TORTS AND DAMAGES

By

TIMOTEO B. AQUINO

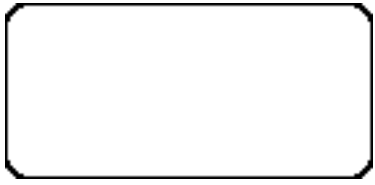
Professor of Law
San Beda College of Law
University of Perpetual Help-Rizal, College of Law
Prefect of Student Affairs
San Beda College of Law
Author, Notes and Cases on Banks, Negotiable Instruments and Other Commercial Documents
Co-Author, Reviewer on Commercial Law, Revised Rules on Summary Procedure: Revisited and Notes and Cases on the Law on Transportation and Public Utilities

SECOND EDITION

2005

Published & Distributed by
REX Book Store
856 Nicanor Reyes, Sr. St.
Tel. Nos. 736-05-67 • 735-13-64
1977 C.M. Recto Avenue
Tel. Nos. 735-55-27 • 735-55-34
Manila, Philippines
www.rexinteractive.com

ISBN-13: 978-971-23-3991-2
ISBN-10: 971-23-3991-2



Printed by

REX PRINTING COMPANY, INC.
TYPOGRAPHY & CREATIVE LITHOGRAPHY
84 P. Florentino St., Quezon City
Tel. Nos. 712-41-08 • 712-41-01

For my wife Bea, my children Leona Isabelle, Lean Carlo and Lauren Margaret

and our parents

Bernabe, Dulia, Felisa, Salvador and Amparo

PREFACE

Technological advances have brought us mixed blessings. On one hand, efforts have been exerted to make the world a better and safer place to live in by providing us with new amenities or by improving existing ones. However, the same development that is meant to address human need for advancement and for betterment had resulted in the proliferation of devices, machineries and equipment that expose us to both apparent and latent risks.

Take for instance the ubiquitous motor vehicle. About a century ago, the Supreme Court observed in one case that a motor vehicle was, to a horse, a shocking apparition. Now, there is hardly any nook and cranny in the archipelago where motor vehicles in one form or another, cannot be found. It would be unthinkable for us to survive or function the way we are used to without such ever present human invention.

But then, it cannot also be denied that the presence of motor vehicles is likewise accompanied by risks. In fact, there is empirical basis to say that road-related accidents comprise a substantial bulk of cases pending in court or at least being investigated by different government agencies. This means that the gift of motor vehicles is also inevitably coupled with the bane of hazards.

Indeed, every offering of technology also brings about causes of discontent. Although we try to correct any danger that we discover from technology's fruits, we are still confronted with perils produced by new products or contraptions. Every age produces its own kind of risk. There is hazard in medicines, in new medical procedure, in "improved" means of transportation and even in ordinary consumer products. Add to the mix countless long standing and unavoidable natural risks, an uncontrolled population growth, and the usual congeries of stratagems, deceits and other human failings and weaknesses, what results is a wide fountain of injuries, troubles and mischief.

Law seeks to reduce or, if possible, to eliminate such risks by prescribing rules and regulations and providing penalties for violations thereof and by creating administrative bodies that implement said prescriptions. Tort law, in particular, contributes towards this end by providing deterrence to harmful activities. The knowledge that

one may be exposed to liability for damage may induce him to desist from using dangerous objects or engaging in harmful activities. It is, however, impossible to totally prevent injury either because men voluntarily accept risk as a *quid pro quo* for their needs or because they are plainly indifferent to risk or regulation. Tort law's alternative in this respect is to provide redress to anyone who may be victimized by such voluntary acts or indifference. In doing so, tort law touches almost every branch of law. It involves constitutional law, administrative law, civil law, criminal law, remedial law, commercial law and even the law on legal ethics.

The present work is devoted to the above-mentioned specific branch of law — tort law. The book is designed to give students an overview of the framework of law and to state the fundamental concepts, principles and rules of tort law. It also supplies selected cases that illustrate the operation of the law and that provide students with ready primary or secondary authority from which they can discover on their own the doctrines and the doctrines' inner workings. As much as possible, the reason and philosophy behind the law and doctrine, as well as their history, are presented so that they can assist in gaining firmer grasp of such law and doctrine. The cases are reproduced verbatim — except for deleted or summarized portions that are unnecessary or irrelevant to the topic concerned — because the author believes that it is only through examination and analysis of cases in the original or as written by the Supreme Court that these cases can better serve as pedagogical tools.

The author dared venture in the preparation of this work and thereby expose his inadequacies, in the hope that this work will be of help to every student of law. If what is written here will be used merely as a starting point or material for a more enlightened thinking and discussion, then it has served its purpose.

THE AUTHOR

PREFACE TO THE SECOND EDITION

This edition adheres to the basic aims of the first edition — to give students an overview of the fundamental framework of tort law

and to state its concepts, principles and rules. The aims are sought to be achieved not only by resorting to expository presentation but also by providing edited cases.

This second edition differs from the original work because it contains new cases and authorities. In addition, cases that were part of the original were transferred to sections where they can best serve as examples and study guides. A few cases were deleted and/or replaced. Discussions of a number of topics were expanded and several topics that were not discussed in the first edition are now part of this edition. Moreover, certain portions of the original edition were transferred to the "Notes" at the end of this new edition. The "Notes" also contain supplemental annotations on selected topics.

The author extends his heartfelt gratitude to all those who supported him in the preparation of this work.

THE AUTHOR

Teresa, Rizal
January, 2005

ACKNOWLEDGMENTS

I am grateful to all those who helped me in the preparation of this book. I have been fortunate to have been exposed to many teachers and students whose ideas helped shape this work. To all these teachers

and students, appreciative thanks. In particular, I would like to thank the encouragement and support of Assistant Dean Domingo Navarro of the San Beda College of Law. The past and present Deans of the same institution, Justice Florenz D. Regalado, Dean Jose Sundiang and Dean Virgilio Jara, as well as University of Perpetual Help of Rizal, College of Law Dean Justice Isagani Cruz, have likewise been very supportive and have given me venues for academic work.

Special thanks are due to my law partners, Maria Paz Tagle-Chua and Edmundo A. Cruz. Our secretary, Rowena J. Portes, had been indispensable in the preparation of the manuscript while the rest of our staff Olive Lagasca-Velo, Dennis Caballero and Angelito Bisquera contributed in their own way to this endeavor.

I also greatly appreciate the assistance of many persons who helped secure materials that were included in the work. Particularly, I would like to thank my classmates Atty. Caroline O. Peralta and Judge Eduardo B. Peralta, Jr., my former student, Atty. Gudelia Cacdac-Guese, Mrs. Jocelyn Silverio, the staff of the College of Law and College of Arts and Sciences Libraries of San Beda College and the staff of the Office of the Dean of the San Beda College of Law. I would also like to thank Mr. Jose Maria Estrada for translating Spanish text of cases that are now integral parts of this work.

Finally, I would like to thank Mr. Juanito F. Fontelera and Atty. Ernesto C. Salao of Rex Bookstore, Inc. for making the publication of this work possible.

THE AUTHOR

TABLE OF CONTENTS

CHAPTER 3 — AFFIRMATIVE DUTIES AND MISCELLANEOUS ACTIVITIES

CHAPTER 5 — CAUSATION

CHAPTER 6 — HUMAN RELATIONS: INTENTIONAL TORTS

CHAPTER 7 — HUMAN DIGNITY

CHAPTER 8 — TORTS WITH INDEPENDENT CIVIL ACTION

CHAPTER 9 — CIVIL LIABILITY ARISING FROM DELICT

CHAPTER 10 — THE DEFENDANTS

CHAPTER 12 — PRODUCT AND SERVICE LIABILITY

CHAPTER 13 — BUSINESS TORTS

CHAPTER 14 — DAMAGES

CHAPTER 1

GENERAL CONSIDERATIONS

1. TORT DEFINED

The word "tort" is taken directly from the French and is a derivation of the Latin word *'torquere'* meaning 'to twist.' In common law, tort is an unlawful violation of private right, not created by contract, and which gives rise to an action for damages. It is an act or omission producing an injury to another, without any previous existing lawful relation of which the said act or omission may be said to be a natural outgrowth or incident. *(Robles vs. Castillo, 61 O.G. 1220, 5 C.A.R. [2s] 213).*

It is also defined as a "private or civil wrong or injury, other than breach of contract," for which the court will provide a remedy in the form of an action for damages. It is a violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction. There must always be violation of some duty that must arise by operation of law and not by mere agreement of the parties. *(Black's Law Dictionary, 5th Ed., p. 1335, citing Coleman vs. California Yearly Meeting of Friends Church, 27 Cal. App. 2d 579, 81 P. 2d 469, 470).* It is a legal wrong committed upon person or property independent of contract. *(ibid.).*

As a general legal classification, it encompasses a number of different civil causes of action providing a private remedy, almost always in the form of money damages, for an injury to a person caused by the tortious conduct of another. *(Edward J. Kionka, Torts, 1988 Ed., p. 92).* Each tort is separately named and defined. Although some rules or principles are common to various torts or groups of torts, there is no universal formula for tort liability. *(ibid.).*

As thus defined, tort in common law includes intentional torts, negligence, and strict liability in tort. Intentional torts include con-

duct where the actor desires to cause the consequences of his act or believes the consequences are substantially certain to result from it. Intentional torts include assault, battery, false imprisonment, defamation, invasion of privacy and interference of property. Negligence, on the other hand, involves voluntary acts or omissions which result in injury to others, without intending to cause the same. The actor fails to exercise due care in performing such acts or omissions. There is strict liability in tort where the person is made liable independent of fault or negligence upon submission of proof of certain facts.

2. PHILIPPINE TORT LAW

A. SOURCES.

The New Civil Code is the primary statute that governs torts in the Philippines. Article 1157 of the New Civil Code includes quasi-delict as a source of obligation. This source of obligation is classified as "extra-contractual obligation" and is governed by Chapter XVII, Chapter 2 of the Code consisting of Articles 2176 to 2194. Other provisions that are considered "tort" provisions can be found in other titles of the Code and in special laws. These tort provisions, just like the rest of the provisions of the Civil Code, are from Spanish, French as well as Anglo-American law. The Code Commission explained:

> "The project of the Civil Code is based upon the Civil Code of 1889, which is of Spanish and French origin. The proposed Code has been strengthened and enriched with new provisions chosen with care from the codes, laws and judicial decisions of various countries as well as from the works of jurists of various nations. Among them are: Spain, the various States of the American Union, — especially California and Louisiana, — France, Argentina, Germany, Mexico, Switzerland, England, and Italy. In addition, there are a number of articles which restate the doctrines laid down by the Supreme Court of the Philippines. Finally, there are hundreds of amendments and new rules agreed upon by the Commission originally and not having in mind any code, decision or treatise, in order to consecrate Filipino customs, or to rectify unjust or unwise provisions heretofore in force, or to clarify doubtful articles and clauses in the present Code, or to afford solutions to numerous questions and situations not foreseen in the Civil Code of 1889 and other laws.
>
> The adoption of provisions and precepts from other countries is justified on several grounds:
>
> (1) The Philippines, by its contact with Western culture from the last four centuries, is a rightful beneficiary of the Ro-

man Law, which is common heritage of civilization. For many generations that legal system as developed in Spain has been the chief regulator of the juridical relations among Filipinos. It is but natural and fitting, therefore, that when the young Republic of the Philippines frames its new Civil Code, the main inspiration should be the Roman law as unfolded and adapted in Spain, France, Argentina, Germany and other civil law countries.

(2) The selection of rules from the Anglo-American law is proper and advisable: (a) because of the element of American culture that has been incorporated into Filipino life during the nearly half a century of democratic apprenticeship under American auspices; (b) because in the foreseeable future, the economic relations between the two countries will continue; and (c) because the American and English courts have developed certain equitable rules that are not recognized in the present Civil Code.

(3) The concepts of right and wrong are essentially the same throughout the civilized world. Provided, the codifier exercises prudence in selection and bears in mind the peculiar conditions of his own country, he may safely draw rules from the codes and legal doctrines of other nations." *(Report of the Code Commission, pp. 3-5).*

It is therefore not surprising that various torts in other countries are likewise recognized as such in this jurisdiction. It is also not surprising that the Supreme Court borrows heavily from the decisions of the Court in other countries especially Spain and the United States. In deciding tort cases, it is not unusual for the Supreme Court to rely, as it often relies, on the decisions of the said foreign courts summarized and explained in the works of leading legal writers like Manresa, Prosser, Keeton, Cooley, Harper and James as well as the American Law Institute's Restatement (Second) of Tort.

The Code Commission explained that Roman Law served as the main inspiration of the New Civil Code. The influence of Roman Law is quite evident in the field of quasi-delict. It should be noted that the *"Institutes"* in Roman law added the category of obligations that arise *quasi ex delicto*. Four are listed within such category: a) liability of a judge who misconducts a case or gives a wrong decision, b) the liability of an occupier of a building for double the damage caused by anything thrown or forced out of the building, no matter by whom, on to a public place, c) liability of the occupier if he keeps any object suspended from the building which would do damage if it fell, and d) the liability of the shop keeper, innkeeper or keeper of a stable for any theft or damage caused by slaves or employees, or in

case of the innkeepers, of permanent residents. *(Barry Nicholas, An Introduction to Roman Law, 1962 Ed., pp. 224-225).*

The second tort in the list of obligations arising *quasi ex delicto* in Roman Law is recognized in Article 2193 of the New Civil Code. Article 2193 provides that "the head of a family that lives in a building or part thereof is responsible for damages caused by things thrown or falling from the same." On the other hand, the last liability is recognized in the New Civil Code provisions on the contract of deposit. Article 2000 provides that hotel-keepers are liable for the loss of or injury to the personal property of guests caused by the servants or employees of the hotels or inns. The liability is now part of contract law rather than tort law.

B. SCOPE AND APPLICABLE LAWS.

The Code Commission which prepared the draft of the New Civil Code of the Philippines contemplated the possibility of adopting the word "tort" in lieu of quasi-delict as a separate source of obligation. The Commission later decided against the use of the word "tort" because the members believed that such use would not be accurate because "tort" in Anglo-American law "is much broader than the Spanish-Philippine concept of obligations arising from non-contractual negligence. 'Tort' in Anglo-American jurisprudence includes not only negligence, but also intentional criminal acts such as assault and battery, false imprisonment and deceit. *(Report of the Code Commission, pp. 161-162).*" The general plan sought to be implemented in the New Civil Code was for intentional acts to be governed by the Revised Penal Code.

However, the New Civil Code as enacted and other statutes clearly deviate from the general plan which the Commission had articulated. For instance, although the word tort does not appear in the New Civil Code, there are statutory provisions that use the word thereby recognizing tort as a source of liability. The provisions that recognize tort liability and use the term "tort" include Sections 22 and 100 of the Corporation Code, Art. 68 of the Child and Youth Welfare Code and Sec. 17(a)(6) of the Ship Mortgage Decree.

The Supreme Court had, in fact, repeatedly used the term tort in deciding cases involving negligent acts or omissions as well as those involving intentional acts. In a recent case, the Supreme Court broadly defined tort as a breach of legal duty. The Supreme Court explained that tort essentially consists in the violation of a right given or omission of statutory duty imposed by law. *(Naguiat vs. NLRC,*

269 SCRA 564 [1997]).

The New Civil Code as enacted and the Report of the Code Commission itself, reveal an evident intent to adopt the common law concept of tort and to incorporate the different, intentional and unintentional common law torts in the New Civil Code. Tortious conduct for which civil remedies are available are embodied in different provisions of the New Code. For instance, the Code Commission explained that the justifications for the inclusion of independent civil actions (Arts. 32, 33, 34, 35 and 36 of the Civil Code) are:

> "In England and the United States, the individual may bring an action in tort for assault and battery, false imprisonment, libel and slander, deceit, trespass, malicious prosecution, and other acts which also fall within criminal statutes. This independent civil action is in keeping with the spirit of individual initiative and the intense awareness of one's individual rights in those countries." *(Report of the Code Commission, p. 47).*

The same intent to incorporate Anglo-American rules is present in the rules regarding proximate cause and contributory negligence (Article 2199, NCC) as the Code Commission explained that the rules are a "blending of American and Spanish-Philippine law." *(Report of the Code Commission, p. 163).*

a. Catch-all Provisions.

The intent to adopt the expanded common law concept of intentional and unintentional tort is more evident in Articles 19, 20, and 21 of the Civil Code which state:

> "Art. 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.
>
> Art. 20. Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.
>
> Art. 21. Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage."

