

[G.R. No. 2892. November 16, 1906]

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FELIX ORTEGA,
DEFENDANT AND APPELLANT.**

D E C I S I O N

ARELLANO, C.J.:

This case was instituted upon the following complaint: "That on or about the 5th day of April, 1903, the defendant, Felix Ortega, willfully and unlawfully, and by and through gross and reckless negligence, executed an act which, if done with malice, would have constituted a grave crime—viz, that of murder—in that the said Felix Ortega, representing and pretending to be a regularly licensed and practicing physician, did prescribe and administer and direct and cause to be administered to one Garlos Clark, an infant of the age of six days, dangerous and poisonous medicines, chemicals, and substances, in large and dangerous quantities, from the effect of which the said Carlos Clark then and there died." The foregoing complaint was filed on the 10th of September, 1904. Theretofore, to wit, on the 23d of September, 1903, the defendant had been sentenced to ninety days' imprisonment and a fine of 150 dollars, or in default thereof to suffer thirty days' subsidiary imprisonment for practicing medicine without a license, that prosecution having arisen out of the same facts. He commenced to serve sentence on the same day but was subsequently pardoned by the Chief Executive of the unexpired portion of such sentence December 8, 1903.

It appears from the evidence that the defendant was called by the father of the child on the 5th of April, 1903, between 8 and 9 o'clock in the morning, and the former prescribed certain medicine for the child who, according to the father, seemed to improve after it was administered; and that, the child growing worse about 3 o'clock in the afternoon, the father again called on the defendant, who gave the prescription attached to the record, and to which the expert testimony, introduced in evidence, relates.

Of the medicine so prescribed by the defendant, a teaspoonful was administered to the child

about 6 o'clock in the evening, and another teaspoonful about two hours later, after which the father gave the child no more of this medicine in view of its lethargic condition and subsequent convulsions which continued until 2 o'clock in the morning when the child died.

Dr. Carter, Commissioner of Public Health, testified as follows:

"Q. Would the administering of that quantity of chloral in your opinion produce death in the average case, or an ordinary case, or not?

"A. In a child of six days of age it would be exceedingly risky; it would not be a safe dose" (p. 96). Dr. Robert E. L. Newberne, medical inspector of the Board of Health, testified as follows:

"Q. State whether or not, in your opinion, the administering of the two doses of approximately two grains of chloral within a period of two hours to a child six days old would cause death.

"A. If it entered the circulation, if it were absorbed, I think it would.

"Q. That is, you mean by that, if it were retained upon the stomach?

"A. Retained, or if it entered the circulation there might be some circumstances which would render it impossible; it is highly probable though, that it would be exceedingly dangerous" (pp. 100,101).

Dr. W. E. Musgrave testified as follows:

"Q. What, in your opinion, would be the effect of administering to a child six days old of two doses of the prescription, Exhibit A?

"A. They would be exceedingly dangerous.

"Q. Would it, in your opinion, cause the death of the infant?

"A. As I stated before, the poison from chloral hydrate has an uncertain effect, there are records of 1.2 grams in a dose killing an adult; on the other hand, there are records of a case recovering from an ounce and a half without treatment,

whatever. I would not state that it would cause death, but I would state that it would be very dangerous.

“Q. Would it probably cause death?”

“A. Following the directions of the prescription, Exhibit A, it would probably cause death in the amount prescribed. This would be between 20,22, and 24 doses to the bottle; he has 100 cubic centimeters of liquid and the soluble substances are all soluble without increasing the amount.”

Finally the witness P. G. Woolley testified as follows (p. 108):

“Q. Please examine this document, Exhibit A, and say whether in your judgment the medicine prescribed in that prescription in the doses therein given are proper for a child six years of age.

“A. I believe not.

“Q. Why?”

“A. I think the doses of chloral are too large.

“Q. What then, in your opinion, would be the effect of administering the chloral prescribed by that prescription on a child six days old?”

“A. Well, it would depend entirely on the child; the question of idiosyncrasy, the question of the condition of the child at the time, the contents of the stomach, and the instructions under which the medicine was administered enter into it, and I could not say what they would be, but what they might be.

“Q. What are those?”

“A. It might be that it would quiet the child and cause sleep, it might be that it would cause more than that, might cause coma, and it might be that it would cause death.”

The defendant is held responsible for the death of the Clark child. The charge against him is

that he administered to it a certain medicine, after which the child died. No attempt has been made to show that the medicine thus administered was the only cause of the child's death. It might have been, it may be that it was; that is all that the witnesses said in hypothetical testimony without having the body of the child before them, and without a postmortem of the same having been made; in other words, without any knowledge even of the aspect of the child after death. On the other hand, there is nothing in the certificate of death showing that there was anything abnormal about the death of the child.

A possibility is not an actual fact, probability is not certainty, and certainty requires positive proof of the commission of the crime, whether maliciously committed or through merely reckless negligence; it does not matter how. Consequently, there being no evidence that the defendant caused the death of the Clark child by administering the medicine in question, he can not be convicted of homicide through reckless negligence.

The judgment of the court below is accordingly reversed and the defendant, Felix Ortega, is hereby acquitted with the costs *de officio*. After the expiration of ten days from the date of final judgment the case will be remanded to the court below for execution. So ordered.

Torres, Mapa, Johnson, Carson, Willard, and Tracey, JJ., concur.
