operating so that boat capsizes and child drowns is negligent, and his negligence is proximate cause of child's death.

2. Torts-Negligence

Where defendant in negligence action is public school teacher, question of liability should be governed by American common law rules since matter of schools and responsibility of teachers is foreign to Truk custom and there is no express provision as to teacher's liability in written enactment.

3. Trust Territory-Applicable Law

Rules of common law as expressed in restatements of law and generally understood and applied in United States are rules of decision in courts of Trust Territory in cases to which they apply, in absence of written or customary law. (T.T.C., Sees. 20, 21, 22, 24)

4. Torts-Negligence-Vicarious Liability

Public schools and boards which control them are not held liable for injuries caused to pupils by negligence of teachers or other employees of school in performance of their duties.

5. Torts-Generally

Tort is legal term for wrong independent of contract, including both wilful and negligent wrongs.

6. Torts-Immunity-Government

Immunity extends to municipal corporations which are not liable for torts committed in course of purely governmental functions.

7. Torts-Immunity-Public Employees

Immunity of school and municipal corporation does not extend to individual whose wrongful conduct caused injury, whether he is public officer or employee.

8. Torts-Generally

Individual should be liable in damages for injuries caused by negligence or wilful wrong.

9. Torts-Immunity-Public Employees

Board of education is not liable for torts committed in exercise of governmental function, but where members are sued in individual capacities, no legal theory insulates public official from personal tortious acts.

10. Torts-Immunity-Public Employees

Fact that defendant in tort action was public school teacher at time of incident does not relieve him of liability he might otherwise have.

11. Truk Custom-Torts-Wrongful Death

Under Truk custom, there is no consensus on matter of liability for unintentionally causing death.

12. Truk Custom-Torts-Wrongful Death

Under Truk custom, in former times, compensation for death was paid by transfer of land from lineage of wrong-doer to lineage of deceased.

13. Truk Custom-Torts-Wrongful Death

Under Truk custom, deaths caused unintentionally have been forgiven where person causing death has shown proper regret, sorrow, and sympathy for surviving members of family or lineage of deceased.

14. Truk Custom-Torts-Wrongful Death

If there is liability for money damages under traditional Truk custom for unintentionally causing death, it should go to deceased's lineage rather than to father.

15. Truk Custom-Torts

Under Truk custom, there may be no such thing as liability for negligence, there being no middle ground between absolute liability for all harm inflicted or intentional wrongs only.

16. Custom-Generally

"Custom" is usage by common consent, or uniform practice which becomes law of place or subject matter to which it relates.

17. Custom-Generally

Custom must be accepted by those upon whom it places burden as well as by those who hope to profit from it.

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18. Torts-Wrongful Death

Where court can find no custom as to liability in money damages for unintentionally causing death, it must hold that liability for wrongful death which is not wilful does not depend on custom but on other parts of law.

19. Torts-Negligence

Where court found liability for damages arising out of automobile accident in Palau District, case involved new elements introduced by outsiders, not covered by local custom, and governed by rules of common law. (T.T.C., Sec. 22)

20. Torts-Negligence

Liability for damages arising out of motorboat accident is governed by rules of common law.

21. Admiralty-Motorboats

In case of accident involving motorboats, there may be liability in admiralty.

22. Torts-Negligence

Liability for negligence in situations not clearly covered by local custom in part of Trust Territory concerned must be governed by common law principles so far as not governed by any written law.

23. Torts-Negligence

Common law concept of negligence is very broad.

24. Torts-Negligence

Negligence is omission to do something which reasonable man guided by considerations which regulate conduct of human affairs would do, or doing something which reasonable man would not do.

25. Torts-Negligence

Actionable negligence is violation of duty to use care.

26. Torts-Negligence

If person's negligence causes injury to person or property of another as natural, direct and immediate result of the negligence, negligent person will be held liable to pay injured person value in money of damage caused, provided injured person was acting properly at time of injury.

27. Torts-Negligence-Standard of Care

Teacher has duty to use reasonable care to protect students from danger.

28. Torts-Negligence-Standard of Care

, Teacher, has duty to prevent third persons from intentionally harming students or conducting themselves in such manner as to, create unreasonable risk of harm to students.

29. Torts-Negligence-Standard of Care

In determining what is reasonable care in action for tort, standards of people and area involved must be considered.

