

CHAPTER 12

Contribution Among Joint Tort-feasors Act

SECTIONS

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§ 1201. Short title.

This chapter may be cited as the "Contribution Among Joint Tort-feasors Act."

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 551.

§ 1202. Right of contribution.

(1) Except as otherwise provided in this chapter, where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share. No tort-feasor is compelled to make contribution beyond his own pro rata share of the entire liability.

(3) There is no right of contribution in favor of any tort-feasor who has intentionally, willfully, or wantonly caused or contributed to the injury or wrongful death.

(4) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor whose liability for the injury or wrongful death is not extinguished by the settlement nor is he entitled to recover in respect to any amount paid in a settlement which is in excess of what was reasonable.

(5) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, is subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's *pro rata* share of the common liability. This provision does not limit or impair any right of subrogation arising from any other relationship.

(6) This chapter does not impair any right of indemnity under existing law. Where one tort-feasor is entitled

to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(7) This chapter shall not apply to breaches of trust or of other fiduciary obligation.

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 552.

Cross-reference: The statutory provisions on the FSM Supreme Court and the Judiciary are found in title 4 of this code. The FSM Supreme Court website contains court decisions, rules, calendar, and other information of the court, the Constitution, the code of the Federated States of Micronesia, and other legal resource information at <http://www.fsmsupremecourt.org/>.

Case annotations: The following are case annotations discussing various concepts of tort law and are included here for reference:

Comparative Negligence

Comparative negligence, which has displaced contributory negligence in most jurisdictions in the United States, should be given careful consideration by courts even though the Restatement (Second) of Torts refers only to contributory negligence and is silent about comparative negligence. There is reason to doubt that the FSM Supreme Court is bound by 1 F.S.M.C. 203 pointing to the Restatements as a guide for determining and applying the common law. *Ray v. Elec. Contracting Corp.*, 2 FSM R. 21, 22 n.1 (App. 1985).

Apportionment of fault among several defendants in a personal injury case must be based on the Pohnpeian concept of "kaidehn peid sipal ieu dihp," which requires each wrongdoer to bear the consequences of his or her own fault. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 75 (Pon. S. Ct. Tr. 1986).

In keeping with the spirit of Pohnpeian custom, when defendants are at fault, they should share in the payment of damages based upon their share of liability. *Koike v. Ponape Rock Prods., Inc. (II)*, 3 FSM R. 182, 185 (Pon. S. Ct. Tr. 1987).

In apportioning damages among negligent parties, the Pohnpei Supreme Court will consider the following factors: the Pohnpei Constitution, custom and tradition, the degree of negligence of each party, other jurisdictions' efforts to abolish joint liability, the need to minimize the role of insurance companies given Pohnpei's stage of development, the example of the U.S. insurance crisis, other jurisdictions' efforts to modify the rules governing joint and several liability, and American judges' assessments of joint and several liability. *Koike v. Ponape Rock Prods., Inc. (II)*, 3 FSM R. 182, 185 (Pon. S. Ct. Tr. 1987).

The "pure system" of comparative negligence is available as a defense to defendants in Chuuk State. The defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of his injuries. *Epiti v. Chuuk*, 5 FSM R. 162, 167-68 (Chk. S. Ct. Tr. 1991).

Where an employee is commanded to take action which creates a known risk of injury, his obedience to the command will not bar subsequent recovery for injuries suffered, even where the risk of injury is apparent, but this will not excuse clearly reckless conduct by the employee where he had full knowledge of reasonable means to limit or prevent the injury. *Epiti v. Chuuk*, 5 FSM R. 162, 169 (Chk. S. Ct. Tr. 1991).

Tr. 1991).

As a loss of consortium claim is derivative from a spouse's claim for damages an award for loss of consortium is properly reduced by the percentage of fault attributable to the spouse. *Epiti v. Chuuk*, 5 FSM R. 162, 170 (Chk. S. Ct. Tr. 1991).