The above-quoted provisions enlarge the concept of tortious acts and embody in our law the Anglo-American concept of tort. *(Eduardo P. Caguioa, Comments and Cases on Civil Law, Vol. I, p. 29).* It introduces malice in the commission of torts. Article 20 is the "general sanction for all other provisions of law which do not especially provide

their own sanction" and "is broad enough to cover all legal wrongs which do not constitute violations of contract." *(Albenson Enterprises Corp. vs. Court of Appeals, 217 SCRA 16 [1993], citing Tolentino, Civil Code of the Philippines, Commentaries and Jurisprudence, Vol. I, p. 69).*

Under such broad concept of torts, Philippine laws include the following torts, some of which are also considered torts in American law: a) Defamation, b) Fraud, c) Physical Injuries, d) Violation of Constitutional Rights, e) Negligence, f) Interference with Contractual Relations, g) Violation of Privacy, h) Malicious Prosecution, i) Product liability, j) Strict liability for possession of animals, k) Abuse of right (Article 19, Civil Code), and l) Acts which violate good morals and customs. *(Article 21, NCC).* Tort is even broad enough to include civil liability arising from criminal liability. *(6 Reyes and Puno 157).*

Articles 19, 20 and 21 of Civil Code are likewise "catch-all" provisions that serve as basis of any imaginable tort action. Under the Anglo-American law, each tort is usually named and defined. On the other hand, Articles 19, 20 and 21 of the New Civil Code provide for general concepts that make persons liable for every conceivable wrongful acts. There is a general duty owed to every person not to cause harm either willfully or negligently. Articles 19, 20, and 21 are provisions on human relations that "were intended to expand the concept of torts in this jurisdiction by granting adequate legal remedy for the untold number of moral wrongs which is impossible for human foresight to specifically provide in the statutes." *(Philippine National Bank vs. The Court of Appeals, et al., 83 SCRA 237, citing Commissioner's Note, Capistrano, 1 Civil Code of the Philippines, 1950 Ed., p. 29).* Under Art. 21, taken together with Articles 19 and 20, "the scope of civil wrongs has been greatly broadened; it has become much more supple and adequate than Anglo-American law on torts" *(Albenson Enterprises, supra, citing Tolentino).* The statutory provisions, as they are now worded, afford relief against novel forms of misconduct when necessary and appropriate. It is now difficult to conceive of any malevolent exercise of a right which could not be checked by the application of these articles. *(ibid.).*

b. Expanded Scope of Quasi-Delict.

It should be noted, however, that even prior to enactment of the New Civil Code, the Supreme Court had already adopted, in some of its decisions, a broad concept of torts using Art. 1902 of the old Civil Code. The law on quasi-delict under the Civil Code of Spain which was then in force states:

> "Art. 1902. Any person who by any act or omission causes damage to another by his fault or negligence shall be liable for the damage so done."

The Supreme Court applied the above-quoted provision to an alleged case of malicious interference in the performance of contract in the 1919 case of *Daywalt vs. La Corporacion de los Padres Agustinos Recoletos (G.R. No. 13505, February 4, 1919, 39 Phil. 587)*, stating that:

> "Article 1902 of the Civil Code declares that any person who by any act or omission, characterized by fault or negligence, causes damage to another shall be liable for the damage so done. Ignoring so much of this article as relates to liability of negligence, we take the rule to be that a person is liable for damage done to another by any culpable act; and by "culpable act" we mean any act which is blameworthy when judged by accepted legal standards. The idea thus expressed is undoubtedly broad enough to include any rational conception of liability for the tortious acts likely to be developed in any society. x x x"

The same provision was applied by the Supreme Court to a tort case involving fraud. *(Silva vs. Peralta, 110 Phil. 57)*. The plaintiff in the said case was induced to live with one of the defendants by deceiving her that he was not married. The defendant was made liable for all the consequences of such fraud on the basis of Article 1902 of the old Civil Code.

It is noteworthy that the same broad interpretation of quasi-delict had been given to Article 2176, the provision on quasi-delict under the New Civil Code. The Supreme Court observed in a number of cases that Article 2176 includes intentional acts. *(Elcano and Elcano vs. Hill and Hill, 77 SCRA 98; Virata vs. Ochoa, 81 SCRA 472; Andamo vs. Court of Appeals, 191 SCRA 195; Dulay vs. Court of Appeals, April 31, 1995; Wylie vs. Rarang, 209 SCRA 327)*. The Supreme Court ruled in *Elcano* that:

> "Contrary to an immediate impression one might get upon a reading of the foregoing excerpts from the opinion in Garcia — that the concurrence of the Penal Code and the Civil Code therein referred to contemplate only acts of negligence and not intentional voluntary acts — deeper reflection would reveal that the thrust of the pronouncements therein is not so limited, but that in fact it actually extends to fault or *culpa*. This can be seen in the reference made therein to the Sentence of the Supreme Court of Spain of February 14, 1919, *supra*, which involved a case of fraud or estafa, not a negligent act. Indeed, Article 1093 of the Civil Code

of Spain, in force here at the time of Garcia, provided textually that obligations "which are derived from acts or omissions in which fault or negligence, not punishable by law, intervene shall be the subject of Chapter II, Title XV of this book (which refers to quasi-delicts)." And it is precisely the underline qualification, "not punishable by law," that Justice Bocobo emphasized could lead to an undesirable construction or interpretation of the letter of the law that "killeth, rather than the spirit that giveth life" hence, the ruling that "(W)e will not use the literal meaning of the law to smother and render almost lifeless a principle of such ancient origin and such full-grown development as *culpa aquiliana* or *cuasi-delito*, which is conserved and made enduring in Articles 1902 to 1910 of the Spanish Civil Code." And so, because Justice Bocobo was Chairman of the Code Commission that drafted the original text of the new Civil Code, it is to be noted that the said Code, which was enacted after the Garcia doctrine, no longer uses the term, "not punishable by law," thereby making it clear that the concept of *culpa aquiliana* includes acts which are criminal in character or in violation of the penal law, whether voluntary or negligent. Thus, the corresponding provisions to said Article 1093 in the new code, which is Article 1162, simply says, "Obligations derived from quasi-delicts shall be governed by the provisions of Chapter 2, Title XVII of this Book, (on quasi-delicts) and by special laws." More precisely, a new provision, Article 2177 of the new code provides:

"ART. 2177. Responsibility for fault or negligence under the preceding article is entirely separate and distinct from the civil liability arising from negligence under the Penal Code. But the plaintiff cannot recover damages twice for the same act or omission of the defendant."

According to the Code Commission: "The foregoing provision (Article 2177) though at first sight startling, is not so novel or extraordinary when we consider the exact nature of criminal and civil negligence. The former is a violation of the criminal law, while the latter is a *"culpa aquiliana"* or quasi-delict, of ancient origin, having always had its own foundation and individuality, separate from criminal negligence. Such distinction between criminal negligence and *"culpa extra-contractual"* or *"cuasi-delito"* has been sustained by decision of the Supreme Court of Spain and maintained as clear, sound and perfectly tenable by Maura, an outstanding Spanish jurist. Therefore, under the proposed Article 2177, acquittal from an accusation of criminal negligence, whether on reasonable doubt or not, shall not be a bar to a subsequent civil action, not for civil liability arising from criminal negligence, but for damages due to a quasi-delict or *"culpa aquiliana."* But said article forestalls a double recovery." *(Report of the Code Commission, p. 162).*

> Although, again, this Article 2177 does seem to literally refer to only acts of negligence, the same argument of Justice Bacobo about construction that upholds "the spirit that giveth life" rather than that which is literal that killeth the intent of the lawmaker should be observed in applying the same. And considering that the preliminary chapter on human relations of the new Civil Code definitely establishes the separability and independence of liability in a civil action for acts criminal in character (under Articles 29 to 32) from the civil responsibility arising from crime fixed by Article 100 of the Revised Penal Code, and, in a sense, the Rules of Court, under Sections 2 and 3(c), Rule 111, contemplate also the same separability, it is "more congruent with the spirit of law, equity and justice, and more in harmony with modern progress," to borrow the felicitous relevant language in *Rakes vs. Atlantic Gulf and Pacific Co., 7 Phil. 359*, to hold, as We do hold, that Article 2176, where it refers to "fault or negligence," covers not only acts "not punishable by law" but also acts criminal in character, whether intentional and voluntary or negligent. Consequently, a separate civil action lies against the offender in a criminal act, whether or not he is criminally prosecuted and found guilty or acquitted, provided that the offended party is not allowed, if he is actually charged also criminally, to recover damages on both scores, and would be entitled in such eventuality only to the bigger award of the two, assuming the awards made in the two cases vary. In other words, the extinction of civil liability referred to in Par. (e) of Section 3, Rule 111, refers exclusively to civil liability founded on Article 100 of the Revised Penal Code, whereas the civil liability for the same act considered as a quasi-delict only and not as a crime is not extinguished even by a declaration in the criminal case that the criminal act charged has not happened or has not been committed by the accused. Briefly stated, We here hold, in reiteration of Garcia, that *culpa aquiliana* includes voluntary and negligent acts which may be punishable by law."

It should be noted that the cases which adopt the view that Article 2176 covers intentional acts did so in order to justify the application of Article 2180 on the vicarious liability of parents and employers. With respect to parents, however, the distinction is no longer material because their vicarious liability under Article 221 of the Family Code covers intentional acts of their children.

c. View that Art. 2176 is limited to negligence.

The view that intentional acts fall within the purview of Article 2176 on quasi-delict is subject to a minority opinion to the contrary. There are authorities for the view that quasi-delict refers merely to negligenct acts. *(Padilla, Civil Code Annotated, Vol. VII-A, p. 37).*

Under this view, quasi-delict is homologous but not identical to tort of common law. *(Manila Railroad Co. vs. Cia Transatlantica, 38 Phil. 875).* In *Cangco vs. Manila Railroad Company* (38 Phil. 768 [1918]), the Supreme Court cited Manresa (Vol. 8, p. 68) who declared that the liability arising from extra-contractual *culpa* is always based upon a voluntary act or omission which, without willful intent, but by mere negligence or inattention, has caused damage to another.

The proposition is that the entire notion of quasi-delict is founded on fault or negligence which excludes all notions of intent, deliberateness, bad faith or malice. It is opined that the insertion of the word "intentional" in the above-cited *Andamo* case is an inaccurate obiter and the same should be read as "voluntary." *(Padilla, p. 38)*. Chief Justice Davide (then Associate Justice) expressed the same view in *Gashem Shookat Baksh vs. Court of Appeals (219 SCRA 115 [1993])*. He observed that Article 2176 "is limited to negligent acts or omissions and excludes the notion of willingness or intent. Quasi-delict, known in Spanish legal treatises as *culpa aquiliana*, is a civil law concept while torts is an Anglo-American or common law concept. Torts is much broader than *culpa aquiliana* because it includes not only negligence, but intentional criminal acts as well as assault and battery, false imprisonment and deceit. In the general scheme of the Philippine legal system envisioned by the Commission responsible for drafting the New Civil Code, intentional and malicious acts, with certain exceptions, are to be governed by the Revised Penal Code while negligent acts or omissions are to be covered by Article 2176 of the Civil Code. In between these opposite spectrums are injurious acts which in the absence of Article 21, would have been beyond redress."

3. PURPOSES OF TORT LAW

A. MAJOR PURPOSES.

The major purposes of tort law include the following: (1) to provide a peaceful means for adjusting the rights of parties who might otherwise take the law into their own hands; (2) deter wrongful conduct; (3) to encourage socially responsible behaviour; and (4) to restore injured parties to their original condition, insofar as the law can do this, by compensating them for their injury. *(William L. Prosser, John W. Wade, Victor E. Schwartz, Cases and Materials on Torts, 1988 Ed., p.1)*. In one case, the Supreme Court observed that the governing law (Article 2176, Civil Code) seeks to reduce the risks and burden of living in the society and to allocate them among the members of society. *(Phoenix Construction, Inc. vs. Intermediate Appellate Court, 148 SCRA 353 [1987])*.

B. BALANCING OF CONFLICTING INTERESTS.

The purposes specified above directly serve the general purpose of protecting different interests in the society. This is consistent with the view that civil law is the mass of precepts that determine or regulate relations that exist between members of the society for the protection of private interests. *(Quisaba vs. Sta. Ines-Melale Veneer and Plywood, Inc., 58 SCRA 771, August 30, 1974, citing 1 Sanchez Roman 3).* Dean Wright explained that:

> "Arising out of the various ever-increasing clashes of activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the person or property of others – in short doing all the things that constitute modern living – there must of necessity be losses, or injuries of many kind sustained as a result of the activities of others. The purpose of the law of torts is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another . . . The study of the law of torts is, therefore, a study of the extent to which the law will shift the losses sustained in modern society from the person affected to the shoulder of him who caused the loss or more realistically in many fields, to the insurance companies who are increasingly covering the many risks involved in the conduct of business and individual activities." *(Wright, Cases on the Law of Torts, p. 1).*

When the law provides for compensation to another for personal injuries, the law is protecting the person's interest over his body. A person is entitled to the physical integrity of his or her body; if the integrity is violated or diminished, actual injury is suffered for which actual or compensatory damages are due and assessable. *(Gatchalian vs. Delim, 203 SCRA 126, 137 [1991])*. However, although tort law is mainly concerned with providing compensation for personal injury and property damage caused by negligence, it also protects other interests such as reputation, personal freedom, enjoyment of property, and commercial interests. *(A Dictionary of Law, Oxford University Press, 1994, p. 401)*. The interests protected under the Civil Code and example of provisions which protect such interests are:

Interests Protected	*Torts and/or Provisions Involved*
Person	
Freedom from contact	Physical Injuries (Art. 32), Quasi-

	Delict (Art. 2176)
Freedom from distress	Moral Damages (Arts. 2217-2220)
Dignity	
Reputation	Defamation (Art. 33)
Privacy	Violation of Privacy (Art. 26)
Freedom from wrongful actions	Malicious Prosecution (Arts. 20 and 21)
Property	
Real Property	Nuisance (Arts. 694-770) Quasi-Delict (Art. 2176)
Economic/Pecuniary	
Contracts	Interference with contractual rights (Art. 1314)
Freedom from Deception	Fraud (Art. 33)

4. FUNDAMENTAL PRINCIPLES

The above-mentioned purposes are sought to be achieved in the pursuit of the fundamental principles which are being upheld under the New Civil Code. These fundamental principles include, equity, justice, democracy, and respect for human dignity.

A. EQUITY AND JUSTICE.

In drafting the Code, the Code Commission placed equity and justice above strict legalism. The provisions of the Code "uphold the spirit that giveth life rather than the letter that killeth." *(Report, p. 26)*. These general considerations are embodied in Articles 21 and 26 of the Civil Code. Thus, justice and equity demand that persons who may have been damaged by the wrongful or negligent act of another are compensated. Acting with justice involves the duty to indemnify for damage caused under Arts. 20, 21, 28, 27; to indemnify by reason of unjust enrichment under Arts. 22 and 23 *(See Perez vs. Pomar, 2 Phil. 682; Bonzon vs. Standard Oil, 27 Phil. 141)*; and to protect the weaker party under Article 24. *(Jose B.L. Reyes and Ricardo C. Puno, An Outline of Philippine Civil Law, Vol. 1, 1956 Ed., pp. 39-43)*. In fact, one Code Commissioner has commented that the whole chapter

on human relations under the Civil Code provides for guides for human conduct which should run as golden threads through society, to the end that law may approach its supreme ideal, which is the sway and dominance of justice. *(Francisco R. Capistrano, Civil Code of the Philippines, Vol. I, 1950 Ed., p. 28).*

Consistently, in the adjustment of the conflicting interests of individuals within the society, "some norm or standard must be available whereby the compromise or adjustment may take place. This notion is concealed in the philosophic notion of justice. Interests are to be adjusted in a manner that is just." *(Harper on Torts, pp. 3-4).* Law is conceived as a justice-seeking process and particular laws are therefore evaluated on the basis of their contribution to the ideal of justice. *(Bill Shaw and Art Wolfe, The Structure of Legal Environment, 1991 Ed., pp. 22-23).*

In *The Republic of Plato (I. 331E-336A, F. Cornford trans. 1945)*, Plato recorded an age-old dialouge where Socrates elicited from Polemarches an entry-level definition of justice: giving people their due. The same concept of justice is also reflected in the Roman maxim *Juris Praecepta Sunt Hec, Honeste Vivere, Alterum Non Laedare, Suum Cuique Tribuere* — the precepts of law are these, to live honestly, not to injure another, and to give to each one his due — and the maxim *Justicia Est Constans et Perpetua Voluntas Jus Suum* — Justice is a steady and unceasing disposition to render every man his due. *(Isabelo C. Moreno, Handbook of Legal Maxims, 1955 Ed., pp. 193 and 300, citing Justinian and Corpus Juris).* Such concept of justice pervades two levels: social and individual.

