

Kraalhead Liability

"The responsibility of a kraalhead for the torts committed by the members of his kraal is a condition peculiar to Native custom and there is no corresponding position to be found in Common law. The liability is vicarious and the term "joint tortfeasor" is wholly inapplicable to such cases as it cannot be maintained or shown that the kraalhead is a participator in the tort committed (Ntonteni vs Nkolla, 1 N.A.C. 172). Native law in its unadulterated form viewed the liability as flowing from the power vesting in the kraalhead to control all the inmates resident on that kraal, other than perhaps a person casually spending a day or night at that kraal as a visitor, and not as an inmate. A person living at a kraal in any other capacity was an inmate for whom the kraalhead was responsible (Stengana vs Isuzo & others 1944 N.A.C. (Coo) 102. The position is that of a surety responsible for the good behaviour of the members of his kraal. He is responsible for the penalties incurred by members of his kraal, provided those committing the torts are not in a position to satisfy the judgments rendered against them. The question as to whether the father or uncle is liable in such cases may be pursued up by the simple answer that a legal guardian under whom a ward is liable ~~is~~ irrespective of the degree of relationship subsisting between them (Rubulana vs Tungana, 1 N.A.C. 90; Klaas vs Ngwegwe 1 N.A.C. 19.)

Limits to Liability

1. The responsibility does not extend to liabilities of an inmate not arising out of Native custom (Klaas vs Ngwegwe 1 N.A.C. 19; Qutwana vs Makubalo 4 N.A.C. 177).

It extends to liability for damage arising out of certain crimes committed by inmates, e.g. theft or arson (Tomsana vs Merganyana 3 N.A.C. 137) Kutshuga vs Tunyeni & others, 4 N.A.C. 177

2. In a long series of decisions the Native Appeal Court has laid down the principle that, if a plaintiff elects to sue an inmate of a kraal

without joining the kholhead, he cannot thereafter make such kholhead a party (Macebo vs Mkom, 3 N.A.C. 13; Ngeongco vs Magakamba & ano. 4 N.A.C. 179)

3. The kholhead's responsibility does not extend to temporary residents or to visitors or to a person who had taken up his residence at his khol during his absence apparently without his knowledge or consent (Mpotygi vs Ntlanganis & another 2 N.A.C. 173; Ntsham vs Ntsham & ano. 1926 N.A.C. (C.S.) 23)

4. According to Pondoland custom, when a man not related to the kholhead resides with the latter and there commits adultery, the kholhead can free himself from liability by the payment of a Mggabo beast. It is sufficient compliance with the custom with for the kholhead to hand the beast to the tortfeasor and instruct him to drive it to his father, & if this is not done the plaintiff can himself take the Mggabo beast to the father. A formal tender must be made to the father of the tortfeasor in order to comply with the custom (Matika vs Norati & ano. 4 N.A.C. 177)

Married inmates

5. In East Borneo, more particularly among the Baruti, Hlubi and Pindemose tribes, a kholhead is not responsible for the torts of married inmates of his khol. A man who has paid dowry for his brother or son is no longer liable for his torts (see Bungani vs Modesare 1 N.A.C. 255; Gonyela vs Sinikoti 2 N.A.C. Siforo & ano vs Rwerwana, 4 N.A.C. 205.)

But in Pondoland a kholhead is responsible for the torts of all married sons who are inmates of his khol, & the only way in which a father can free himself of this responsibility is by making his son set up a separate establishment (Fons vs Tomose (1930) N.A.C. (C.S.) 48; Mendwana vs Biya (1934) N.A.C. (C.S.) 59)

In the Ciskei's Native districts a kholhead is liable for all the misdeeds of his children as if committed by himself. Should a son, however, become an infamously bad character, his father have often paid for his misdeeds, his father may obtain

outlawry against him; and if, after this, he wholly casts off his son, he is no longer liable for his actions (see Maclean's Compendium of Kafir Laws & Customs p. 121).

According to Tembu, Sotheka, Nqopha & Xhosa custom in operation in the Transkei a headman is liable for the torts of a married inmate (Kleas vs Ngwegwe; Daviso vs Makinana 1 N.A.C. 86).

In basic Native law the headman is liable for the delict of his children, however young, residing with him (Skanyana sons. vs Beca 6 N.A.C. 4; Kaula vs Intimkulu sons. (1938) N.A.C. (T+N) 68; Sifuba vs Mabaewana & ans. (N.A.C. 222)

6. In the South-Eastern Native districts of the Cape the responsibility of a headman ceases when the inmate leaves his kraal and establishes a kraal of his own, or when the headman has formally & publicly disinherited his son. It is, however, a common practice for a father to order any of his sons to set up a kraal for himself and such order does not necessarily imply that the father is thereby disinheriting him. In addition to publicly disinheriting his son it is advisable that the headman should eject him from his kraal but he may only do so for "good or sufficient cause" (Mkego vs Matikita 1 N.A.C. 242; Tonose vs Tonose (1934) N.A.C. (C+O) 103; Lobisini vs Ngakumbi (1941) N.A.C. (C+O) 1.