The doctrine of comparative negligence is more consistent with life in Pohnpei in that the doctrine recognizes that injuries and damages are often caused through a combination of errors and misjudgments by more than one person. Nothing in Pohnpei custom absolves a party who caused injury to another from the customary obligations of apology and reconciliation because the injured party's negligence contributed to the injury. *Alfons v. Edwin*, 5 FSM R. 238, 242 (Pon. 1991).

Comparative negligence, unlike contributory negligence permits assessment of relative degrees of responsibility and allows awards on that basis. *Alfons v. Edwin*, 5 FSM R. 238, 242 (Pon. 1991).

Doctrine of comparative negligence is more consistent with custom and tradition on Pohnpei unless, and until the highest Pohnpei state court rules otherwise. *Alfons v. Edwin*, 5 FSM R. 238, 242-43 (Pon. 1991).

In order for a third party's negligent conduct to afford any relief to defendants by way of a contributory (comparative) negligence theory, it must be demonstrated that the negligent act or omission somehow caused or contributed to the injury sustained and that there was not an independent or superseding cause. *Ludwig v. Mailo*, 5 FSM R. 256, 261 (Chk. S. Ct. Tr. 1992).

Contributory Negligence and Assumption of the Risk

An employee who is performing a difficult task in one way and is given contrary instructions by his employer and who must be mindful of his employer's instructions or face a possible reprimand is not guilty of contributory negligence. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 66 (Pon. S. Ct. Tr. 1986).

Conduct on an employee's part, contributing as a legal cause to the harm he has suffered, which falls below the standard to which he is required to conform for his own protection, constitutes contributory negligence. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 67 (Pon. S. Ct. Tr. 1986).

The common Pohnpeian custom of assisting a person in need should not be dispensed with in order to allow the defense of contributory negligence or assumption of risk to be raised. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 67 (Pon. S. Ct. Tr. 1986).

Assumption of risk typically involves one of the following situations: 1) plaintiff has given his consent in advance to relieve defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what defendant is to do or leave undone; 2) plaintiff voluntarily enters into a relation with defendant, with knowledge that defendant will not protect him against the risk; 3) plaintiff is aware of a risk already created by defendant's negligence, but proceeds to encounter it by voluntarily taking part even after the danger is known to him. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 67-68 (Pon. S. Ct. Tr. 1986).

Contributory negligence of the owner of property is not a defense available to the wrongdoer in an action for conversion brought by the owner of the property. *Opet v. Mobil Oil Micronesia, Inc.*, 3 FSM R. 159, 166 (App. 1987).

The doctrine of contributory negligence should not be adopted in Truk State in the absence of a statute because it is not in conformity with traditional Trukese concepts of responsibility; in Trukese custom, the wrongdoer cannot excuse his obligations to the injured person or the injured family by arguing that the injury was in part caused by the negligence of the injured party, or that someone else was also responsible. *Suka v. Truk*, 4 FSM R. 123, 127 (Truk S. Ct. Tr. 1989).

The absolute defenses of Assumption of the Risk and Contributory Negligence are contrary to the traditional Chuukese concepts of responsibility and shall not be available in Chuuk State. *Epiti v. Chuuk*, 5 FSM R. 162, 167 (Chk. S. Ct. Tr. 1991).

Damages

The Pohnpei Supreme Court will adhere to the common law rule followed by the former Trust Territory High Court that the wrongdoer in an automobile accident is not obliged to repair the damaged vehicle nor to pay its original cost; his only obligation is to pay the plaintiff-owner the amount of his loss. *Phillip v. Aldis*, 3 FSM R. 33, 37 (Pon. S. Ct. Tr. 1987).

To determine damages in a personal injury case, the Pohnpei Supreme Court will consider the victim's loss of income, as well as his inability to provide support through fishing and farming as a result of his disability. To determine the total loss of income, the court will assume that income would be earned until the age of 60, which is the mandatory retirement age for government employees, though not for private employees. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 73 (Pon. S. Ct. Tr. 1986).