> "In our society, we can find two levels of justice, the social and individual level, and each of these has at least two components. In the social level we speak of justice as distributive and retributive.
>
> Distributive addresses the allocation of social goods and bads: wealth-poverty, income-employment, power-powerless, and so on. These issues are dealt with by the Congress and state legislatures. Distributive justice is a principal concern of our democratic institutions.
>
> Retributive justice, or retribution, refers to sanctions or penalties that are applied to those who engage in certain kinds of antisocial behavior; for example, murder, rape, and kidnapping. The criminal statutes x x x are examples of this type of justice.
>
> On the individual level, justice is viewed as compensatory and commutative.
>
> Compensatory justice (also known as corrective justice)

> means simply that a person who wrongfully inflicts harm on another person or that person's property must repay or repair the damage; that is, the one causing harm must try to place the injured party in as good a position as that person would have enjoyed had the wrong not been inflicted. x x x
>
> Commutative justice entails fairness of a private bargain or exchange. Mutual satisfaction with regard to the substance of such an agreement presupposes full information, truthful- ness, mental capacity, absence of coercion, and subjective satisfaction (as opposed to dollar-for-dollar equivalency) of the exchange. x x x"
>
> *(The Structure of the Legal Environment, pp. 22-23, supra)*

Equity, on the other hand, has broadly been defined as justice according to natural law and right. *(Justice Jose C. Vitug, Compendium of Civil Law and Jurisprudence, 1993 Ed., p. 1)*. It is also described as justice outside legality. *(Tupas vs. Court of Appeals, 193 SCRA 597, 602 [1991])*. Equity is often invoked in justifying the rule regarding mitigation of liability if the plaintiff was guilty of contributory negligence.

B. DEMOCRACY.

The Code Commission explained how democracy is being upheld under the New Civil Code:

> "It may at first sight seem strange that a civil code should concern itself with democracy, which it may be argued, is properly a matter for a political code. But democracy being more than a mere form of government, affecting as it does, the very foundations of human life and happiness, cannot be overlooked by an integral civil code, particularly since the last two world wars which showed all too tragically that democracy as a way of life must be inculcated into the hearts and minds of men and women." *(Report, p. 28)*.

Such concern for the democratic way of life is the reason why the Code includes provisions that implement the civil liberties guaranteed by the Constitution. Thus, for example, Article 32 provides for independent civil action for damages against "any public officer or employee, or any private individual, who directly and indirectly obstructs, defeats, violates or in any manner impedes or impairs the civil rights and liberties of another person." *(Report, pp. 28-29)*.

C. HUMAN PERSONALITY EXALTED.

The Commission observed that certain provisions were included

in the New Civil Code, including Article 26 and the provisions on moral damages, in order to remedy the defects in the Old Civil Code in so far as it did not properly exalt human personality. The Commission explained:

"The sacredness of human personality is a concomitant of every plan for human amelioration. The touchstone of every system of laws, of the culture and civilization of every country, is how far it dignifies man. If in legislation, inadequate regard is observed for human life and safety; if the laws do not sufficiently forestall human suffering or do not try effectively to curb those factors or influences that wound the noblest sentiments; if the statutes insufficiently protect persons from being unjustly humiliated, in short, if human personality is not properly exalted — then the laws are indeed defective. Sad to say, such is to some degree the present state of legislation in the Philippines. To remedy this grave fault in the laws is one of the principal aims of the Project of Civil Code." *(Report, p. 32)*.

5. JUSTIFICATIONS OF TORT LIABILITY

The Supreme Court explained in *Cangco vs. Manila Railroad Company (supra)* the foundation of extra-contractual obligations, *viz.:*

> "Every legal obligation must of necessity be extra-contractual or contractual. Extra-contractual obligation has its source in the breach or omission of those mutual duties which civilized society imposes upon its members, or which arise from these relations, other than contractual, of certain members of society to others, generally embraced in the concept of status. The legal rights of each member of society constitute the measure of the corresponding legal duties, mainly negative in character, which the existence of those rights imposes upon all other members of society. The breach of these general duties whether due to willful intent or to mere inattention, if productive of injury, gives rise to an obligation to indemnify the injured party. The fundamental distinction between obligations of this character and those which arise from contract, rests upon the fact that in cases of non-contractual obligation it is the wrongful or negligent act or omission itself which creates the *vinculum juris*, whereas in contractual relations the *vinculum* exists independently of the breach of the voluntary duty assumed by the parties when entering into the contractual relation."

There are different theories on why in tort law, the wrongful or negligent act or omission itself creates the *vinculum juris*. Legal theorists have tried to explain why liability is imposed or created when there is breach of the duties imposed on the members of the

society. In this Section, we will turn our attention to justifications advanced by legal theorist based on two (2) perspectives, the moral and social perspective.

A. MORAL PERSPECTIVE.

Justification for imposition of tort liability may be viewed from a moral perspective. Tort liability may be justified because the conduct is considered a moral wrong. For instance, Senator Tolentino explained that Articles 19 and 20 provide adequate legal remedy for moral wrongs. *(Tolentino, Civil Code of the Philippines, Commentaries and Jurisprudence, Vol. I, 1990 Ed., p. 70)*. Commenting on the business of the law of torts, Justice Oliver Wendell Holmes, Jr. observed that:

> "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not. But it cannot enable him to predict with certainty whether a given act under given circumstances will make him liable, because an act will rarely have that effect unless followed by damage for most part, if not always, the consequences of an act are not known but only guessed at as more or less probable. All the rules that the law can lay down beforehand are rules for determining the conduct which will be followed by liability if it is followed by harm, — that is, the conduct which a man pursues at his peril. The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event.
>
> If, therefore, there is any common ground for all liability in tort, we shall best find it by eliminating the event as it actually turns out, and by considering only the principles on which the peril of his conduct is thrown upon the actor. We are to ask what are the elements, on the defendant's side, which must all be present before liability is possible, and the presence of which will commonly make him liable if damage follows.
>
> The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent and negligence. Hence, it may naturally be supposed that the risk of a man's conduct is thrown upon him as a result of some moral shortcoming." *(The Common Law, 77-80 [1881] reproduced in Robert L. Rabin, Perspectives on Tort Law).*

Consistent with the moral perspective is the maxim *Ubi jus ibi remedium* — there is no wrong without a remedy. Consequently, the focus of tort law from the moral perspective is the wrong committed and the moral shortcoming of the actor. Such moral justification had pervaded tort law even in the nineteenth century. In fact, "for the nineteenth century, liability in tort was always essentially the penalty of fault to be found in individual tortfeasor." *(W. Friedmann, Legal Theory, 5th Ed., [1967] p. 529).* Moral turpitude was considered the outstanding though not exclusive principle of tortious liability. (*ibid*., p. 529).

B. SOCIAL AND ECONOMIC PERSPECTIVE.

Social responsibility can also be made to justify tort law. In fact, some modern legal writers believe that the social policy of tort is the primary justification of tort liability. *(Jarencio, Torts and Damages, 1983 Ed., p. 6)*. In other words, liability may be provided for certain tortious conduct because of the good that it will do to the society as a whole and its function of encouraging socially responsible behavior.

The purpose of tort law of protecting individual interests (reputation, personal freedom, etc.) discussed above is in fact a reflection of the social policy of tort. As explained by one legal writer, "general notions of policy of incorporating tacitly assumed social objectives have shaped the law and have furnished the final standard by which the adjustments of the conflicting interests have been made." *(Harper on Torts, pp. 4-5)*. He went on further to explain that:

> "Each interest which receives recognition and protection by the law, receives such protection to the extent of the social significance of the individual interest, as compared with the other conflicting individual interests. In other words, public policy requires that some interests not be invaded too far in the advancement of other interests. These principles of policy have become crystallized in rules and doctrine, as found in the ensuing chapters. The extent and measure of the application of any legal rule is, therefore, determined by the social policy represented thereby." *(Harper, ibid., pp. 5-6)*.

The social function of tort may also be viewed from an economic perspective. "Economic analysis of tort law focuses on the allocation of the risks of loss due to the destruction of property or injury to persons created by those activities. Tort law may be viewed as a system of rules designed to maximize wealth by allocating risks so as to minimize the costs associated with engaging in daily activities." *(David W. Barnes and Lynn A. Stout, Economic Analysis of Tort Law,*

1992 Ed., p. 27). Under this view, "tort law allocates the costs of accidents to those in the best position to minimize those costs." *(ibid.)* "The economic analysis of tort law begins by examining how the law encourages people to allocate resources to accident prevention." *(ibid.; See also Richard A. Posner, A Theory of Negligence, 1 Journal of Legal Studies; Richard A. Posner, Strict Liability: A Comment, 2 Journal of Legal Studies; Guido Calabresi & Jon T. Hirschoff, Toward a Test of Strict Liability in Tort, 81 Yale Law Journal 1055; Robert L. Rabin, Perspectives on Tort Law, 1976 Ed., pp. 16-32 and 139-210).*

Thus, the observation of the Supreme Court that the law on quasi-delict seeks to reduce the risks and burdens of living in society and to allocate them among the members of society *(Phoenix Construction, Inc. vs. Intermediate Appellate Court, 148 SCRA 353, 370 [1987])*, may be interpreted to be consistent with the social policy perspective, particularly its economic perspective. It may be viewed as a means of allocating resources to prevent accidents.

It should also be noted that the social policy of tort law and its economic perspective may also justify cases where the law provides for strict liability — liability without fault or negligence. (See Chapter 12). For instance, manufacturers are liable for damages resulting from the consumption of defective products regardless of fault or negligence because they are in the best position to minimize the costs. *(See Article 2187, Civil Code and Article 97 of the Consumer Act)*. It is not grounded on the moral responsibility of the manufacturer as it is not considered in imposing liability. It is partly based on the view that strict liability for defective products is the best way to allocate risks to minimize costs.

6. PERSONS WHO CAN SUE AND BE SUED FOR TORT

A. PLAINTIFFS: PERSONS WHO ARE ENTITLED TO DAMAGES.

As already pointed out earlier, any person who had been injured by reason of a tortious conduct can sue the tortfeasor. Such plaintiff can be a natural person or an artificial person like a corporation. For example, if a taxi driver was physically injured when his vehicle was bumped by another vehicle, both the driver and the corporation that owns the taxi unit can sue the negligent driver of the other. A defendant may be held liable even if he does not know the identity of the plaintiff at the time of the accident. *(Gilchrist vs. Cuddy, 29 Phil. 542 [1915])*. In fact, the defendant may not be even aware at the time of the accident that he injured the plaintiff because the injury may manifest itself later as in the case where the sickness showed

its symptoms only days after the accident.

An unborn child, however, is not entitled to damages. Although the bereaved parents may be entitled to damages, all such damages must be those inflicted directly upon them as distinguished from the injury or violation of the rights of the unborn child, his right to life and physical integrity. *(Geluz vs. Court of Appeals, 2 SCRA 802 [1961])*. Birth determines personality and for civil purposes, the foetus is only considered born if it is alive at the time it is completely delivered from the mother's womb. *(Articles 40 and 41, Civil Code)*. For example, if the mother went to an abortionist without the consent of her husband, the action of the husband against the abortionist for damages pertaining to the unborn child will not prosper. The personality of the child never existed because the child was already dead when it was separated from the mother's womb. The damages to which the husband may be entitled shall be limited to those which he personally suffered and which he can prove during the trial.

B. DEFENDANTS: PERSONS WHO MAY BE HELD LIABLE.

Defendants in tort cases can either be natural or artificial beings. Thus, the Supreme Court explained that a corporation is civilly liable in the same manner as natural persons. *(Philippine National Bank vs. Court of Appeals, 83 SCRA 237 [1978], citing Fletcher's Cyclopedia of Corporations)*.

The employee or officer concerned is not free from liability but the corporation may be held directly and primarily liable under the concept of vicarious liability.

With respect to close corporations, the stockholders who are personally involved in the operation of the corporation may be personally liable for corporate torts under Section 100 of the Corporation Code. The Corporation Code also specifies the rules on tort liability if what is involved is a corporation by estoppel. A corporation by estoppel is not a real corporation but the members make it appear or represent themselves to be members of a corporation in dealing with third persons. Under Section 21 of the Corporation Code, all persons who assume to act as a corporation knowing it to be without authority to do so shall be liable as general partners for all debts, liabilities and damages incurred or arising as a result thereof. The said provision likewise provides that "when any such ostensible corporation is sued on any transaction entered by it as a corporation or on any tort committed by it as such, it shall not be allowed to use as a defense its lack of corporate personality."

With respect to partnerships, Articles 1823 and 1824 of the New Civil Code provide that the partnership is solidarily liable with the partner if the latter commit tortious acts while acting in the pursuit of partnership business. This principle is consistent with the mutual agency rule in partnership.

Subject to rules regarding waiver of immunity from suits, defendants may include the State, its political subdivisions, and government-owned and -controlled corporations. *(National Irrigation Administration vs. Intermediate Appellate Court, 214 SCRA 35 [1992])*. There are even statutory provisions which expressly provide for such liability of the State and provinces, cities and municipalities under certain circumstances. *(Arts. 2180 and 2189, Civil Code)*.

7. REMEDIES

Legal remedies are either preventive or compensatory. Every remedy in a certain sense is preventive because it threatens certain undesirable consequences to those who violate the rights of others *(Thomas M. Cooley and D. Avery Haggard, Cooley on Torts, Vol. 1, 4th Ed., 1932, p. 26)*.

The primary purpose of a tort action is to provide compensation to a person who was injured by the tortious conduct of the defendant. The remedy of the injured person is therefore primarily an action for damages against the defendant.

Preventive remedy is available in some cases. A prayer for injunction and a writ of preliminary injuction and a temporary restraining order may be justified under certain circumstances. Thus, in proper cases, the defendant may be enjoined from continuing with the performance of a tortious conduct. For example, a person may ask for a restraining order and/or writ of injunction to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable. *(Philip S. Yu vs. The Honorable Court of Appeals, 217 SCRA 328 [1993]; Gilchrist vs. Cuddy, 29 Phil. 542 [1915])*. Nuisance may also be stopped by the issuance of an injunction. *(Iloilo Cold Stores Co. vs. Municipal Council, 24 Phil. 471 [1913]; De Ayala vs. Barretto, 33 Phil. 538 [1916]; San Rafael Homeowners Association, Inc. vs. City of Manila, 46 SCRA 40 [1972])*. For instance, if a building that is about to be constructed will unnecessarily pollute the environment, the persons affected may go to court and ask for injunctive relief. The issuance of a writ of preliminary injunction may be justified under

Rule 58 of the 1997 Rules of Civil Procedure.

8. ALTERNATIVE COMPENSATION SCHEMES

The purpose of tort law to compensate injured parties is often hampered by the difficulties encountered by aggrieved parties in tort cases. This is especially true in case of injuries that are not grave and the prosecution of cases would be costly. To help victims secure compensation, the legislature usually provides for alternative means of recovering compensation for losses suffered by the parties. These alternative systems of compensation include laws imposing compulsory insurance as well as employees compensation.

However, the alternative systems usually suffer from some weaknesses foremost of which is the fact that the amount to be recovered is limited. In most cases, the law fixes a maximum amount that can be recovered by the injured party. Consequently, even in cases covered by the alternative systems, tort actions are still resorted to. In tort cases, the plaintiff can recover damages that are proximately caused by the negligent or willful act of the defendant.

A. INSURANCE.

An example of an alternative compensation scheme is that what is provided for under the Insurance Code. *(Presidential Decree No. 1460 as amended)*. Chapter V of the Insurance Code of the Philippines provides for compulsory motor vehicle insurance. Article 378 provides that "any claim not exceeding five thousand pesos (P5,000.00) for death or injury to any passenger or third party shall be paid without the necessity of proving fault or negligence of any kind."

Apparently, the "no-fault" provision of Article 378 of the Insurance Code makes sure that there will be indemnity to persons suffering loss in motor vehicle accidents. The injured party would not be burdened by the inconvenience of litigation because he can recover without proving fault or negligence.

B. WORKER'S COMPENSATION.

Article 166 of the Labor Code provides that the State shall promote and develop a tax-exempt employee's compensation program whereby employees and their dependents may promptly secure adequate income benefits and medical or related benefits in the event of work connected disability or injury. The present controlling statutory provisions on employees' compensation are Articles 167 to 208 of the

Labor Code.

