

members of the owning clans. In all fairness to him, however, he should be given a reasonable time to work out some arrangement to either remain, or to vacate the land.

Following oral argument, Associate Justice Nakamura determined that he must disqualify himself because of personal relationship to one of the parties.

**PONAPE FEDERATION OF COOPERATION ASSOCIATIONS,
Plaintiff-Appellant**

v.

JOHNNY HAWLEY, Defendant-Appellee

Civil Appeal No. 201

Appellate Division of the High Court

Ponape District

January 31, 1980

Appeal from dismissal of negligence action due to a finding of contributory negligence. The Appellate Division of the High Court, Gianotti, Associate Justice, held that where no manifest error was shown, finding of contributory negligence would not be set aside, and any adoption of comparative negligence rule should be a legislative matter, and therefore judgment of dismissal was affirmed.

1. Appeal and Error—Scope of Review—Facts

If the Trial Court finds that there is negligence and/or contributory negligence, such determination will not be set aside by the Appellate Court unless there is manifest error.

2. Appeal and Error—Affirmance—Grounds

Finding of Trial Court that defendant was negligent was upheld on appeal where no manifest error was present.

3. Negligence—Comparative Negligence—Generally

Modification of common-law contributory negligence rule by adoption of a comparative negligence rule is a matter which should be dealt with by legislative rather than by judicial action.

Counsel for Appellant:

MARTIN F. MIX

Counsel for Appellee:

*Public Defender's Office, Ponape
District*

Before GIANOTTI, *Associate Justice*, NAKAMURA,
Associate Justice, and LAURETA, *Designated Justice*

GIANOTTI, *Associate Justice*

This is an appeal from a judgment of the Trial Division of the High Court, Ponape District, wherein the action was dismissed pursuant to Rule 33b, Trust Territory Rules of Civil Procedure, with a specific finding by the court of negligence on the part of both parties. The matter was argued orally and by brief by appellee, and submitted by brief only by appellant.

Sometime prior to and during 1970, appellant, through its subsidiary, Ponape Air Transportation Company, operated, managed, and conducted the Air Micronesia operations on the island of Ponape. Appellee, during this period of time, was employed by Ponape Air Transportation Company, first as a clerk, and later on assumed the duties of manager, conducting those duties for a period of approximately six months. An examination of the operation under appellee showed a discrepancy in funds of approximately \$26,334.00. Appellant filed this action against appellee to recover these funds. The Trial Court, after the submission of certain evidence, made its disposition based upon the evidence submitted.

Appellant raises two main grounds of appeal. First, was appellee's conduct negligent thereby causing the loss, or did it constitute more than mere negligence, i.e., recklessness?

The doctrine of negligence and contributory negligence has long been recognized in the Trust Territory. See: *Ngirasmau v. Trust Territory*, 3 T.T.R. 140, 142 (Tr. Div. 1966); *Falewaath v. Rubelukan*, 4 T.T.R. 527 (App. Div. 1969).

Negligence has been defined as:

Negligence is the failure to use ordinary care under the circumstances in the management of one's person or property. Ordinary care is that care which a reasonable prudent person exercises in the management of their own affairs in order to avoid injury to themselves or their property or to the person or property of others. *Baiei v. Bilamang*, 5 T.T.R. 389, 392 (Tr. Div. 1971).

[1] If the Trial Court finds that there is negligence and/or contributory negligence, such determination will not be set aside by the Appellate Court unless there is manifest error. *Arriola v. Arriola*, 4 T.T.R. 486, 487 (App. Div. 1968). Such manifest error is just not present.

Appellant argues that appellee's conduct constituted more than just negligence, and in fact amounted to "recklessness." The Restatement (Second) of Torts comment writer has contrasted recklessness and negligence with regard to the safety of another in the following manner:

. . . reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man . . . the actor to be reckless must recognize that his conduct involves a risk substantially greater in amount than that which is necessary to make his conduct negligent. Restatement (Second) of Torts Section 500, Comment g at 590 (1965).

Although no mischief of any kind is intended, if a person commits an act which is dangerous to others, and which evinces a reckless disregard of consequences, he is answerable for the resulting injuries. 74 Am. Jur. 2d Negligence Section 21 at 638, 639.

[2] The Trial Court found both parties to be negligent. It failed to find that the conduct of appellee was anything more. Since upon reviewing the record, we find no manifest error present, this finding will not be set aside.

Appellant next raised the issue that the rule of comparative negligence is the proper rule to be adopted by the courts in the Trust Territory.

This Court is aware that it has been stated that comparative negligence, in one form or another, is now the prevailing view in a majority of American jurisdictions. See: Am. Jur. 2d, New Topic Service, Comparative Negligence Section 5 (1977) We likewise recognize that some state courts, in the absence of action by the legislature, have seen fit to adopt and apply a rule of comparative negligence by judicial decision. *Katz v. State* (Alaska), 540 P.2d 1037 (1975); *Li v. Yellow Cab Co.*, 532 P.2d 1226 (1975); *Hoffman v. Jones* (Fla.), 280 So. 2d 431; *Bejach v. Colby*, 141 Tenn. 686, 214 S.W. 869. See: Am. Jur. 2d, New Topic Service, Comparative Negligence Section 7.

[3] However, many courts have taken the position that where the common-law contributory negligence rule is in force, its modification by the adoption of a comparative negligence rule is a matter which should be dealt with by legislative rather than by judicial action. See: *Maki v. Frelk*, 40 Ill. 2d 570 (1974); Am. Jur. 2d, New Topic Service, Comparative Negligence Section 7. We choose to adhere to the reasoning announced in these latter cited authorities.

In view of the foregoing, the judgment of the Trial Court is hereby AFFIRMED.