The Pohnpei Supreme Court recognizes pain and suffering as a principle element of damages in personal injury cases, but because there is no fixed formula to determine the monetary amount, the court has to use its discretion. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 73 (Pon. S. Ct. Tr. 1986).

To determine a monetary value for loss of consortium, the Pohnpei Supreme Court will consider social structure of society and extended family system, whereby other members of family can be expected to provide some, albeit occasional, assistance. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 74 (Pon. S. Ct. Tr. 1986).

The Pohnpei Supreme Court declines to adopt the "collateral source" rule, according to which alternative sources of income available to a victim are not allowed to be deducted from the amount the negligent party owes, because it does not want to discourage customary forms of family restitution. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 74 (Pon. S. Ct. Tr. 1986).

In apportioning damages among negligent parties, the Pohnpei Supreme Court will consider the following factors: the Pohnpei Constitution, custom and tradition, the degree of negligence of each party, other jurisdictions' efforts to abolish joint liability, the need to minimize the role of insurance companies given Pohnpei's stage of development, the example of the U.S. insurance crisis, other

jurisdictions' efforts to modify the rules governing joint and several liability, and American judges; assessments of joint and several liability. *Koike v. Ponape Rock Prods., Inc. (II)*, 3 FSM R. 182, 185 (Pon. S. Ct. Tr. 1987).

In a wrongful death claim in Truk State, where the total pecuniary estimated loss was \$15,288 and where an infant child lost his mother, there should be a finding for the plaintiff in the maximum amount allowed by law, \$50,000. *Asan v. Truk*, 4 FSM R. 51, 56-57 (Truk S. Ct. Tr. 1989).

In a wrongful death claim, parents of the deceased child are entitled to claim pecuniary damages and damages for their own pain and suffering from the loss of their child. *Suka v. Truk*, 4 FSM R. 123, 130 (Truk S. Ct. Tr. 1989).

The mental anguish or grief aspect of a damage award reflects the loss of a broad range of mutual benefits each family member normally receives from others' continued existence, including love, affection, care, attention, companionship, comfort and protection. *Suka v. Truk*, 4 FSM R. 123, 130 (Truk S. Ct. Tr. 1989).

Although in the usual case in Truk the damages for loss of income will be lower than, for instance, Guam or Hawaii because of the wage scale there, and medical expense damages will normally be greatly reduced because in the usual case the government absorbs the medical bills, there is no justification for reducing a mental pain and suffering award because of the citizenship of the parents or the geographic location of the accident causing the injury. *Suka v. Truk*, 4 FSM R. 123, 131 (Truk S. Ct. Tr. 1989).

The term "pecuniary injury" as used in wrongful death statutes traditionally has been interpreted as including the probable support, services and other contributions that reasonably could have been expected by the beneficiaries had the decedent lived out her full life expectancy, all reduced to present worth. *Leeruw v. FSM*, 4 FSM R. 350, 365 (Yap 1990).

Where the court cannot compel the state to honor an illegal and/or unconstitutional lease it can order the state to restore the illegally held land, with any and all public improvements removed, to its rightful owner who may also be entitled to damages. *Billimon v. Chuuk*, 5 FSM R. 130, 137 (Chk. S. Ct. Tr. 1991).

Despite lack of evidence of medical expenses, either that medical treatment was necessary, or that medical treatment was obtained as a result of injuries the court is entitled to presume that some expenditures were made and finds that plaintiff should recover damages for those expenses, even in the absence of proof of purchase. *Meitou v. Uwera*, 5 FSM R. 139, 145 (Chk. S. Ct. Tr. 1991).

An injured victim is entitled to recover for mental anguish, including humiliation, resulting from unlawful conduct in violation of the victim's civil rights. *Meitou v. Uwera*, 5 FSM R. 139, 146 (Chk. S. Ct. Tr. 1991).

An employer generally may not be held liable for punitive damages for the tortious acts of its employees. However, an employer may be held liable for punitive damages if 1) the employer authorized the act, 2) the employer knew the employee was unfit for the position at the time of the hiring, or 3) the employer ratified the tortious act of the employee. *Meitou v. Uwera*, 5 FSM R. 139, 146 (Chk. S. Ct. Tr. 1991).