In Common law, employees can claim compensation from their employers if the latter committed tortious actions against them. Liability may be due to the negligence of the employer in the maintenance of the workplace. In such cases, the employee will be saddled with the burden of proving negligence on the part of the employer. The employer will then be able to invoke defenses which will make the employee bear the loss. In most cases, the employee will not have the money to be involved in expensive litigation.

The history of employees compensation laws and the reasons for their enactment were discussed in the dissenting opinion of Justice Hugo Gutierrez in *Floresca vs. Philex Mining Corporation (136 SCRA 141 [1985]).* The Supreme Court Justice explained that workmen's compensation statutes were enacted to address not only the tendency of employers to employ his wealth to frustrate fault based actions but also the defenses available to the employer. The problems associated with the application of the fellow servant rule, the assumption of risk doctrine, the principle of contributory negligence, and the many other defenses so easily raised in protracted damage suits illustrated the need for a system whereby workers had only to prove the fact of covered employment and the fact of injury arising from employment in order to be compensated. Another objective of the workmen's compensation statutes was to have simplified, expeditious, inexpensive, and nonlitigious procedures so that victims of industrial accidents could more readily, if not automatically, receive compensation for work-related injuries. *(See Notes in p. 923)*

CHAPTER 2

NEGLIGENCE

1. KINDS OF NEGLIGENCE

Actionable negligence may either be *culpa contractual, culpa aquiliana* and criminal negligence. Thus, an action for damages for the negligent acts of the defendant may be based on contract, quasi-delict or delict. The bases of liability are separate and distinct from each other even if only one act or omission is involved.

Previously, there were conflicting opinions regarding the separate nature of the basis of liability for negligence. Manresa's view was the same as the present prevailing rule. He believed that there is a difference between *culpa,* substantive and independent, which of itself constitutes the source of an obligation between persons not formerly connected by any legal tie and *culpa* considered as an incident in the performance of an obligation already existing. (Vol. 8, pp. 30 and 67, cited in *Cangco vs. Manila Railroad*, 38 Phil 768 [1918]; *Manila Railroad Co. vs. Compania Transatlantica,* 38 Phil. 875 [1918]). One is called *culpa contractual* and the other *culpa aquiliana.* The same principle and terminologies were accepted by Sanchez Roman and supported by decisions of the Supreme Court of Spain (*Manila Railroad Co. vs. Compania Tranatlantica, ibid.,* citing Sanchez Roman, *Derecho Civil,* fourth section, Chapter XI, Article II, No. 12; 80 *Jurisprudencia Civil,* Nos. 151 and 75 *Jurisprudencia Civil,* No. 182).

A. STATUTORY BASIS AND REQUISITES.

a. Quasi-delict.

Quasi-delict was used by the Code Commission to designate negligence as a separate source of obligation because it "more nearly corresponds to the Roman Law classification of obligations and is in harmony with the nature of this kind of liability." (*Report of the Code Commission*, p. 161; see also *Manila Railroad Co. vs. Compania Transatlantica*, 38 Phil. 875). It was called *culpa-aquiliana* in Spanish

law because it can be traced from the Roman law source of obligation called *Lex Aquilia*.

Quasi-delict is governed mainly by Article 2176 of the Civil Code, which states that:

> "Article 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called quasi-delict and is governed by the provisions of this Chapter."

Under the above-quoted provision, the essential requisites for a quasi-delictual action are: (1) an act or omission constituting fault or negligence; (2) damage caused by the said act or omission; (3) the causal relation between the damage and the act or omission. *(Taylor vs. Manila Electric Company, 16 Phil. 8; Algarra vs. Sandejas*, *27 Phil. 284; Tayag, Sr. vs. Alcantara, 98 SCRA 723; Vergara vs. Court of Appeals, 154 SCRA 564; Andamo vs. Intermediate Appellate Court, 191 SCRA 195; Philippine Bank of Commerce vs. Court of Appeals, 269 SCRA 695 [1997])*. It should be noted, however, that the Supreme Court added a fourth requisite in some cases, that is, the absence of contractual relation between the plaintiff and the defendant. Although such requirement appears to be consistent with the language of Article 2176 of the Civil Code, it is no longer being cited because it is now well-settled that an action based on quasi-delict can be maintained even if there is an existing contractual relation between the parties.

b. Delict.

Criminal negligence, on the other hand, is governed by Article 365 of the Revised Penal Code, which provides that:

> "Art. 365. *Imprudence and negligence.* — Any person who, by reckless imprudence, shall commit any act which, had it been intentional, would constitute a grave felony, shall suffer the penalty of *arresto mayor* in its maximum period to *prision correccional* in its maximum period; if it would have constituted a less grave felony, the penalty of *arresto mayor* in its minimum and medium periods shall be imposed.
>
> Any person who, by simple imprudence or negligence, shall commit an act which would otherwise constitute a grave felony, shall suffer the penalty of *arresto mayor* in its medium and maximum periods; if it would have constituted a less serious felony, the penalty of *arresto mayor* in its minimum period shall be imposed.

x x x

> Reckless imprudence consists in voluntary, but without malice, doing or failing to do an act from which material damage results by reason of inexcusable lack of precaution on the part of the person performing or failing to perform on the part of the person performing or failing to perform such act, taking into consideration his employment or occupation, degree of intelligence, physical condition and other circumstances regarding persons, time and place.
>
> Simple imprudence consists in the lack of precaution displayed in those cases in which the damage impending to be caused is not immediate nor the danger clearly manifest. x x x"

The elements of the crime defined under Article 365 of the Revised Penal Code are as follows: (1) that the offender does or fails to do an act; (2) that the doing or the failure to do that act is voluntary; (3) that it be without malice; (4) that material damage results from the reckless imprudence; and (5) that there is inexcusable lack of precaution on the part of the offender, taking into consideration his employment or occupation, degree of intelligence, physical condition, and other circumstances regarding persons, time and place. *(Cruz vs. Court of Appeals, 282 SCRA 188).*

c. Contract.

Culpa contractual is governed by the Civil Code provisions on Obligations and Contracts particularly Articles 1170 to 1174. Article 1170 provides that those, who in the performance of the obligation are guilty of fraud, negligence, or delay, are liable for damages. Responsibility arising from negligence in the performance of every kind of obligation is demandable, but such liability may be regulated by courts, according to the circumstances. (Article 1172, Civil Code).

By express provision of Article 2178, Articles 1172 to 1174 are applicable to quasi-delict cases.

B. DISTINCTIONS.

a. *Culpa Aquiliana* distinguished from *Culpa Contractual*.

In *culpa contractual,* the foundation of the liability of the defendant is the contract. The obligation to answer for the damage that the plaintiff has suffered arises from breach of the contract by reason of defendant's failure to exercise due care in its performance. *Culpa aquiliana* is a separate source of obligation independent of contract.

For instance, when breach of contract was committed through the negligence of an employee, the employer cannot erase his primary and direct liability by setting up the defense of the diligence of a good father of a family in the selection and supervision of the employee. That is to say the employer's liability is direct and immediate, differing essentially from his presumptive responsibility for the negligence of his servants based on quasi-delict under Article 2180 of the Civil Code, which can be rebutted by proof of the exercise of due care in their selection and supervision. *(Rakes vs. Atlantic Gulf and Pacific Co., 7 Phil. 359).*

b. *Culpa aquiliana* distinguished from crimes.

Crimes under the Penal Code differ from *culpa aquiliana* or *quasi-delitos* under the Civil Code, *viz*.: a) Crimes affect the public interest, while *cuasi-delitos* are only of private concern; b) The Penal Code punishes or corrects criminal act, while the Civil Code, by means of indemnification, merely repairs the damage; c) Delicts are not as broad as quasi-delicts, because the former are punished only if there is a penal law clearly covering them, while the latter, *cuasi-delitos,* include all acts in which any kind of fault or negligence intervenes; and d) The liability of the employer of the actor-employee is subsidiary in crimes while his liability is direct and primary in quasi-delict. *(Barredo and Garcia vs. Almario, 73 Phil. 607, 611 [1942]; Diana and Diana vs. Batangas Transportation Co, 93 Phil. 391 [1953]; Carpio vs. Daroja, 180 SCRA 1).*

C. CONCURRENCE OF CAUSES OF ACTION.

It should be noted, however, that a single act or omission may give rise to two or more causes of action. The obligation based on one is separate and distinct from the other. That is, an act or omission may give rise to an action based on delict, quasi-delict and even contract. *(Far East Bank and Trust Co. vs. Court of Appeals, 240 SCRA 348.)*

Whenever a contractual obligation can be breached by tort, it is also possible that two persons are liable for such breach even if there is only one act or omission that causes the injury. The same act or omission may result in both *culpa contractual* and *culpa aquiliana,* in which event, Article 2194 of the Civil Code can well apply when two persons are involved. Thus, the same negligence of a guard who is employed by an independent contractor to man a common carrier may result in the solidary liability of the carrier as well as the independent contractor. The liability of the carrier is based on contract and

liability of the contractor is based on quasi-delict. In fine, a liability for tort may arise even under a contract, where tort is that which breaches the contract. When an act which constitutes a breach of contract would have itself constituted the source of a quasi-delictual liability had no contract existed between the parties, the contract can be said to have been breached by tort, thereby allowing the rules on tort to apply *(Light Rail Transit Authority et al. v. Marjorie Navidad, et al., G.R. No. 145804, February 6, 2003)*.

There may also be concurrence of causes of action even if only one person is sought to be held liable. Thus, a common carrier's liability may arise *ex contractu* and at the same time *quasi ex-delicto* even if there is only a single act or omission. The Supreme Court explained in *Air France vs. Carrascoso (L-21438, September 28, 1966):*

> "A contract to transport passengers is quite different in kind and degree from any other contractual relation. And this, because of the relation which an air-carrier sustains with the public. Its business is mainly with the travelling public. It invites people to avail of the comforts and advantages it offers. The contract of air carriage, therefore, generates a relation attended with a public duty. Neglect or malfeasance of the carrier's employees, naturally, could give ground for an action for damages.
>
> Passengers do not contract merely for transportation. They have a right to be treated by the carrier's employees with kindness, respect, courtesy and due consideration. They are entitled to be protected against personal misconduct, injurious language, indignities and abuses from such employees. So it is, that any rude or discourteous conduct on the part of employees towards a passenger gives the latter an action for damages against the carrier.
>
> Thus, "Where a steamship company had accepted a passenger's check, it was a breach of contract and a tort, giving a right of action for its agent in the presence of third persons to falsely notify her that the check was worthless and demand payment under threat of ejection, though the language used was not insulting and she was not ejected. And this, because, although the relation of passenger and carrier is 'contractual both in origin and nature' nevertheless 'the act that breaks the contract may be also a tort.'" And in another case, "Where a passenger on a railroad train, when the conductor came to collect his fare, tendered him the cash fare to a point where the train was scheduled not to stop, and told him that as soon as the train reached such point he would pay the cash fare from that point to destination, there was nothing in the conduct of the passenger which justified the conductor in using insulting language to him, as by calling him a lunatic," and the Supreme Court of South Carolina there held

the carrier is liable for the mental suffering of said passenger.

> Petitioner's contract with Carrascoso is one attended with public duty. The stress of Carrascoso's action as we have said, is placed upon his wrongful expulsion. This is a violation of public duty by the petitioner-air carrier — a case of quasi-delict. Damages are proper."

The limitation imposed by law is the proscription against double recovery provided for under Article 2177 of the Civil Code. Although an act or omission may give rise to two causes of action, the plaintiff cannot recover twice for the same act or omission of the defendant *(Article 2177, Civil Code; Equitable Leasing Corporation v. Lucita Suyom, et al., G.R. No. 143360, September 5, 2002).*

2. CONCEPT OF NEGLIGENCE

The discussion hereunder covers the substantive aspects of negligence based on quasi-delict. However, the definition of negligence and the test thereof as well as the standard of conduct discussed below apply to obligations arising from contract. This is evident from Article 2178 of the New Civil Code which provides that provisions applicable to *culpa contractual* (Articles 1172 to 1173 of the Civil Code) are likewise applicable to quasi-delict.

The same test and definition apply to criminal negligence. Although the Revised Penal Code distinguishes between simple imprudence and reckless imprudence, they are conceptually compatible with negligence arising from quasi-delict. The Supreme Court adopted the view of Wharton in *United States vs. Garces* (31 Phil. 637, 639 [1915]):

> "Ker's Wharton on Criminal Law (11th ed.), section 163, note 4 reads in part as follows: 'To impose criminal responsibility, Sir J.F. Stephen *(2 History Crim. Law, 11)* maintains that there must be more, but no one can say how much more, carelessness than is required in order to create a civil liability. For instance, many railway accidents are caused by a momentary forgetfulness or want of presence of mind, which are sufficient to involve the railway in civil liability, but are not sufficient to make the railway servant guilty of manslaughter if death is caused.' But the better view is that the only difference between criminal and civil procedure in such case is that in the first there can be no conviction if there be reasonable doubt of guilt, while in the second the verdict goes with preponderance of proof."

Hence, the cases cited hereunder include criminal cases and cases arising from *culpa contractual* which apply with equal force to

quasi-delictual actions.

A. DEFINITION AND TEST OF NEGLIGENCE.

Article 1173 defines negligence as the omission of that degree of diligence which is required by the nature of the obligation and corresponding to the circumstances of persons, time and place.

Jurisprudential definitions of negligence include the following:

> "Negligence is 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 (*Black's Law Dictionary*, Fifth Edition, 930) or as Judge Cooley defines it, '(T)he failure to observe for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.' *(Cooley on Torts*, *Fourth Edition, vol. 3, 265)" (Layugan vs. Intermediate Appellate Court (167 SCRA 363 [1988]).*
>
> "Negligence was defined by us in two 1912 decisions, *United States v. Juanillo and United States v. Barias.* Cooley's formulation was quoted with approval in both the Juanillo and Barias decisions. Thus: Judge Cooley, in his work on Torts *(3rd ed.)*, Sec. 1324, defines negligence to be: 'The failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.' There was likewise reliance on *Ahern v. Oregon Telephone Co.* Thus: 'Negligence is want of care required by the circumstances. It is a relative or comparative, not absolute term and its application depends upon the situation of the parties and the degree of care and vigilance which the circumstances reasonably require. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances.'" *(Corliss vs. Manila Railroad Company, 27 SCRA 674 [1969]).*
>
> "Negligence, as it is commonly understood is conduct which creates undue risk of harm to others." (*Valenzuela vs. Court of Appeals, 253 SCRA 303 [1996], citing Keeton and Dobbs, et al., Prosser and Keeton on Torts, 1984 Ed., p. 451).*

An oft repeated discussion on negligence is embodied in the decision in *Picart vs. Smith (37 Phil. 809, 813 [1918], cited in Gan vs. Court of Appeals, 165 SCRA 378 [1988]; Layugan vs. Intermediate Appellate Court, 167 SCRA 363 [1988]; Leano vs. Domingo, July 4, 1991; McKee vs. Intermediate Appellate Court, 211 SCRA 517 [1992];*

Bank of Philippine Islands vs. Court of Appeals, 216 SCRA 51 [1992]; Mandarin Villa, Inc. vs. Court of Appeals, 257 SCRA 538, 543 [1996]) penned by Justice Street:

> "The test by which to determine the existence of negligence in a particular case may be stated as follows: *Did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordinarily prudent person would have used in the same situation?* If not, then he is guilty of negligence. The law here in effect adopts the supposed to be supplied by the imaginary conduct of the discreet *paterfamilias* of the Roman law. The existence of negligence in a given case is not determined by reference to the personal judgment of the actor in the situation before him. The law considers what would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that.
>
> The question as to what would constitute the conduct of a prudent man in a given situation must of course be always determined in the light of human experience and in view of the facts involved in the particular case. Abstract speculation cannot here be of much value but this much can be profitably said: Reasonable men govern their conduct by the circumstances which are before them or known to them. They are not, and are not supposed to be, omniscient of the future. Hence, they can be expected to take care only when there is something before them to suggest or warn danger. *Could a prudent man, in the case under consideration, foresee harm as a result of the course actually pursued?* If so, it was the duty of the actor to take precautions to guard against harm. Reasonable foresight of harm, followed by the ignoring of the suggestion born of this provision, is always necessary before negligence can be held to exist. Stated in these terms, the proper criterion for determining the existence of negligence in a given case is this: Conduct is said to be negligent when a prudent man in the position of the tortfeasor would have foreseen that an effect harmful to another was sufficiently probable to warrant his foregoing the conduct or guarding against its consequences."