30. Torts-Wrongful Death-Personal Representative

Personal representative of deceased may bring any action for wrongful death such as would have entitled party injured to maintain action if death had not ensued. (T.T.C., Sec. 25(a) and (b))

31. Torts-Wrongful Death-Damages

Court may award damages in wrongful death actions not exceeding ten thousand dollars, proportional to pecuniary injury resulting from such death, to surviving spouse, children or other next of kin. (T.T.C., Sec. 25(b) and (c))

32. Torts-Wrongful Death-Personal Representative

Requirement of bringing action for wrongful death in name of personal representative of deceased is procedural matter which should not affect question of liability except to protect defendant from actions by other claimants.

33. Torts-Wrongful Death-Personal Representative

Logical person to represent deceased in wrongful death action in Truk is father or maternal uncle of deceased child.

34. Torts-Wrongful Death-Damages

In wrongful death action, court may grant money damages to next of kin only for pecuniary injury and not for sorrow or grief.

35. Torts-Wrongful Death-Damages

Past expenditures for child is not proper measure of damages in action for wrongful death of child.

36. Torts-Wrongful Death-Damages

Pecuniary benefits in wrongful death action include present value of future -services and value of any services rendered immediately before death.

37. Torts-Wrongful Death-Damages

In case of a child, pecuniary damages in wrongful death action is the excess in present value in dollars of services which next of kin might reasonably have expected from deceased, reduced by the additional expense which they would have incurred in raising her.

FURBER, *Chief Justice*

This is an appeal from a judgment of the Truk District Court in favor of the father of a ten-year old girl against

the girl's public schoolteacher for causing her death. The father requested one thousand dollars (\$1,000) damages and the District Court granted judgment for that amount.

[1] There was no dispute about most of the basic facts. The teacher was endeavoring to take his students by outboard motorboat in the waters of Truk Atoll to see a cacao plantation. He was personally operating the boat, which was badly over-crowded; he was the only adult on board and says the plug was out of order; when he speeded up the motor, the bow went under the water, the boat capsized, and in the excitement, the ten-year old girl in question drowned. The teacher testified that he asked four children who had jumped on the boat at the last minute to get off, but that they failed to do so. He proceeded on the trip, however, and speeded up the motor. From the evidence it appears clear that the defendant-appellant's negligence was what caused the child's death without the intervention of any new cause which was not naturally to be expected. That is, his negligence was what is called in legal terms the "proximate cause" of the child's death. The principal questions raised by this appeal, therefore, are whether he is liable in money damages for the death, and if so, for how much, and to whom.

Counsel for the defendant-appellant raised three main grounds for appeal :-.

1. The defendant-appellant was acting as a teacher. As he understands it, American schools and other governmental bodies are not liable for the injuries caused in the exercise of governmental functions, and that rule should apply in the Trust Territory.

2. The defendant-appellant never intended or desired that the child should drown; her death was accidental; he had gone promptly to the child's father and expressed his regret, sorrow, and sympathy. Therefore, under Truk-

ese custom he should be forgiven and not required to pay damages.

3. The damages awarded are excessive since the child was only ten years old and didn't work regularly.

The plaintiff-appellee acknowledges that the defendant-appellant was acting as a public schoolteacher, that he had no intention or desire that the child should drown. The plaintiff-appellee does not dispute the defendant-appellant's claim that he expressed promptly his regret and sorrow over the incident and his sympathy for the parents of the child, but says that under Trukese custom if a person kills the child of another, he should pay for it.

[2,3] As to the defendant-appellant's first point that he was acting as a public schoolteacher, this court is in agreement with his counsel's contention that the matter should be governed by usual American common law rules since this whole matter of schools and the authority and responsibility *of* teachers is foreign to Trukese custom and there is no express provision as to a teacher's liability in any written enactment in the Trust Territory. **It** therefore comes under Section 22 of the Trust Territory Code, which provides as follows:-

"Sec. 22. *Common law applicable; exceptions.* The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in cases to which they apply, in the absence of written law applicable under Section 20 hereof or local customary law applicable under Section 21 hereof to the contrary and except as provided in Section 24 hereof; Provided, That no person shall be subject to criminal prosecution except under the written law of the Trust Territory or recognized local customary law not inconsistent therewith."

Section 24 has to do with land law and is not material to this action.

[4-6] It is true that, except where the situation has been changed by statute, public schools (and private schools not conducted for profit), and the boards or other bodies that control them, are generally held in the United States, *not* to be liable for injuries caused to pupils by the negligence or wrongful actions of teachers and other employees of the school in the performance of their duties. This is often referred to as immunity from tort liability. "Tort" is the usual legal term for a wrong independent of contract. The term includes both willful wrongs and negligent ones. This is an immunity quite generally extended, where the situation has not been changed by statute, to municipal corporation so far as torts committed in the course of purely governmental functions are concerned.