As a loss of consortium claim is derivative from a spouse's claim for damages an award for loss of consortium is properly reduced by the percentage of fault attributable to the spouse. *Epiti v. Chuuk*, 5 FSM R. 162, 170 (Chk. S. Ct. Tr. 1991).

To recover for pain and suffering a plaintiff need only show "suffering," not both "pain" and "suffering" as the term includes not only the physical pain but also fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. *Ludwig v. Mailo*, 5 FSM R. 256, 262 (Chk. S. Ct. Tr. 1992).

There is no authority to award punitive damages against a foreign national government even when it is otherwise liable for damages. *Damarlane v. United States*, 6 FSM R. 357, 361 (Pon. 1994).

A statutory cap on the amount and scope of recovery in a wrongful death action, lawfully enacted by the Kosrae legislature, does not interfere with traditional Kosraean or Micronesian compensation of a victim's family by the tortfeasor. *Tosie v. Healy-Tibbets Builders, Inc.*, 5 FSM R. 358, 361 (Kos. 1992).

Where a plaintiff makes damage claims in tort as well damage claims based on contract, contract clauses limiting the contract damages do not apply. *McGillivray v. Bank of the FSM (I)*, 6 FSM R. 404, 409 (Pon. 1994).

Punitive damages are not recoverable for ordinary negligence. *Elwise v. Bonneville Constr. Co.*, 6 FSM R. 570, 572 (Pon. 1994).

One whose property is converted is entitled to interest at the legal rate from the time of conversion. *Bank of Guam v. Nukuto*, 6 FSM R. 615, 617 (Chk. 1994).

Where the defendant has breached her fiduciary duty, and converted to her own personal use funds of others, has made no claim of right to any of the funds or offered any defense, and blame thus lies wholly with the defendant, the plaintiff will be allowed to recover its attorney's fees in order to make the victim whole. This is a narrowly drawn exception to the general rule parties will bear their own attorney's fees. *Bank of Guam v. Nukuto*, 6 FSM R. 615, 617-18 (Chk. 1994).

Duty of Care

In a jurisdiction like Pohnpei, where individual and economic development is beginning to take place and people are not quite sophisticated about the uses or proper handling of certain machinery or equipment introduced into the community to support such development, the procurer, user, owner, or seller of such equipment or machinery must take precautionary measures to educate people, either through written or oral explanation, about the proper handling, operation or storing of such equipment or machinery, and to inform them about the harm that might result if such equipment or machinery is not properly handled, operated or stored. *Koike v. Ponape Rock Prods., Inc.*, 3 FSM R. 57, 68 (Pon. S. Ct. Tr. 1986).

Once a state health services decision has been made that a particular medicine should be obtained for patients, the state health services staff and other responsible state officials are under a duty to take reasonable steps to obtain the medicine. *Amor v. Pohnpei*, 3 FSM R. 519, 531 (Pon. 1988).

So long as a state retains its role as the primary provider of health care services in that state, it is legally obligated to make a reasonable effort to provide a health care system reasonably calculated to meet the needs of the people of the state, but the state may make decisions to limit the scope of medicines to be maintained, so long as the decisions are based upon sound medical judgment arrived at through consideration of the health needs and financial realities of the state. *Amor v. Pohnpei*, 3 FSM R. 519, 530-31 (Pon. 1988).

The standard of care for doctors at the Truk State hospital is that they are to exercise professional judgment in the attempt to diagnose the illness of the patient, and then, consistent with available facilities and supplies, act on that diagnosis. *Asan v. Truk*, 4 FSM R. 51, 56 (Truk S. Ct. Tr. 1989).

When a person elects to operate a vehicle on the public streets he owes a duty to pedestrians and others using the road and adjacent areas to operate the vehicle in a safe and prudent manner. When the breach of this duty by driving in a fast and careless manner is the proximate cause of an injury the driver will be held liable. *Ludwig v. Mailo*, 5 FSM R. 256, 259 (Chk. S. Ct. Tr. 1992).