B. NEGLIGENCE IS CONDUCT.

The above-quoted discussion of the Supreme Court makes it clear that negligence is conduct. A court that determines the question of existence of negligence is concerned with what the defendant did or did not do. What is important in the determination of the presence or absence of negligence is whether the person who is sought to be held liable omitted to do something which a reasonable man would do or did something which a reasonable man would not do. The state of mind of the actor is not important; good faith or use of sound judg-

ment is immaterial. Hence, the existence of negligence in a given case is not determined by reference to the personal judgment but by the behavior of the actor in the situation before him. *(Picart vs. Smith, ibid.).* Even if the actor believed that he exercised proper diligence, he will still be liable if his conduct did not correspond to what a reasonable man would have done under the same circumstances.

For the same reason, motive is not material in negligence cases. For example, the defendant may still be held liable for damages even if the act was meant to be a practical joke. *(57 Am. Jur. 354).*

It should likewise be emphasized that only juridical fault is subject to liability and not moral fault. "Acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy." *(Donoghue vs. Stevenson, A.C. 562 at 580, [1932]).*

For instance, a person who does not give assistance to a person who is in danger of death is guilty only of moral negligence, but not of juridical negligence. In such case, the person who lacked the virtue of charity is not liable for damages. *(Tolentino, Commentaries and Jurisprudence on the Civil Code of the Philippines, 1992 Ed., p. 594).*

Nevertheless, the conduct that should be examined in negligence cases is prior conduct, that is, conduct prior to the injury that resulted or, in proper cases, the aggravation thereof. The law imposes a duty on the doer to take precaution against its mischievous results, hence, what is important is that what was called in a dissenting opinion in one case as "diligence before the fact." *(St. Francis High School vs. Court of Appeals, 194 SCRA 341, 356-357 [1991]).* This diligence may include the duty to investigate. Where the situation suggest investigation and inspection in order that its danger may fully appear, the duty to make such investigation and inspection is imposed. *(Dichitang, et al. vs. Vicente V. Aguilar & Co., et al., 8 CAR 2s 618, 622 [1965]).*

Moreover, such diligence before the fact does not necessarily mean that conduct which is the safest way of doing things. The fact that there may have been a safer method than that employed or danger may have been avoided by action in a different manner, does not make an act negligent. *(67 C.J.S. 472).*

C. UNREASONABLE OR UNDUE RISKS.

Negligence, as it is commonly understood is a conduct that creates an undue risk of harm to others. *(Valenzuela vs. Court of*

Appeals, 253 SCRA 303 [1996]). For example, if a driver of a vehicle recklessly drove his vehicle thereby causing damage to another's vehicle, the reckless driving created an undue risk that resulted in such damage. Of course, driving without recklessness also involves risks. The moment a driver gets out of his garage, there exists a risk that somebody might be injured. Indeed, all actions entail a degree of risk and all conduct under certain circumstances may be a source of damage.

However, in negligence, risk means a danger which is apparent, or should be apparent, to one in the position of the actor. *(Prosser and Keeton, pp. 169-170)*. Such type of risk is unreasonable risk. If such unreasonable risk results in injury to the plaintiff, the latter can recover from the defendant. *(Phoenix Construction vs. IAC, 148 SCRA 353 [1987])*.

D. FORSEEABILITY.

Since the unreasonableness of the risk means danger that is apparent or should be apparent, the determination of negligence is a question of foresight on the part of the actor. The test to determine the existence of negligence is to ask if the defendant used reasonable care and caution which an ordinarily prudent person would have used. However, to determine what a reasonable man would have done requires the application of the test of foreseeability. As stated in *Picart vs. Smith (supra),* the question is "Could a prudent man, in the case under consideration, foresee harm as a result of the course actually pursued?" In determining whether or not the actor was negligent, the court will place itself in the position of the actor and see if a prudent man could have foreseen the harm that would result if the conduct is pursued. However, the courts should look more on the possibility of hazard of some form than the particular chance that happened. *(Pease vs. Sinclair Ref. Co., 123 ALR 933, 104 F2d 183)*. In other words, even if the particular injury was not foreseeable, the risk is still foreseeable if possibility of injury is foreseeable.

Thus, in a case where the vehicle being driven by the defendant bumped another vehicle parked in the highway, the Supreme Court ruled that the defendant was negligent because at the time of the incident, he was driving in a highway at the rate of 70 kilometers per hour although he could hardly see an object at the distance of ten (10) meters because of heavy rain. A reasonable man would have foreseen that a stalled vehicle is parked in the highway. *(Cabardo vs. The Court of Appeals, G.R. No. 118202, May 19, 1998)*.

CASES:

ONG vs. METROPOLITAN WATER DISTRICT
104 Phil. 398 [1958]

BAUTISTA ANGELO, *J.*:

Plaintiffs spouses seek to recover from defendant, a government-owned corporation, the sum of P50,000 as damages, P5,000 as funeral expenses, and P11,000 as attorneys' fees, for the death of their son Dominador Ong in one of the swimming pools operated by defendant.

Defendant admits the fact that plaintiffs' son was drowned in one of its swimming pools but avers that his death was caused by his own negligence or by unavoidable accident. Defendant also avers that it had exercised due diligence in the selection of, and supervision over, its employees and that it had observed the diligence required by law under the circumstances.

After trial, the lower court found that the action of plaintiffs is untenable and dismissed the complaint without pronouncement as to costs. Plaintiffs took the case on appeal directly to this Court because the amount involved exceeds the sum of P50,000.

Defendant owns and operates three recreational swimming pools at its Balara filters, Diliman, Quezon City, to which people are invited and for which a nominal fee of P0.50 for adults and P0.20 for children is charged. The main pool is between two small pools of oval shape known as the "Wading pool" and the "Beginners Pool." There are diving boards in the big pools and the depths of the water at different parts are indicated by appropriate marks on the wall. The care and supervision of the pools and the users thereof is entrusted to a recreational section composed of Simeon Chongco as chief, Armando Rule, a male nurse, and six lifeguards who had taken the life-saving course given by the Philippine Red Cross at the YMCA in Manila. For the safety of its patrons, defendant has provided the pools with a ring buoy, toy roof, towing line, saving kit and a resuscitator. There is also a sanitary inspector who is in charge of a clinic established for the benefit of the patrons. Defendant has also on display in a conspicuous place certain rules and regulations governing the use of the pools, one of which prohibits the swimming in the pool alone or without any attendant. Although defendant does not maintain a full-time physician in the swimming pool compound, it has however a nurse and a sanitary inspector ready to administer injections or operate the oxygen resuscitator if the need should arise.

In the afternoon of July 5, 1952, at about 1:00 o'clock, Dominador Ong, a 14-year old high school student and a boy scout, and his brothers Ruben and Eusebio, went to defendant's swimming pools. This was not the first time that the three brothers had gone to said natatorium for they had already been there four or five times before. They arrived at the natatorium at about

1:45 p.m. After paying the requisite admission fee, they immediately went to one of the small pools where the water was shallow. At about 4:35 p.m., Dominador Ong told his brothers that he was going to the locker room in an adjoining building to drink a bottle of coke. Upon hearing this, Ruben and Eusebio went to the bigger pool leaving Dominador in the small pool and so they did not see the latter when he left the pool to get a bottle of coke. In that afternoon, there were two lifeguards on duty in the pool compound, namely, Manuel Abaño and Mario Villanueva. The tour of duty of Abaño was from 8:00 to 12:00 in the morning and from 2:00 to 6:00 in the afternoon, and of Villanueva from 7:30 to 11:30 a.m. and from 12:30 to 4:30 p.m. Between 4:00 to 5:00 that afternoon, there were about twenty bathers inside the pool area and Manuel Abaño was going around the pools to observe the bathers in compliance with the instructions of his chief.

Between 4:40 to 4:45 p.m., some boys who were in the pool area informed a bather by the name of Andres Hagad, Jr., that somebody was swimming under water for quite a long time. Another boy informed lifeguard Manuel Abaño of the same happening and Abaño immediately jumped into the big swimming pool and retrieved the apparently lifeless body of Dominador Ong from the bottom. The body was placed at the edge of the pool and Abaño immediately applied manual artificial respiration. Soon after, male nurse Armando Rule came to render assistance, followed by sanitary inspector Iluminado Vicente who, after being called by phone from the clinic by one of the security guards, boarded a jeep carrying with him the resuscitator and a medicine kit, and upon arriving he injected the boy with camphorated oil. After the injection, Vicente left on a jeep in order to fetch Dr. Ayuyao from the University of the Philippines. Meanwhile, Abaño continued the artificial manual respiration, and when this failed to revive him, they applied the resuscitator until the two oxygen tanks were exhausted. Not long thereafter, Dr. Ayuyao arrived with another resuscitator, but the same became of no use because he found the boy already dead. The doctor ordered that the body be taken to the clinic.

In the evening of the same day, July 5, 1952, the incident was investigated by the Police Department of Quezon City and in the investigation the boys Ruben Ong and Andres Hagad, Jr. gave written statements. On the following day, July 6, 1952, an autopsy was performed by Dr. Enrique V. de los Santos, Chief, Medico Legal Division, National Bureau of Investigation, who found in the body of the deceased the following: an abrasion on the right elbow lateral aspect; contusion on the right forehead; hematoma on the scalp, frontal region, right side; a congestion in the brain with petechial subcortical hemorrhage, frontal lobe; cyanosis on the face and on the nails; the lung was soggy with fine froth in the bronchioles; dark fluid blood in the heart; congestion in the visceral organs, and brownish fluid in the stomach. The death was due to asphyxia by submersion in water.

The issue posed in this appeal is whether the death of minor Dominador Ong can be attributed to the negligence of defendant and/or its employees so as to entitle plaintiffs to recover damages.

The present action is governed by Article 2176 in relation to Article 2080 of the new Civil Code. The first article provides that "whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damages done." Such fault or negligence is called quasi-delict. Under the second article, this obligation is demandable not only for one's own acts or omissions but also for those of persons for whom one is responsible. In addition, we may quote the following authorities cited in the decision of the trial court:

"The rule is well settled that the owners of resorts to which people generally are expressly or by implication invited are legally bound to exercise ordinary care and prudence in the management and maintenance of such resorts, to the end of making them reasonably safe for visitors." *(Larkin vs. Saltair Beach Co., 30 Utah 86, 83 Pac. 688).*

"Although the proprietor of a natatorium is liable for injuries to a patron, resulting from lack of ordinary care in providing for his safety, without the fault of the patron, he is not, however, in any sense deemed to be the insurer of the safety of patrons. And the death of a patron within his premises does not cast upon him the burden of excusing himself from any presumption of negligence (*Bertalot vs. Kinnare*, 72 Ill. App. 52, 22 A. L. R. 635; *Flora vs. Bimini Water Co.*, 161 Cal. 495, 119 Pac. 661). Thus in *Bertalot vs. Kinnare, supra*, it was held that there could be no recovery for the death by drowning of a fifteen-year boy in defendant's natatorium, where it appeared merely that he was lastly seen alive in water at the shallow end of the pool, and some ten or fifteen minutes later was discovered unconscious, and perhaps lifeless, at the bottom of the pool, all efforts to resuscitate him being without avail."

Since the present action is one for damages founded on culpable negligence, the principle to be observed is that the person claiming damages has the burden of proving that the damage is caused by the fault or negligence of the person from whom the damage is claimed, or of one of his employees *(Walter A. Smith & Co. vs. Cadwallader Gibson Lumber Co., 55 Phil. 517).* The question then that arises is: Have appellants established by sufficient evidence the existence of fault or negligence on the part of appellee so as to render it liable for damages for the death of Dominador Ong?

There is no question that appellants had striven to prove that appellee failed to take the necessary precaution to protect the lives of its patrons by not placing at the swimming pools efficient and competent employees who may render help at a moment's notice, and they ascribed such negligence to appellee because the lifeguard it had on the occasion minor Ong was drowning was not available or was attending to something else with the result that his help came late. Thus, appellants tried to prove through the testimony of Andres Hagad, Jr. and Ruben Ong that when Eusebio Ong and Hagad, Jr. detected that there was a drowning person in the bottom of the big swimming pool and shouted to the lifeguard for help, lifeguard Manuel Abaño did not immediately respond to the alarm and it was only upon the third call that he threw away the magazine he was reading and allowed three or four minutes

to elapse before retrieving the body from the water. This negligence of Abaño, they contend, is attributable to appellee.

But the claim of these two witnesses not only was vehemently denied by lifeguard Abaño, but is belied by the written statements given by them in the investigation conducted by the Police Department of Quezon City approximately three hours after the happening of the accident. Thus, these two boys admitted in the investigation that they narrated in their statements everything they knew of the accident, but, as found by the trial nowhere in said statements do they state that the lifeguard was chatting with the security guard at the gate of the swimming pool or was reading a comic magazine when the alarm was given for which reason he failed to immediately respond to the alarm. On the contrary, what Ruben Ong particularly emphasized therein was that after the lifeguard heard the shouts for help, the latter immediately dived into the pool to retrieve the person under water who turned out to be his brother. For this reason, the trial court made this conclusion: "The testimony of Ruben Ong and Andres Hagad, Jr. as to the alleged failure of the lifeguard Abaño to immediately respond to their call may therefore be disregarded because they are belied by their written statements."

On the other hand, there is sufficient evidence to show that appellee has taken all necessary precautions to avoid danger to the lives of its patrons or prevent accident which may cause their death. Thus, it has been shown that the swimming pools of appellee are provided with a ring buoy, toy roof, towing line, oxygen resuscitator and a first aid medicine kit. The bottom of the pools is painted with black colors so as to insure clear visibility. There is on display in a conspicuous place within the area certain rules and regulations governing the use of the pools. Appellee employs six lifeguards who are all trained as they had taken a course for that purpose and were issued certificates of proficiency. These lifeguards work on schedule prepared by their chief and arranged in such a way as to have two guards at a time on duty to look after the safety of the bathers. There is a male nurse and a sanitary inspector with a clinic provided with oxygen resuscitator. And there are security guards who are available always in case of emergency.

The record also shows that when the body of minor Ong was retrieved from the bottom of the pool, the employees of appellee did everything possible to bring him back to life. Thus, after he was placed at the edge of the pool, lifeguard Abaño immediately gave him manual artificial respiration. Soon thereafter, nurse Armando Rule arrived, followed by sanitary inspector Iluminado Vicente who brought with him an oxygen resuscitator. When they found that the pulse of the boy was abnormal, the inspector immediately injected him with camphorated oil. When the manual artificial respiration proved ineffective they applied the oxygen resuscitator until its contents were exhausted. And while all these efforts were being made, they sent for Dr. Ayuyao from the University of the Philippines who however came late because upon examining the body found him to be already dead. All of the foregoing shows that appellee has done what is humanly possible under the circumstances to restore life to minor Ong and for that reason it is unfair to

hold it liable for his death.

**CIVIL AERONAUTICS ADMINISTRATION vs.
COURT OF APPEALS and ERNEST E. SIMKE
G.R. No. L-51806, November 8, 1988**

CORTES, *J.*:

The facts of the case are as follows:

Private respondent is a naturalized Filipino citizen and at the time of the incident was the Honorary Consul General of Israel in the Philippines.

In the afternoon of December 13, 1968, private respondent with several other persons went to the Manila International Airport to meet his future son-in-law. In order to get a better view of the incoming passengers, he and his group proceeded to the viewing deck or terrace of the airport.

While walking on the terrace, then filled with other people, private respondent slipped over an elevation about four (4) inches high at the far end of the terrace. As a result, private respondent fell on his back and broke his thigh bone.

The next day, December 14, 1963, private respondent was operated on for about three hours.

Private respondent then filed an action for damages based on quasi-delict with the Court of First Instance of Rizal, Branch VII against petitioner Civil Aeronautics Administration or CAA as the entity empowered "to administer, operate, manage, control, maintain and develop the Manila International Airport . . ." [Sec. 32(24), R.A. 776].

Said claim for damages included, aside from the medical and hospital bills, consequential damages for the expenses of two lawyers who had to go abroad in private respondent's stead to finalize certain business transactions and for the publication of notices announcing the postponement of private respondent's daughter's wedding which had to be cancelled because of his accident [Record on Appeal, p. 5].

Judgment was rendered in private respondent's favor prompting petitioner to appeal to the Court of Appeals. The latter affirmed the trial court's decision. Petitioner then filed with the same court a Motion for Reconsideration but this was denied.