[7] This immunity of a school, and the municipal corporation or other body operating it, does *not* extend, however, to the individual whose own wrongful or "tortious" conduct caused the injury complained of, whether he is considered as a public officer or as an employee. 47 Am. Jur., Schools, § 60.1 (found on p. 37 of the 1964 Cumulative Supplement to Vol. 47). *Whitt v. Reed* (Ky.) 239 S.W.2d 489, 32 A.L.R.2d 1160 (1951); and the annotations following it in p. 1181-1189 of 32 A.L.R.2d. 43 Am. Jur., Public Officers, § 279. Restatement of the Law of Torts, Sees. 887c and 888c.

The situation is stated thus in the first part of *paragraph c of the comment following Section 888 in the Restatement of the Law of Torts, p. 470:—*

"c. Public officers. While there is no immunity by the mere fact that one is a public officer, there are many situations where a person may be protected by the command of a superior or the existence of a privilege held by him because of his official position or because of a privilege held by another *on* whose account he acts (see Sec. 890). Where, however, the other has not a privilege but has merely an immunity from civil liability, as in the case of a municipal corporation which is not liable for tortious conduct committed

by its servants while in the performance of a governmental function, the person who acts does not share the immunity."

[8, 9] The idea that an individual should be liable in damages for injuries caused by his own negligence or willful wrong is deep-seated in the common law as applied in the United States. In the case of *Whitt v. Reed* cited above, suit was brought against the individual members of a board of education, school superintendent, principal, maintenance supervisor, and janitor for injuries caused to a pupil by the alleged individual negligence of each of the defendants. The *Kentucky Court of Appeals at p. 1162 of 32 A.L.R.2d* stated as follows: -

"Defendants contend this suit is in fact one against the Graves County Board of Education and its employees for a tort committed in the performance of official duties. It is, of course, well recognized that a board of education is not liable for torts committed in the exercise of a governmental function. *Wallace v. Laurel County Board of Education*, 287 (Ky.) 454, 153 S.W.2d 915. This, however, is not such a suit. The Graves County Board of Education is not a party. Its members and the other school officials are sued in their individual capacities for their individual acts of negligence. We know of no legal theory which insulates a public official from liability for his own personal tortious acts."

[10] This court therefore holds that the fact that the defendant-appellant was acting as a public schoolteacher at the time of the incident in question does not relieve him of any liability he may otherwise be under for the death in question.

[11] The court has made as careful a study as seemed practical of the various aspects of Trukese custom involved, with particular reference to the conflicting claims of the parties as to the applicable customary law, and has come to the conclusion that there is no clear or well accepted consensus on the matter of liability under Trukese custom for unintentionally causing a death,

where no wilful wrongdoing is shown. Several distinct schools of thought appear.

[12] First, in olden times, there were certainly a number of instances where compensation for a death was paid by the transfer of land from the lineage of the alleged wrongdoer to the lineage of the deceased. It is not too clear whether such settlements by transfers of land were restricted to wilful acts of wrongdoing or included cases where the death was caused unintentionally by mere negligence, or by unavoidable accident.

[13] Second, it is clear that there have been a number of instances in which deaths caused unintentionally have been forgiven where the person alleged to have caused the death has shown proper regret, sorrow, and sympathy for the surviving members of the family or the lineage of the deceased. This has happened in some instances where heavy money damages were originally demanded, but in some of these there are intimations or expressions of belief finally by those granting forgiveness that the death was unavoidable—that is, in legal terms, the prospective defendant either was not negligent or his negligence was not the proximate cause of the death. There is one reliably reported instance of a claim by a Japanese father for the death of his half-Trukese child, which was carried to the Japanese court in Ponape and in which the father lost. Unfortunately the record in that case is not available to this court, which has been unable to determine the exact ground on which recovery was denied. Conceivably it might have been that the defendant was not negligent, or that his negligence was not the proximate cause of the death, or that there was no liability in money damages for the causing of such a death, or that the father was not the right one to receive the damages.

[14] Third, by analogy to the settlements by transfers of land between lineages in compensation for a death in olden days, it would seem that if there is any liability for money damages under Trukese custom for unintentionally causing a death, the damages should go to the deceased's lineage rather than to his father. There seems to be another school of thought, however, based apparently on ideas brought in by outsiders along with the use of money, that where money is involved, it should go to the father rather than to the lineage, but here again the influence of older ideas appears to lead a number of Trukese to believe that the father should then share the damages recovered with the deceased's lineage.