Only when there is a duty of care, breach of this duty, damage caused by the breach, and determination of the value of the damage can there be a liability for negligence. *Nena v. Kosrae*, 5 FSM R. 417, 420 (Kos. S. Ct. Tr. 1990).

Everyone has a duty of care to act in such a way that other people are not harmed. Duties of care differ according to the circumstances and the exact parameters of each person's responsibilities towards others will be defined through time by judicial decisions and statutes. *Nena v. Kosrae*, 5 FSM R. 417, 421 (Kos. S. Ct. Tr. 1990).

The state, when building a road, has a duty of care to take precautions to avoid foreseeable harm, and it has a duty of care not to take undue advantage of a landowner's generosity and lack of understanding of his rights. *Nena v. Kosrae*, 5 FSM R. 417, 421 (Kos. S. Ct. Tr. 1990).

Generally, a breach of duty is proven by the testimony of witnesses who describe what a reasonable person, acting in compliance with the duty of care, would have done or not done in the same situation. In rare circumstances when the facts are indisputable and when they raise such a strong inference that all reasonable people agree on the duty of care, the court can decide, as a matter of law, the person has breached his duty of care. *Nena v. Kosrae*, 5 FSM R. 417, 421 (Kos. S. Ct. Tr. 1990).

When the state fails to tell a landowner that he has the option to refuse to grant the state an easement for a road, it has breached its duty of care. *Nena v. Kosrae*, 5 FSM R. 417, 421-22 (Kos. S. Ct. Tr. 1990).

In order to be liable for a breach of the duty of care the breach must cause damage. *Nena v. Kosrae*, 5 FSM R. 417, 422 (Kos. S. Ct. Tr.

1990).

§ 1203. Pro rata shares.

In determining the *pro rata* shares of tort-feasors in the entire liability:

- (1) their relative degrees of fault shall not be considered;
- (2) if equity requires, the collective liability of some as a group shall constitute a single share; and
- (3) principles of equity applicable to contribution generally shall apply.

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 553.

Case annotations: Comparative negligence, which has displaced contributory negligence in most jurisdictions in the United States, should be given careful consideration by courts even though the Restatement (Second) of Torts refers only to contributory negligence and is silent about comparative negligence. There is reason to doubt that the FSM Supreme Court is bound by 1 F.S.M.C. 203 pointing to the Restatements as a guide for determining and applying the common law. *Ray v. Elec. Contracting Corp.*, 2 FSM R. 21, 22 n.1 (App. 1985).

§ 1204. Enforcement.

(1) Whether or not judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(2) Where a judgment has been entered in an action against two or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of one against other judgment defendants by motion upon notice to all parties to the action.

(3) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, any separate action by him to enforce contribution must be commenced within one year after the judgment has become final by lapse of time for appeal or after appellate review.

(4) If there is no judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right of contribution is barred unless he has either:

(a) discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within one year after payment; or

(b) agreed while action is pending against him to discharge the common liability and has within one year after agreement paid the liability and commenced his action for contribution.

(5) The recovery of a judgment for an injury or wrongful death against one tort-feasor does not of itself discharge the other tort-feasors from liability for the injury or wrongful death unless the judgment is satisfied. The satisfaction of the judgment does not impair any right of contribution.

(6) The judgment of the court in determining the liability of the several defendants to the claimant for an

injury or wrongful death shall be binding as among such defendants in determining their right to contribution.

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 554.

§ 1205. Release or covenant not to sue.

When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

- (1) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the other to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; and,
- (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 555.

§ 1206. Retroactivity.

This chapter shall not be deemed to create any right or remedy to any joint tort-feasor in favor of whom the provisions of this chapter would otherwise apply, where such joint tort-feasor's cause of action accrued prior to the effective date of this chapter, and to this extent the provisions of this chapter are not retroactive.

Source: COM PL 4C-22 § 1; TT Code 1980, 6 TTC 556.