Petitioner now comes before this Court raising the following assignment of errors:

x x x

2. The Court of Appeals gravely erred in finding that the injuries of respondent Ernest E. Simke were due to petitioner's negligence — although there was no substantial evidence to support such finding; and that the

inference that the hump or elevation in the surface of the floor area of the terrace of the (old) MIA building is dangerous just because said respondent tripped over it is manifestly mistaken — circumstances that justify a review by this Honorable Court of the said finding of fact of respondent appellate court. *(Garcia vs. Court of Appeals, 33 SCRA 622; Ramos vs. CA, 63 SCRA 331).*

x x x

II

Petitioner tries to escape liability on the ground that there was no basis for a finding of negligence. There can be no negligence on its part, it alleged, because the elevation in question "had a legitimate purpose for being on the terrace and was never intended to trip down people and injure them. It was there for no other purpose but to drain water on the floor area of the terrace." [Rollo, p. 99].

To determine whether or not the construction of the elevation was done in a negligent manner, the trial court conducted an ocular inspection of the premises.

x x x x x x x x x

. . . This Court after its ocular inspection found the elevation shown in Exh. A or 6-A where plaintiff slipped to be a step, a dangerous sliding step, and the proximate cause of plaintiffs injury . . .

x x x x x x x x x

This Court during its ocular inspection also observed the dangerous and defective condition of the open terrace which has remained unrepaired through the years. It has observed the lack of maintenance and upkeep of the MIA terrace, typical of many government buildings and offices. Aside from the litter allowed to accumulate in the terrace, pot holes caused by missing tiles remained unrepaired and unattented. The several elevations shown in the exhibits presented were verified by this Court during the ocular inspection it undertook. Among these elevations is the one (Exh. A) where plaintiff slipped. This Court also observed the other hazard, the slanting or sliding step (Exh. B) as one passes the entrance door leading to the terrace [Record on Appeal, U.S., pp. 56 and 59; Italics supplied].

The Court of Appeals further noted that:

The inclination itself is an architectural anomaly for as stated by the said witness, it is neither a ramp because a ramp is an inclined surface in such a way that it will prevent people or pedestrians from sliding. But if, it is a step then it will not serve its purpose, for pedestrian purposes. (tsn, p. 35, *id*.) [Rollo, p. 29.]

These factual findings are binding and conclusive upon this Court. Hence, the CAA cannot disclaim its liability for the negligent construction

of the elevation since under Republic Act No. 776, it was charged with the duty of planning, designing, constructing, equipping, expanding, improving, repairing or altering aerodromes or such structures, improvements or air navigation facilities [Section 32, *supra*, R.A. No. 776]. In the discharge of this obligation, the CAA is duty-bound to exercise due diligence in overseeing the construction and maintenance of the viewing deck or terrace of the airport.

It must be borne in mind that pursuant to Article 1173 of the Civil Code, "(t)he fault or negligence of the obligor consists in the omission of that diligence which is required by the nature of the obligation and corresponds with the circumstances of the person, of the time and of the place." Here, the obligation of the CAA in maintaining the viewing deck, a facility open to the public, requires that CAA insure the safety of the viewers using it. As these people come to the viewing deck to watch the planes and passengers, their tendency would be to look to where the planes and the incoming passengers are and not to look down on the floor or pavement of the viewing deck. The CAA should have thus made sure that no dangerous obstructions or elevations exist on the floor of the deck to prevent any undue harm to the public.

The legal foundation of CAA's liability for quasi-delict can be found in Article 2176 of the Civil Code which provides that "(w)hoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. . . ." As the CAA knew of the existence of the dangerous elevation which it claims though, was made precisely in accordance with the plans and specifications of the building for proper drainage of the open terrace [See Record on Appeal, pp. 13 and 57; Rollo, p. 39], its failure to have it repaired or altered in order to eliminate the existing hazard constitutes such negligence as to warrant a finding of liability based on quasi-delict upon CAA.

The Court finds the contention that private respondent was, at the very least, guilty of contributory negligence, thus reducing the damages that plaintiff may recover, unmeritorious. Contributory negligence under Article 2179 of the Civil Code contemplates a negligent act or omission on the part of the plaintiff, which although not the proximate cause of his injury, contributed to his own damage, the proximate cause of the plaintiff's own injury being the defendant's lack of due care. In the instant case, no contributory negligence can be imputed to the private respondent, considering the following test formulated in the early case of *Picart vs. Smith*, 37 Phil. 809 (1918):

The test by which to determine the existence of negligence in a particular case may be stated as follows: Did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordinarily prudent man would have used in the same situation? If not, then he is guilty of negligence. The law here in effect adopts the standard supposed to be supplied by the imaginary conduct of the discreet *paterfamilias* of the Roman law. The existence of the negligence in a given case is not determined by reference to the personal judgment of the actor in the situation before him. The law considers what would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that.

The question as to what would constitute the conduct of a prudent man in a given situation must of course be always determined in the light of human experience and in view of the facts involved in the particular case. Abstract speculations cannot be here of much value but this much can be profitably said: Reasonable men govern their conduct by the circumstances which are before them or known to them. They are not, and are not supposed to be omniscient of the future. Hence, they can be expected to take care only when there is something before them to suggest or warn of danger. Could a prudent man, in the case under consideration, foresee harm as a result of the course actually pursued? If so, it was the duty of the actor to take precautions to guard against that harm. Reasonable foresight of harm, followed by the ignoring of the suggestion born of this prevision, is always necessary before negligence can be held to exist . . . *(Picart v. Smith, supra, p. 813).*

The private respondent, who was the plaintiff in the case before the lower court, could not have reasonably foreseen the harm that would befall him, considering the attendant factual circumstances. Even if the private respondent had been looking where he was going, the step in question could not easily be noticed because of its construction. As the trial court found:

In connection with the incident testified to, a sketch, Exhibit O, shows a section of the floorings on which plaintiff had tripped. This sketch reveals two pavements adjoining each other, one being elevated by four and one-fourth inches than the other. From the architectural standpoint, the higher pavement is a step. However, unlike a step commonly seen around, the edge of the elevated pavement slanted outward as one walks to the interior of the terrace. The length of the inclination between the edges of the two pavements is three inches. Obviously, plaintiff had stepped on the inclination because had his foot landed on the lower pavement he would not have lost his balance. The same sketch shows that both pavements including the inclined portion are tiled in red cement, and as shown by the photograph. Exhibit A, the lines of the tilings are continuous. It would therefore be difficult for a pedestrian to see the inclination especially where there are plenty of persons in the terrace as was the situation when plaintiff fell down. There was no warning sign to direct one's attention to the change in the elevation of the floorings. [Rollo, pp. 28-29.]

E. PROBABILITY.

It is clear that foreseeability involves the question of probability. The Supreme Court explained that there is negligence "if a prudent man in the position of the tortfeasor would have foreseen that the effect harmful to another was *sufficiently probable* to warrant his conduct or guarding against its consequence. *(Picart vs. Smith, supra.)*" If there is a great probability and risk that damage will result, a person is negligent if he did not exercise due diligence in the face of such great probability.

Generally, the degree of care required is graduated according to the danger a person or property attendant upon the activity which the actor pursues or the instrumentality he uses. The greater the danger the greater the degree of care required. What is ordinary under extraordinary conditions is dictated by those conditions; extraordinary risk demands extraordinary care. Similarly, the more imminent the danger, the higher the degree of care. *(Far Eastern Shipping Company vs. Court of Appeals, 297 SCRA 30, 64-65 [1998]).*

However, foreseeability is not the same as probability. Even if there is lesser degree of probability that damage will result, the damage may still be considered foreseeable. Indeed, there is no mathematical rule of percentage to be followed here. A risk is not necessarily unreasonable because the harmful consequence is more likely than not to follow the conduct, nor reasonable because the chances are against that. A very large risk may be reasonable in some circumstances, and a small risk unreasonable in other circumstances. *(Terry, Negligence, 29 Harv. L. Rev. 40, 42 [1915]).*

As explained in one case, "when the inquiry is one of foreseeability, as regards a thing that may happen in the future and to which the law of negligence holds a party to anticipation as a measure of duty, that inquiry is not whether the thing is foreseen or anticipated as one which will probably happen, according to the ordinary acceptation of that term, but whether it is likely to happen, even though the likelihood may not be sufficient to amount to a comparative probability." *(Gulf Refining Co. vs. Williams, 183 Miss. 723, 185 So. 234 [1938]).* The test as respects foreseeability is not the balance of probabilities, but the existence, in the situation in hand, of some real likelihood of some damage and the likelihood is of such appreciable weight and moment to induce, or which reasonably should induce, action to avoid it on the part of a person of a reasonably prudent mind. *(ibid.; Tullgren vs. Amoskeag Mfg. Co., 82 N.H. 268, 133 A. 4 [1926]).* In the last cited *Tullgren* case, the court ruled that:

> "x x x Danger consists in the risk of harm, as well as the likelihood of it, and a danger calling for anticipation need not be of more probable occurrence than less. If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure to do so is negligence. That danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care. One who crosses a railroad track may not reasonably anticipate that a train will in fact be met but, by reason of the risk that one may be, he is called upon to do what is reasonably required to find out. In going

> around a sharp turn on a highway, where the view is obstructed, a driver may be careless toward opposite travel in speed or other ways, though the probabilities may be against meeting one. If the chance is so great that ordinary men would drive differently, then it is careless not to do so."

3. CALCULATION OF RISK

A. RISK BENEFIT ANALYSIS.

Many legal writers have suggested different ways of determining the unreasonableness of the risk involved in defendant's conduct. The late Dean William Prosser, the most influential legal writer on Tort in the United States, explained the fundamental precept in said jurisdiction that the standard of conduct, which is the basis of the law of negligence, is usually determined upon a risk-benefit form of analysis: "by balancing the risk, in the light of the social value of the interest threatened, and the probability and extent of harm against the value of the interest which the actor is seeking to protect, and the expedience of the course pursued." *(Prosser and Keeton, Law of Torts, 1984 Ed., p. 173, citing Terry, Negligence, supra).*

Under such analytical framework, the following circumstances should therefore be considered: a) gravity of the harm to be avoided; b) utility of conduct or the social value it seeks to advance; and c) alternative course of action, dangers and advantages to the person or property of the actor himself and to others. (*ibid*., pp. 169-172).

Professor Terry, the authority cited by Prosser, explained that reasonableness may depend upon five factors: 1) The magnitude of risk (A risk is more likely to be unreasonable the greater it is); 2) The value or importance of that which is exposed to the risk, which is the object that the law desires to protect, and may be called the principal object; 3) A person who takes a risk of injuring the principal object usually does so because he has some reason of his own for such conduct (referred to as the collateral object); 4) The probability that the collateral object will be attained by the conduct which involves risk to the principal (the utility of the risk); and 5) The probability that the collateral object will be attained without taking the risk (the necessity of the risk). *(Terry, Negligence, supra, pp. 42-44)*. The following illustration was given:

> "The plaintiff's intestate, seeing a child on a railroad track in front of a rapidly approaching train, went upon the track to save him. He did save him, but was himself killed by train. The jury were allowed to find that he had not been guilty of

contributory negligence. The question was of course whether he had exposed himself to an unreasonable great risk. Here the above-mentioned elements of reasonableness were as follows:

(1) The magnitude of the risk was the probability that he would be killed or hurt. That was very great.

(2) The principal object was his own life, which was very valuable.

(3) The collateral object was the child's life, which was also very valuable.

(4) The utility of that risk was the probability that he could save the child. That must have been fairly great, since he in fact suceeded. Had there been no fair chance of saving the child, the conduct would have been unreasonable and negligent.

(5) The necessity of the risk was the probability that the child would not have saved himself by getting off the track in time.

Here, although the magnitude of the risk was very great and principal object very valuable, yet the value of the collateral object and the great utility and necessity of the risk counterbalanced those considerations, and made the risk reasonable. The same risk would have been unreasonable, had the creature on the track been a kitten, because the value of the collateral object would have been small. There is no general rule that human life may not be put at risk in order to save property; but since life is more valuable than property, such a risk has often to the effect that it is always so. But in the circumstances of other cases a risk of that sort has been reasonable."

Judge Learned Hand's landmark opinion in *United States vs. Carroll Towing Co. (159 F. 2d 169 [1947])* reduced the risk benefit rule to a negligence formula:

"x x x It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others, obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and, since, if she does, she becomes a menace to those about her, the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three

> variables: (1) That the probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury L; and the burden B; liability depends upon whether B is less than L multiplied by P; *i.e.*, whether B is less than PL."

B. RULE IN THE PHILIPPINES.

There is an opinion to the effect that the risk-benefit analysis is applicable in this jurisdiction. *(See Jarencio, Philippine Law on Torts and Damages, 1983 Ed., p. 107, citing Prosser, Handbook of the Law of Torts, pp. 119-123; Henry T. Terry, Selected Essays on the Law of Torts, 29 Harv. Law Rev., 40-44).* It would seem, however, that the risk benefit "formula" has not taken root and developed in Philippine case law. Courts in this jurisdiction do not use any formula in determining if the defendant committed a negligent act or omission. There is no indication in cases decided by the Supreme Court that it seeks to give "a precise economic meaning to the term."

What appears to be the norm is to give negligence what Prof. Richard Epstein calls "a common sense, intuitive interpretation. *(Epstein, Cases and Materials on Torts, 6th Ed., p. 189)*." In the cases decided by the Supreme Court, the High Court, by intuition, determined if any of the parties was negligent after weighing all the circumstances. Thus, in effect, Courts in this jurisdiction believe Prof. Seavy when he said that we cannot rely upon any formula in regard to "balancing interests" to solve negligence cases. In fact, the phrase "balancing of risk" is merely a convenient one to indicate factors which may be considered and should not connote any mathematical correspondence. *(Seavy, Negligence, Subjective or Objective, 41 Harv. L. Rev. 1, 8, n. 7 [1927])*. In the field of negligence, interests are to be balanced only in the sense that the purposes of the actor, the nature of his act and the harm that may result from action or inaction are elements to be considered. Some may not be considered depending on the circumstances. *(ibid.)*.

The rule in the Philippines has always been that what constitutes ordinary care vary with the circumstances of the case; that negligence is want of care required by the circumstances. In *Corliss vs. Manila Railroad Company (supra),* the Supreme Court explained that one cannot just single out a circumstance and then confidently assign to it the decisive weight and significance. The Supreme Court stressed "that the decisive considerations are too variable, too depend-

ent in the last analysis upon a common sense estimate of the situation as it presented itself to the parties for us to be able to say that this or that element having been isolated, negligence is shown. The factors that enter the judgment are too many and diverse for us to imprison them in a formula sufficient of itself to yield the correct answer to the multi-faceted problems the question of negligence poses. Every case must be dependent on its facts. The circumstances indicative of lack of care must be judged in the light of what could reasonably be expected of the parties. If the objective standard of prudence be met, then negligence is ruled out." In other words, negligence is a relative or comparative concept. Its application depends upon the situation the parties are in, and the degree of care and vigilance which the prevailing circumstances reasonably require. *(Bulilan vs. Commission on Audit, 285 SCRA 445, 453 [1998]).*

Statutory provisions applicable to negligence cases specify circumstances that should be considered in determining negligence. Article 1173 of the Civil Code provides that the degree of diligence depends upon the nature of the obligation and corresponds to the circumstances of person, time and place. Article 365 of the Revised Penal Code provides that the determination of reckless imprudence should take into consideration the employment or occupation of the actor, his degree of intelligence, physical condition and other circumstances regarding persons, time and place.

In the subsections below, we will endeavor to explain circumstances specified in statutes that may affect the determination of negligence. We shall also discuss other circumstances considered by the Supreme Court in determining negligence.

a. Circumstances to consider.

(1) Time.

Obviously, the time of the day may affect the diligence required of the actor. *(Article 1173, Civil Code).* A driver is required to exercise more prudence if he is driving at night. In fact, running in a dark place requires a different degree of care compared to running in the light of day.

In *People vs. Ramirez* (48 Phil. 204 [1925]), the accused shot his companion while they were hunting at night. He alleged that "he seemed to have seen with his lantern something like the eyes of a deer, about 50 meters from him then he shot it." He claimed that he did not expect to find one of his companion on the spot for he had warned them not to leave the place where he left them. The Supreme

Court rejected the argument stating that a person who was carrying a firearm to hunt at nighttime with the aid of a lantern knowing that he had two companions should have exercised all the necessary diligence to avoid every undesirable accident. "The night being dark, the hunter in the midst of the forest without paths is likely to get confused as to his relative situation; and after walking around, he may think having gone very far, when in fact he has not, from the point of departure."