[15] Fourth, it is suggested that there may be no such thing as liability for negligence under Trukese custom. Many Trukese seem to find it hard to understand the concept and appear to think a person should either be absolutely liable, like an insurer, for any injuries caused by a line of activity he undertakes, or should only be liable for intentional wrongs. Several Trukese have stated that they believe the entire concept of liability for negligence is one that has been brought in by outsiders. Certainly the idea of payment of money damages was brought in that way. It may be noted in this connection that the plaintiff-appellee, in stating the custom on which he relies, makes no mention of negligence, but claims there is an absolute liability on one who kills the child of another.

[16] The question of what may be considered as part of the customary law was considered by this court in *Lalou et al. v. Aliang*, 1 T.T.R. 94, 290, where the court stated in the third paragraph of its conclusions of law:-

"'Custom' in the legal sense, is defined in part in Bouvier's Law Dictionary (Third Revision) as, 'Such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it relates,' with the further statement,

'Custom is a law established by long usage.' Customs may change gradually, and changes may be started by some of the people affected agreeing to some new way of doing things, but such new ways will not become established and legally binding or accepted customs until they have at least existed long enough to have become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would naturally be affected. Mere agreement to new ways by those to be benefited without the consent of those to be adversely affected, will not of itself work a sudden change in the customary law. See paragraphs 5 and 11 of the article on Usages and Customs in volume 55 of American Jurisprudence, at pages 267 and 272."

[17,18] In other words, an alleged custom must be at least generally accepted and followed by those upon whom it places a burden as well as by those who hope to profit from it, before it can fairly be considered to have become a part of the customary law. Since the court can find no such common consent and fairly uniform practice as to liability in money damages for unintentionally causing a death without any wilful act of wrongdoing, it feels it must hold that any liability there may be in the Truk Islands for unintentionally killing a person where no wilful wrongdoing or fault, other than negligence, is shown on the part of the person causing the death, does not depend on Trukese custom, but on other parts of the law. No intimation is made here as to what the customary law may be as to liability for death caused by an intentional act of wrongdoing, since no such act is claimed here and it is recognized that such an act, especially if it were one likely to cause death or serious bodily harm, would present a very different situation in the minds of many Trukese.

[19-22] This court has already held in *Ngiratkel Etpison v. Rudimch Indalecio*, 2 T.T.R. 186, that the question of liability for damages arising out of an automobile accident in the Palau Islands involved new elements

introduced by outsiders and not covered by local custom, and was therefore, in accordance with Section 22 of the Trust Territory Code governed by the rules of the common law. The court now holds that the same is true of liability for damages arising out of motorboat accidents in the Truk Islands. The court recognizes that in the case of boats, there may also be a possibility of liability in the admiralty, but no relief in admiralty has been claimed in this action. The court is inclined to believe that the general question of liability for negligence in situations not clearly covered by local custom in the part of the Trust Territory concerned must similarly be governed by common law principles so far as not governed by any written law of the Trust Territory, and strongly urges that all persons in the Trust Territory engaged in activity not clearly covered by local custom, should give careful consideration to the liabilities imposed by the common law for damages caused by negligence.

[23-26] The common law concept of liability for negligence is very broad. It is explained in considerable detail in the Restatement of the Law of Torts, Vol. II and some of the defenses to such claims are discussed in Vol. IV of the same Restatement, both of which are available in each District Law Library in the Trust Territory. The basic idea of negligence is indicated by the first definition of it in Bouvier's Law Dictionary (Third Revision), Vol. 2, p. 2312, as : -

"The omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do."

That dictionary then goes on with sixteen pages of further definitions, illustrations, and explanations of negligence as applied to various situations. In 38 Am. Jur., Negligence, § 2, the definitions of negligence start as follows:-

"Negligence in the popular sense is the lack of due diligence or care. Actionable negligence, or negligence in the legal sense, has been defined as a violation of the duty to use care. It is doubtful, according to some authorities, whether a more comprehensive definition is practicable."

Negligence covers any failure of a person engaging in a lawful activity to use "due care"-that is, the care which a reasonable person would take-to avoid causing injury to others who,he should realize, will be endangered by his activity or to whom he has a special duty. Generally speaking, if a person's negligence causes injury to the person or property of another as a natural, direct, and immediate result of the negligence, the negligent person will be held liable to pay the injured person the value in money of the damage caused, provided the injured person was acting properly at the time of the injury. 38 Am. Jur., Negligence, §§ 4 and 174.