7. Among the Basuto (East Angaland) the headman is responsible for the torts of his unmarried brothers & sons living at his kraal (Ganyani vs Modisane 1 N.A.C. 255). The same rule is in operation among the Basuto of the S. F.S. (Mothlony vs Motsoeneng (1935) N.A.C. (C+O) 127; Dhlanini vs Seatebe (1944) N.A.C. (C+O) 69.

"A parent is liable for the misdeeds of his children, & the liability continues unless the father renounces the offending child publicly when it is inexcusable" (Commission on Native Laws & Customs of the Basutos quoted in Whitfield p. 265).

Among Basuto tribes inhabiting Native reserves in Witwatersrand and

In the Ndebele districts in the S.S. a headman is responsible for the delict or ~~misdeeds~~ wrongdoings of his unmarried son who is an inmate of his household (Mothleng vs Motsoeneng (1939) N.A.C. (C.O.) 127). In Native law the headman is responsible for the wrongs done by inmates, but he is liable as a quasi surety although even this term is not entirely applicable since there is no similar obligation in Common Law. Native law consequently holds the headman liable only when the wrongdoer is directly sued as principal, the headman being joined with him. If not so joined, the headman cannot afterwards be made liable. And so it follows that the headman cannot be sued alone (Dhlamini vs Gatabe (1944) N.A.C. (C.O.) 69).

Procedure

"Under Ndebele customary law the power of a father over his children is neither greater nor less than that the Common Law. He is liable for the torts of his sons or ward residing at his household and subject to his control. As the principle is based on full control of the minor, it is a fair inference that a parent is not liable for the torts of sons absent from home on European service. Altered conditions of Native life and the trend of our legislation have undoubtedly lessened parental control and consequently, perhaps, parental responsibility. The answer will perhaps be found to lie in the nature of the tort & where committed. i.e. The father will still be held responsible for acts resulting in damage to others "if committed at the parental home and/or "further if such acts are of a sort or nature falling within the field of ordinary Native home life".
The father is always liable for the daughters torts. Women are perpetually minors under tutelage." (Jackson, quoted by Whitfield pp 310-311)

Natal
Position of
headman
in family

In Natal + Zululand, as in the South-Eastern Cape, the Native system of law in its original form contemplated each family as an association under the control of the headman, who is the owner of, or the person having a household (see s. 1 (3) of the Code) & in whom is vested the

management of its affairs. As head of the family he is its priest and the link between the present generation and the ancestors, the family according to their ideas consisting of the past and present members. The religious duties are performed by the person born to that position and not by one elevated, out of his turn in the order of primogeniture, by the caprice of the testator. All the assets and the income of the kwool — the domestic establishment and ordinary places of residence of Natives & may consist of one or more houses and includes individual dwelling occupied by Natives on mission stations or private lands (see s. 1(3)(i) of Code — were pooled and from the pool come the funds for lobolo of the inmates, as well as for maintenance & for the discharge of other obligations of tort or contract which attached liability to the association or members. The development of the family into major sections, the Indhlunkulu, the Qadi or the Idobho, with allied houses has sub-divided the association into units with self-contained resources under the control of the kwoolhead, but more exclusive than the other sections. Any adventitious property, not derived from a self-contained section of the family, was kept in a fund called kwool property, at the more general disposal of the kwoolhead in the interests of the family. This property was virtually that of the Indhlunkulu until appropriated (Faneiso Khas vs Sitole Khas 5 N.A.C. 178) and passes on the death of the kwoolhead to the general heir who is also Indhlunkulu heir (Sitole vs Sitole (1938) N.A.C. (T.S.N) 35.

- s. 38. "The inmates of a kwool, irrespective of sex or age are, in respect of all kwool matters, under the control of some headman to the kwoolhead"
- s. 39. "A kwoolhead is responsible to his chief and to the supreme chief for the good conduct of the inmates of his kwool and requires right serious liabilities under contracts entered into by the inmates of his kwool when acting with his authority express or implied"
- s. 141(1) A guardian is liable in respect of delicts committed by his ward while in residence at the same kwool as himself
- s. 141(2) Notwithstanding anything in s. 27 or in any other provision of the Code
 - (a) a father is liable in respect of the delicts committed by his children while in residence at the same kwool as himself
 - (b) a kwoolhead is liable in respect of the delicts committed by any unmarried inmate of his kwool while in residence at the kwool.