A greater degree of diligence is needed if one is driving in an avenue at 8:00 o'clock in the morning when there are many pedestrians and motorists. However, ordinary care and vigilance would suffice while driving at half past 1:00 o'clock in the morning along an almost deserted avenue which may consists of keeping a watchful eye on the road ahead and observing the traffic rules on speed, right of way and traffic light *(Adzuara v. Court of Appeals, 301 SCRA 657 [1999]).*

(2) Place.

The place of the incident is also material. A man who should have occasion to discharge a gun on an open and extensive marsh, or in a forest would be required to use less circumspection and care, than if he were to do the same thing in an inhabited town, village, or city. *(Brown vs. Kendall, 60 Mass. 292 [1850]; see also People vs. Cusi, CA 68 O.G. 2777)*. Travelling on a slippery road likewise requires a higher degree of diligence than driving in a dry road.

(3) Emergency.

"Who can be wise, temperate and furious, loyal and neutral, in a moment? No man." (McBeth, Act I, Scene III). McBeth may not have been answering a legal question when he uttered that line, but the line certainly describes the basis of what is known in tort law as the "Emergency Rule." With respect to the circumstance of time, jurisprudence likewise requires courts to consider the presence of an emergency. The Supreme Court explained the rule in one case:

> "Courts have traditionally been compelled to recognize that an actor who is confronted with an emergency is not to be held up to the standard of conduct normally applied to an individual who is in no such situation. The law takes stock of impulses of humanity when placed in threatening or dangerous situations and does not require the same standard of thoughtful and reflective care from persons confronted by unusual and oftentimes threatening conditions. Under the 'emergency rule' adopted by this Court in *Gan vs. Court of Appeals*, an individual who suddenly finds

himself in a situation of danger and is required to act without much time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to undertake what subsequently and upon reflection may appear to be a better solution, unless the emergency was brought by his own negligence." *(Valenzuela vs. Court of Appeals, 253 SCRA 303, 318 [1996])*.

An example of the case where the "emergency rule" was applied is *McKee vs. Intermediate Appellate Court* (211 SCRA 517 [1992]). One of the plaintiffs therein swerved his vehicle in order to avoid hitting two (2) children. The Supreme Court explained that "any reasonable and ordinary prudent man would have tried to avoid running over two boys by swerving the car away from where they where even if this would mean entering the opposite lane. Avoiding such immediate peril would be the natural course to take particularly where the vehicle in the opposite lane would be several meters away and could very well slow down, move to the other side of the road and give way to the oncoming car. Moreover, under the emergency rule 'one who suddenly finds himself in a place of danger, and is required to act without time to consider the best means that may be adopted to avoid the impending danger, is not guilty of negligence, if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.'"

It cannot be disregarded, however, that while the emergency rule applies to those cases in which reflective thought, or the opportunity to adequately weigh a threatening situation is absent, the conduct which is required of an individual in such cases is dictated not exclusively by the suddenness of the event which absolutely negates thoughtful care, but by the over-all nature of the circumstances. *(Valenzuela vs. Court of Appeals, supra)*.

(4) Gravity of Harm to be Avoided.

Even if the odds that an injury will result is not high, harm may still be considered foreseeable if the gravity of harm to be avoided is great. Thus, in one case *(Consolacion Junio vs. Manila Railroad Company, 58 Phil. 176 [1933])*, the respondent operated a gate in an intersection even at night; it closed the gate if a train passed. Under such circumstances, although the driver of a motor vehicle can expect that the railway company will perform its self-imposed obligation and the chances of being hit by a train is remote if the gate is open, the driver is likewise negligent if he fails to exercise due care in crossing the railway. Life is much too precious so much so that disregard of

danger, even if the odds that it will result is not great, is negligence. When human life is at stake, due care under the circumstances requires everything that gives reasonable promise of preserving life to be done regardless of the difficulties. *(57 Am. Jur. 2d 418).*

For the same reason, a motorist should always use due diligence in traversing a railroad crossing. The degree of diligence may vary depending on the circumstances but in any event he should always check if the crossing is clear. Thus, greater care is necessary in crossing a road where cars are running at a high rate of speed and close together than where they are running at less speed and remote from one another. In some cases the use of sight would be sufficient, but in every case due care should be exercised. It is very possible that where, on approaching a crossing, the view of the tracks in both directions is unobstructed for such a distance as to render it perfectly safe to pass over without the use of any faculty *other than sight*, such use alone is sufficient and it is not necessary to stop or even to slacken speed, to reduce noice, if any, of the vehicle, to look and to listen, if necessary, or do any other act necessary to determine that a train is not in dangerous proximity to the crossing. *(Yamada vs. Manila Railroad Co., 33 Phil. 8 [1915]).*

(5) Alternative Course of Action.

In *McKee vs. Intermediate Appellate Court* (*supra*, at 55), the gravity of injury which will result if the alternative course of action was taken by the actor was also considered. The said case involves a collision between a car and a truck. The then Intermediate Appellate Court (now Court of Appeals) ruled that the fact that the car improperly invaded the lane of the truck and that the collision occurred in said lane gave rise to the presumption that the driver of the car was negligent. The Supreme Court ruled that there was an unwarranted deduction as the evidence for the petitioners convincingly shows that the car swerved into the truck's lane because as it approached the southern end of the bridge, two (2) boys darted across the road from the right sidewalk into the lane of the car. The Supreme Court explained that the car driver's entry into the lane of the truck was necessary in order to avoid what was, in his mind, at that time, a greater peril — death or injury to the two (2) boys.

If the alternative presented to the actor is too costly, the harm that may result may still be considered unforeseeable to a reasonable man. More so if there is no alternative thereto. Thus, in *Manila Electric Co. vs. Remoquillo, et al.* (99 Phil. 117, 124-125 [1956]), the Supreme Court acknowledged that the stringing of high voltage wires,

uninsulated and so close to houses is a constant source of danger, even death, especially to persons who having occasion to be near said wires, do not adopt the necessary precautions. However, the Court did not consider the same negligence citing, among others, the fact that the high voltage wires cannot be properly insulated and at a reasonable cost.

(6) Social Value or Utility of Activity.

The absence of a viable alternative should also be examined in the light of the social value of the activity involved. The diligence which the law requires an individual to observe and exercise varies according to the nature of the situation which he happens to be in, and the importance of the act which he has to perform. *(Bulilan vs. Commission of Audit, 285 SCRA 445, 453 [1998]).* Thus, in *Manila Electric Co. vs. Remoquillo,* it was evident that the danger of using uninsulated high voltage wires was disregarded because of the social value of providing electricity to the public.

The same is true with respect to the manufacture of medicines. Even if the medicine has a foreseeable side effect and even if there is a possibility that consumers will not read the warning stated in the labels, the manufacture and sale thereof cannot be considered negligent considering the utility of the product involved.

Similarly, "one driving a car in a thickly populated district on a rainy day, slowly and in the most careful manner, may do injury to the person of another by throwing muddy or infected water upon that person. Society does not hold the actor responsible because the benefit of allowing people to travel under such circumstances so far outweighs the probable injury to bystanders that such conduct is not disapproved. Circumstances may require the driver of a fire truck to take his truck through the thickly populated district at a high rate of speed, but if he exercises that degree of care which such drivers ordinarily exercise under the same or similar circumstances, society, weighing the benefits against the probabilities of damage, in spite of the fact that as a reasonably prudent and intelligent man should forsee that harm may result, justifies the risk and holds him not liable." *(Osborne vs. Montgomery, 234 N.W. 372 [1931]).*

A train will likewise be allowed to blow its horn even if animals will be frightened because the act is necessary in order to save lives. In another case, it was ruled that: "As has often been pointed out, if all the trains in the country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently

important, justifies the assumption of abnormal risk." *(Daborn Bath Tramways [1946], 2 All E.R. 33 at 336, cited in W.V.H. Rogers, Winfield and Jolowicz on Torts, 1998 Ed. P. 182-183).*

This is not to say, however, that the duty to observe proper diligence is absent if the activity involved has a high social value. Any act which subjects an innocent person to an unnecessary risk is a negligent act if the risk outweighs the advantage accruing to the actor and even to the innocent person himself. *(65 C.J.S. 448).* Thus, the great utility of providing electricity to the public will not be given much weight if there are other circumstances which subjects innocent persons to unnecessary risk and which consequently offsets such great utility. In *Astudillo vs. Manila Electric Co.* (55 Phil. 427), the defendant was made liable because of the undue risk which was created in erecting electric poles and placing the wires and appliances near the place where persons will be injured. The poles involved in the case were very near the public place where persons come to stroll, to rest, and to enjoy themselves. The poles were so close to said place that a person would be able to hold one of the wires by reaching his arm out of the full length. A boy was electrocuted and died when he, for unknown reason, placed one foot at a projection, reached out and grasped a charged electric wire.

In *National Irrigation Administration (NIA for short) vs. Intermediate Appellate Court* (214 SCRA 35, 39 [1992]), the Supreme Court adopted the finding that the petitioner NIA was negligent in installing an irrigation canal. It appears that NIA constructed irrigation canals on the landholding of the plaintiffs by scrapping away the surface of the said landholdings to raise the embankment of the canal. As a result of such construction, the landholding of the plaintiffs was inundated with water. The Supreme Court sustained the finding of the trial court that there was negligence because "although it cannot be denied that *the irrigation canal of the NIA (was) a boon to the plaintiffs*, the delay of almost 7 years in installing the safety measures such as check gates, drainage(s), ditches, and paddy drains has caused substantial damage to the annual harvest of the plaintiffs."

(7) Person Exposed to the Risk.

The character of the person exposed to the risk is also a circumstance which should be considered in determining negligence. Consistent with this rule, a higher degree of diligence is required if the person involved is a child. In *United States vs. Clemente* (24 Phil. 178), for instance, the Supreme Court explained that greater degree

of care in driving is owed to children in the streets.

In some cases, the law imposes a duty of care towards children even if ordinarily there is no duty under the same circumstances if the person involved is an adult with sufficient discretion. Thus, ordinarily no duty is owned by the owner of a tenement to trespassers except to refrain from willfully or wantonly injuring him. A trespasser is a person who enters the property of another without any right, or lawful authority, or express or implied license. *(67 C.J.S. 659, 662)*. However, with respect to children, such duty of care is present even if they are trespassers because entry of children in a vacant lot may be foreseeable. The discussion in *Taylor vs. Manila Electric Railroad* (*supra*, at p. 32) in relation to this topic is worth quoting:

> "In typical cases, the question involved has been whether a railroad company is liable for an injury received by an infant of tender years, who from mere idle curiosity, or for purposes of amusement, enters upon the railroad company premises, at a place where the railroad company knew or had reason to suppose, children would likely to come, and there found explosive signal torpedoes left exposed by the railroad company's employees, one of which when carried away by the visitor, exploded and injured him; or where such infant found upon the premises a dangerous machine, such as a turntable left in such condition as to make it probable that children, in playing with it would be exposed to accident or injury therefrom and where the infant did in fact suffer injury in playing with such machine.
>
> In these, and in a great variety of similar cases, the great weight of authority holds the owner of the premises liable.
>
> As laid down in *Railroad Co. vs. Stout* (17 Wall. [84 U.S.], 657), (wherein the principal question was whether a railroad company was liable for an injury received by an infant while upon its premises, from idle curiosity, or for purposes of amusement, if such injury was, under the circumstances, attributable to the negligence of the company), the principles on which these cases turn are that "while railroad company is not bound to the same degree of care in regard to mere strangers who are unlawfully upon its premises that it owes to passengers conveyed by it, it is not exempt from responsibility to such strangers for injuries arising from its negligence or from its tortious acts;" and that "the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting from the fault or negligence of another he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is

to be determined in such case by the circumstances of the case."

The doctrine of the case of *Railroad Company vs. Stout* was vigorously controverted and sharply criticized in several state courts, and the Supreme Court of Michigan in the case of *Ryan vs. Towar* (128 Mich., 463) formally repudiated and disapproved the doctrine of the Turntable cased, especially that laid down in *Railroad Company vs. Stout*, in a very able decision wherein it held, in the language of the syllabus: (1) That the owner of land is not liable to trespassers thereon for injuries sustained by them, not due to his wanton or willful acts; (2) that no exception to this rule exists in favor of children who are injured by dangerous machinery naturally calculated to attract them to the premises; (3) that an invitation of license to cross the premises of another can not be predicated on the mere fact that no steps have been taken to interfere with such practice; (4) that there is no difference between children and adults of an invitation or a license to enter upon another's premises.

Similar criticisms of the opinion in the case of *Railroad Company vs. Stout* were indulged in by the courts in Connecticut and Massachusetts. *(Nolan vs. Railroad Co., 53 Conn., 461; 154 Mass., 349)*. And the doctrine has been questioned in Wisconsin, Pennsylvania, New Hampshire, and perhaps in other States.

On the other hand, many if not most of the courts of last resort in the United States, citing and approving the doctrine laid down in England in the leading case of *Lynch vs. Nurding* (1 Q.B., 29, 35, 36), lay down the rule in these cases in accord with that announced in *Railroad Company vs. Stout (supra)*, and the Supreme Court of the United States, in a unanimous opinion delivered by Justice Harlan in the case of *Union Pacific Railway Co. vs. McDonald* (152 U.S. 262) on the 5th of March, 1894, re-examined and reconsidered the doctrine laid down in *Railroad Co. vs. Stout*, and after an exhaustive and critical analysis and review of many of the adjudged cases, both English and America, formally declared that it adhered "to the principles announced in the case of *Railroad Co. vs. Stout*."

In the case of *Union Pacific Railway Co. vs. McDonald (supra)* the facts were as follows: The plaintiff, a boy 12 years of age, out of curiosity and for his own pleasure, entered upon and visited the defendant's premises, without defendant's express permission or invitation, and, while there, was by an accident injured by falling into a burning slack pile of whose existence he had knowledge, but which had been left by defendant on its premises without any fence around it or anything to give warning of its dangerous condition, although defendant knew or had reason to believe that it was in a place where it would attract the

interest or curiosity of passers-by. On these facts, the court held that the plaintiff could not be regarded as a mere trespasser, for whose safety and protection while on the premises in question, against the unseen danger referred to, the defendant was under no obligation to make provision.

We quote at length from the discussion by the court of the application of the principles involved to the facts in that case, because what it said there is strikingly applicable in the case at bar, and would seem to dispose of defendant's contention that, the plaintiff in this case being a trespasser, the defendant's company owed him no duty, and in no case could be held liable for injuries which would not have resulted but for the entry of plaintiff on defendant's premises.

"We adhere to the principle announced in *Railroad Co. vs. Stout. (supra)*. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pile, made by it in the vicinity of its depot building. It could have forbidden all the persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind, or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provisions.

"In *Townsend vs. Wathen* (9 East., 277, 281), it was held that if a man places dangerous traps, baited with flesh, in his own ground, so near to a highway, or to the premises of another, that dogs passing along the highway, or kept in his neighbor's premises, would probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dog be so attracted and thereby injured, an action on the case would lie. 'What difference,' said Lord Ellenborough, *C.J.*, 'is there a reason between drawing the animal into the trap by means of his instinct which he can not resist, and putting him there by manual force?' What difference, in reason we may observe in this case, is there

between an express license to the children of this village to visit the defendant's coal mine, in the vicinity of its slack pile, and an implied license, resulting from the habit of the defendant to permit them, without objection or warning, to do so at will, for purposes of curiosity or pleasure? Referring to the case of *Townsend vs. Wathen*, Judge Thompson, in his work on the Law of Negligence, Volume 1, page 305, note well says: "It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life."

Chief Justice Cooley, voicing the opinion of the Supreme Court of Michigan, in the case of *Powers vs. Marlow* (53 Mich., 507), said that (p. 515):

"Children, wherever they go, must be expected to act upon childlike instincts and impulses; and others who are chargeable with a duty of care and caution toward them must calculate upon this, and take precautions accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken."

And the same eminent jurist in his treaties on torts, alluding to the doctrines of implied invitations to visit the premises of another, says:

"In the case of young children, and other persons not fully *sui juris*, an implied license might sometimes arise when it would not on behalf of others. Thus, leaving a tempting thing for children to play with exposed, where they would be likely to gather for that purpose, may be equivalent to an invitation to them to make use of it; and, perhaps if one were to throw away upon his premises, near the common way, things tempting to children, the same implication should arise." (Chap. 10, p. 303).