[27,28] Thus from the common law point of view a teacher has a duty to use reasonable care to protect his students from danger even to the extent of exercising reasonable care to control the conduct of third persons and prevent them from intentionally harming his students or so conducting themselves as to create an unreasonable risk of harm to the students so far as the teacher knows or has reason to know that he has the ability to control the conduct of such third persons and knows or should know of the necessity and opportunity for exercising such control. Restatement of the Law of Torts, Sec. 320 and Comment a and b thereunder.

[29] In determining what is due or reasonable care under these common law principles, standards of the people and area involved must be considered, but making every reasonable allowance for willingness on the part of many Trukese to tolerate more dangerous conditions than are usual in the United States, the court considers that

the defendant-appellant in this case failed to use "due care" to protect his students, that this failure caused the boat's capsizing, and that injury to one or more of the young students was a result naturally to be expected. So, if the child had merely been injured, without being killed, the defendant-appellant would have been liable for the injury as a matter of common law.

[30,31] Trust Territory Code, Section 25, makes express provision for liability in an action for death of a person caused by wrongful act, neglect, or default such as would have entitled the party injured to maintain an action and recover damages in respect thereof if death had not ensued. Paragraph (b) of this section requires that such an action must be brought in the name of the personal representative of the deceased, for the exclusive benefit of the surviving spouse, the children and other next of kin, if any, of the decedent as the court may direct. Paragraph (c) provides that the trial court may give such damage, not exceeding ten thousand dollars (\$10,000.00), as it may think proportioned to the *pecuniary injury* resulting for such death to the persons respectively for whose benefit the action is brought.

[32, 33] This requirement of bringing the action in the name of the personal representative of the deceased, however, is a procedural matter which should not affect the basic question of the liability of the defendant-appellant except to the extent of protecting him from possible action by other claimants. The court therefore believes that this requirement may fairly be met by amendment, especially since counsel for the plaintiff cited Section 25 of the Code in the District Court in support of the plaintiff's claim. In this instance, the logical person to act as personal representative of the deceased would be either the father or the maternal uncle and since the father has shown so much interest in it, the court has appointed him

Special Administrator of the deceased as of the date the action was commenced and amended the pleadings to show the claim as brought by the father as Special Administrator under Trust Territory Code, Section 25.

[34,35] Under this section of the Code, as indicated above, the court may only grant damages proportioned to the "pecuniary injury" to the persons for whose benefit the action is brought. That is, in this instance, the court must try to figure out what the money loss from the death is to the next of kin-since the child had no spouse or children-and may not properly allow anything for their sorrow and grief, which must necessarily have been great. It is true, as claimed by the defendant-appellant, that the child did not work regularly and that her services could not in all probability be of any great net pecuniary value to the next of kin for a few more years. At the hearing on the appeal, the plaintiff-appellee stated that "they" had figured they should have \$1,000 damages because that was what they estimated they had spent on the child-the "they" presumably referring to the parents and other relatives-but this past expenditure is not the proper measure of damages under the Code section in question.

[36,37] Under such statutes as ours, sometimes referred to as a "Lord Campbell's Act" after an English law on the subject, it is generally held that the damages are limited to the pecuniary benefits which the beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated-including the present value of future services as well as the value of any being rendered immediately before the death. 16 Am. Jur., Death, §§ 177, 182 and 197. In the case of a child, as here, the correct measure of damages allowable is, therefore, the excess of the present value in dollars of the services which the next of kin may reasonably

have expected from the deceased over the additional expense which they would have been under for her further bringing up. No detailed evidence on this matter was presented and it is unlikely that any was readily available to the plaintiff-appellee. This court, therefore, has made the best estimate it felt it could on the basis of the probabilities of the case considering the age of the child and usual practices as to support in the Truk Islands, and has determined upon the figure of three hundred and fifty dollars (\$350.00) as representing the excess referred to above.

The judgment of the District Court has therefore been modified by judgment of this court entered December 17, 1964, to provide that the plaintiff's father as Special Administrator of the deceased's estate recover from the defendant-appellant the sum of three hundred and fifty dollars (\$350.00), without costs, to be held for the exclusive benefit of the next of kin and paid by him to them as the District Court may direct and on motion of any of the next of kin filed in the District Court action, and as so modified, the judgment of the District Court has been affirmed.