The reasoning which led the Supreme Court of the United States to its conclusions in the cases of *Railroad Co. vs. Stout (supra)* and *Union Pacific Railroad Co. vs. McDonald (supra),* is not less cogent and convincing in this jurisdiction than in that wherein those cases originated. Children here are actuated by similar childish instincts and impulses. Drawn by curiosity and impelled by the restless spirit of youth, boys here as well as there will usually be found wherever the public permitted to congre-

gate. The movement of machinery, and indeed anything which arouses the attention of the young and inquiring mind, will draw them to the neighborhood as inevitably as does the magnet draw the iron which comes within the range of its magnetic influence. The owners of premises, therefore, whereon things attractive to children are exposed, or upon which the public are expressively or impliedly permitted to enter to or upon which the owner knows or ought to know children are likely to roam about for pastime and in play, "must calculate upon this, and take precautions accordingly." In such cases the owner of the premises can not be heard to say that because the child has entered upon his premises without his express permission he is a trespasser to whom the owner owes no duty or obligation whatever. The owner's failure to take reasonable precautions to prevent the child from entering premises at a place where he knows or ought to know that children are accustomed to roam about or to which their childish instincts and impulses are likely to attract them is at least equivalent to an implied license to enter, and where the child does not enter under such conditions the owner's failure to make reasonable precaution to guard the child against the injury from unknown or unseen dangers, placed upon such premises by the owner, is clearly a breach of duty, a negligent omission, for which he may and should be held responsible, if the child is actually injured, without other fault on its part than that it had entered on the premises of a stranger without his express invitation or permission. To hold otherwise would be to expose all the children in the community to unknown perils and unnecessary danger at the whim of the owners or occupants of land upon which they might naturally and reasonably be expected to enter.

This conclusion is founded on reason, justice, and necessary, and neither the contention that a man has a right to do what he wills with his own property or that children should be kept under the care of the parents or guardian, so as to prevent their entering on the premises of others is of sufficient weight to put it in doubt. In this jurisdiction as well as in the United States all private property is acquired and held under the tacit condition that it shall not be so used as to injure the equal rights of others or greatly impair the public rights and interests of the community (see *U.S. vs. Toribio*, 1 No. 5060, decided January 26, 1910), and except as to infants of very tender years it would be absurd and unreasonable in community organized as is that in which we live to hold that parents or guardians are guilty of negligence or imprudence in every case wherein they permit growing boys and girls to leave the parental roof unattended, even if in the event of accident to the child the negligence of the parents could in any event be imputed to the child so as to deprive it of a right to recover in such cases — a point which we neither discuss nor

decide.

It should be noted, however, that even with respect to trespassers of sufficient age and discretion, there are various limitations and particular circumstances which may give rise to the duty of care. For example, even if a person is technically a trespasser, the owner of the tenement may still be liable if the trespasser will be injured due to an excavation that is very near the highway.

CASE:

VALENZUELA vs. COURT OF APPEALS
253 SCRA 303 [1996]

KAPUNAN, *J.*:

These two petitions for review on *certiorari* under Rule 45 of the Revised Rules of Court stem from an action to recover damages by petitioner Lourdes Valenzuela in the Regional Trial Court of Quezon City for injuries sustained by her in a vehicular accident in the early morning of June 24, 1990. The facts found by the trial court are succinctly summarized by the Court of Appeals below:

This is an action to recover damages based on quasi-delict, for serious physical injuries sustained in a vehicular accident.

Plaintiff's version of the accident is as follows: At around 2:00 o'clock in the morning of June 24, 1990, plaintiff Ma. Lourdes Valenzuela was driving a blue Mitsubishi Lancer with Plate No. FFU 542 from her restaurant at Marcos highway to her home at Palanza Street, Araneta Avenue. She was travelling along Aurora Blvd. with a companion, Cecilia Ramon, heading towards the direction of Manila. Before reaching A. Lake Street, she noticed something wrong with her tires; she stopped at a lighted place where there were people, to verify whether she had a flat tire and to solicit help if needed. Having been told by the people present that her rear right tire was flat and that she cannot reach her home in that car's condition, she parked along the sidewalk, about 1-1/2 feet away, put on her emergency lights, alighted from the car, and went to the rear to open the trunk. She was standing at the left side of the rear of her car pointing to the tools to a man who will help her fix the tire when she was suddenly bumped by a 1987 Mitsubishi Lancer driven by defendant Richard Li and registered in the name of defendant Alexander Commercial, Inc. Because of the impact, plaintiff was thrown against the windshield of the car of the defendant, which was destroyed, and then fell to the ground. She was pulled out from under defendant's car. Plaintiff's left leg was severed up to the middle of her thigh, with only some skin and sucle connected to the rest of the body. She was brought to the UERM Medical Memorial Center where she was found to have a "traumatic amputation leg, left up to distal thigh (above knee)." She was confined in the hospital for

twenty (20) days and was eventually fitted with an artificial leg. The expenses for the hospital confinement (P120,000.00) and the cost of the artificial leg (P27,000.00) were paid by defendants from the car insurance.

In her complaint, plaintiff prayed for moral damages in the amount of P1 million, exemplary damages in the amount of P100,000.00 and other medical and related expenses amounting to a total of P180,000.00, including loss of expected earnings.

Defendant Richard Li denied that he was negligent. He was on his way home, travelling at 55 kph; considering that it was raining, visibility was affected and the road was wet. Traffic was light. He testified that he was driving along the inner portion of the right lane of Aurora Blvd. towards the direction of Araneta Avenue, when he was suddenly confronted, in the vicinity of A. Lake Street, San Juan, with a car coming from the opposite direction, travelling at 80 kph, with "full bright lights." Temporarily blinded, he instinctively swerved to the right to avoid colliding with the oncoming vehicle, and bumped plaintiff's car, which he did not see because it was midnight blue in color, with no parking lights or early warning device, and the area was poorly lighted. He alleged in his defense that the left rear portion of plaintiff's car was protruding as it was then "at a standstill diagonally" on the outer portion of the right lane towards Araneta Avenue (par. 18, Answer). He confirmed the testimony of plaintiff's witness that after being bumped the car of the plaintiff swerved to the right and hit another car parked on the sidewalk. Defendants counterclaimed for damages, alleging that plaintiff was reckless or negligent, as she was not a licensed driver.

The police investigator, Pfc. Felic Ramos, who prepared the vehicular accident report and the sketch of the three cars involved in the accident, testified that the plaintiff's car was "near the sidewalk"; this witness did not remember whether the hazard lights of plaintiff's car were on, and did not notice if there was an early warning device; there was a street light at the corner of Aurora Blvd. and F. Roman, about 100 meters away. It was not mostly dark, *i.e.,* "things can be seen." (p. 16, tsn, Oct. 28, 1991).

A witness for the plaintiff, Rogelio Rodriguez, testified that after plaintiff alighted from her car and opened the trunk compartment, defendant's car came approaching very fast ten meters from the scene; the car was "zigzagging." The rear left side of plaintiff's car was bumped by the front right portion of defendant's car; as a consequence, the plaintiff's car swerved to the right and hit the parked car on the sidewalk. Plaintiff was thrown to the windshield of defendant's car, which was destroyed, and landed under the car. He stated that defendant was under the influence of liquor as he could "smell it very well." (pp. 43, 79, tsn, June 17, 1991).

After trial, the lower court sustained the plaintiff's submissions and found defendant Richard Li guilty of gross negligence and liable for damages under Article 2176 of the Civil Code.

x x x

It is plainly evident that the petition for review in G.R. No. 117944 raises no substantial questions of law. What it, in effect, attempts to have this Court review are factual findings of the trial court, as sustained by the Court of Appeals finding Richard Li grossly negligent in driving the Mitsubishi Lancer provided by his company in the early morning hours of June 24, 1990. This we will not do. As a general rule, findings of fact of the Court of Appeals are binding and conclusive upon us, and this Court will not normally disturb such factual findings unless the findings of fact of the said court are palpably unsupported by the evidence on record or unless the judgment itself is based on a misapprehension of facts.

In the first place, Valenzuela's version of the incident was fully corroborated by an uninterested witness, Rogelio Rodriguez, the owner-operator of an establishment located just across the scene of the accident. On trial, he testified that he observed a car being driven at a "very fast" speed, racing towards the general direction of Araneta Avenue. Rodriguez further added that he was standing in front of his establishment, just ten to twenty feet away from the scene of the accident, when he saw the car hit Valenzuela, hurtling her against the windshield of the defendant's Mitsubishi Lancer, from where she eventually fell under the defendant's car. Spontaneously reacting to the incident, he crossed the street, noting that a man reeking with the smell of liquor had alighted from the offending vehicle in order to survey the incident. Equally important, Rodriguez declared that he observed Valenzuela's car parked parallel and very near the sidewalk, contrary to Li's allegation that Valenzuela's car was close to the center of the right lane. We agree that as between Li's "self-serving" asseverations and the observations of a witness who did not even know the accident victim personally and who immediately gave a statement of the incident similar to his testimony to the investigator immediately after the incident, the latter's testimony deserves greater weight. As the court emphasized:

The issue is one of credibility and from Our own examination of the transcript, We are not prepared to set aside the trial court's reliance on the testimony of Rodriguez negating defendant's assertion that he was driving at a safe speed. While Rodriguez drives only a motorcycle, his perception of speed is not necessarily impaired. He was subjected to cross-examination and no attempt was made to question his competence or the accuracy of his statement that defendant was driving "very fast." This was the same statement he gave to the police investigator after the incident, as told to a newspaper report. (Exh. "P"). We see no compelling basis for disregarding his testimony.

The alleged inconsistencies in Rodriguez' testimony are not borne out by an examination of the testimony. Rodriguez testified that the scene of the accident was across the street where his beerhouse is located about ten to twenty feet away. (pp. 35-36, tsn, June 17, 1991). He did not state that the accident transpired immediately in front of his establishment. The ownership of the Lambingan sa Kambingan is not material; the business is registered in the name of his mother, but he explained that he owns the establishment. (p. 5, tsn, June 20, 1991). Moreover, the testimony that the streetlights on his side of Aurora Boulevard were on the night the accident transpired (p.

8) is not necessarily contradictory to the testimony of Pfc. Ramos that there was a streetlight at the corner of Aurora Boulevard and F. Roman Street. (p. 45, tsn, Oct. 20, 1991).

With respect to the weather condition, Rodriguez testified that there was only a drizzle, not a heavy rain and the rain has stopped and he was outside his establishment at the time the accident transpired. (pp. 64-65, ts, June 17, 1991). This was consistent with plaintiff's testimony that it was no longer raining when she left Bistro La Conga. (pp. 10-11, tsn, April 29, 1991). It was defendant Li who stated that it was raining all the way in an attempt to explain why he was travelling at only 50-55 kph. (p. 11, tsn, Oct. 14, 1991). As to the testimony of Pfc. Ramos that it was raining, he arrived at the scene only in response to a telephone call after the accident had transpired. (pp. 9-10, tsn, Oct. 28, 1991). We find no substantial inconsistencies in Rodriguez's testimony that would impair the essential integrity of his testimony or reflect on his honesty. We are compelled to affirm the trial court's acceptance of the testimony of said eyewitness.

Against the unassailable testimony of witness Rodriguez we note that Li's testimony was peppered with so many inconsistencies leading us to conclude that his version of the accident was merely adroitly crafted to provide a version, obviously self-serving, which would exculpate him from any and all liability in the incident. Against Valenzuela's corroborated claims, his allegations were neither backed up by other witnesses nor by the circumstances proven in the course of trial. He claimed that he was driving merely at a speed of 55 kph. when "out of nowhere he saw a dark maroon lancer right in front of him, which was (the) plaintiff's car." He alleged that upon seeing this sudden "apparition" he put on his brakes to no avail as the road was slippery.

One will have to suspend disbelief in order to give credence to Li's disingenuous and patently self-serving asseverations. The average motorist alert to road conditions will have no difficulty applying the brakes to a car traveling at the speed claimed by Li. Given a light rainfall, the visibility of the street, and the road conditions on a principal metropolitan thoroughfare like Aurora Boulevard, Li would have had ample time to react to the changing conditions of the road if he were alert — as every driver should be — to those conditions. Driving exacts a more than usual toll on the senses. Physiological "fight or flight" mechanisms are at work, provided such mechanisms were not dulled by drugs, alcohol, exhaustion, drowsiness, etc. Li's failure to react in a manner which would have avoided the accident could therefore have been only due to either or both of the two factors: 1) that he was driving at a "very fast" speed as testified by Rodriguez; and 2) that he was under the influence of alcohol. Either factor working independently would have diminished his responsiveness to road conditions, since normally he would have slowed down prior to reaching Valenzuela's car rather than be in a situation forcing him to suddenly apply his brakes. As the trial court noted (quoted with approval by respondent court);

Secondly, as narrated by defendant Richard Li to the San Juan Police

immediately after the incident, he said that while driving along Aurora Blvd., out of nowhere he saw a dark maroon lancer right in front of him, which was plaintiff's car, indicating, again, thereby that, indeed, he was driving very fast, oblivious of his surroundings and the road ahead of him, because if he was not, then he could not have missed noticing at a still far distance the parked car of the plaintiff at the right side near the sidewalk which had its emergency lights on, thereby avoiding forcefully bumping at the plaintiff who was then standing at the left rear edge of her car.

Since, according to him, in his narration to the San Juan Police, he put on his brakes when he saw the plaintiff's car in front of him, but that it failed as the road was wet and slippery, this goes to show again, that, contrary to his claim, he was, indeed, running very fast. For, were it otherwise, he could have easily completely stopped his car, thereby avoiding the bumping of the plaintiff, notwithstanding that the road was wet and slippery. Verily, since, if, indeed, he was running slow, as he claimed, at only about 55 kilometers per hour, then, inspite of the wet and slippery road, he could have avoided hitting the plaintiff by the mere expedient or applying his brakes at the proper time and distance.

It could not be true, therefore, as he now claims during his testimony, which is contrary to what he told the police immediately after the accident and is, therefore, more believable, that he did not actually step on his brakes, but simply swerved a little to the right when he saw the on-coming car with glaring headlights, from the opposite direction, in order to avoid it.

For, had this been what he did, he would not have bumped the car of the plaintiff which was properly parked at the right beside the sidewalk. And, it was not even necessary for him to swerve a little to the right in order to safely avoid a collision with the on-coming car, considering that Aurora Blvd. is a double lane avenue separated at the center by a dotted white paint, and there is plenty of space for both cars, since her car was running at the right lane going towards Manila and the on-coming car was also on its right lane going to Cubao."

Having come to the conclusion that Li was negligent in driving his company-issued Mitsubishi Lancer, the next question for us to determine is whether or not Valenzuela was likewise guilty of contributory negligence in parking her car alongside Aurora Boulevard, which entire area Li points out, is a no parking zone.

We agree with the respondent court that Valenzuela was not guilty of contributory negligence.

Contributory negligence is conduct on the part of the injured party, 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. Based on the foregoing definition, the standard or act to which, according to petitioner Li, Valenzuela ought to have conformed for her own protection was not to park at all at any point of Aurora Boulevard, a no parking zone. We cannot agree.

Courts have traditionally been compelled to recognize that an actor who is confronted with an emergency is not to be held up to the standard of conduct normally applied to an individual who is in no such situation. The law takes stock of impulses of humanity when placed in threatening or dangerous situations and does not require the same standard of thoughtful and reflective care from persons confronted by unusual and oftentimes threatening conditions. Under the "emergency rule" adopted by this court in *Gan vs. Court of Appeals,* an individual who suddenly finds himself in a situation of danger and is required to act without much time to consider the best means that may be adopted to avoid the impending danger, is not guilty of negligence if he fails to undertake what subsequently and upon reflection may appear to be a better solution, unless the emergency was brought by his own negligence.

Applying this principle to a case in which the victims in a vehicular accident swerved to the wrong lane to avoid hitting two children suddenly darting into the street, we held, in *McKee vs. Intermediate Appellate Court,* that the driver therein, Jose Koh, "adopted the best means possible in the given situation" to avoid hitting the children. Using the "emergency rule" the court concluded that Koh, in spite of the fact that he was in the wrong lane when the collision with an oncoming truck occurred, was not guilty of negligence.

While the emergency rule applies to those cases in which reflective thought, or the opportunity to adequately weigh a threatening situation is absent, the conduct which is required of an individual in such cases is dictated not exclusively by the suddenness of the event which absolutely negates thoughtful care, but by the over-all nature of the circumstances. A woman driving a vehicle suddenly crippled by a flat tire on a rainy night will not be faulted for stopping at a point which is both convenient for her to do so and which is not a hazard to other motorists. She is not expected to run the entire boulevard in search for a parking zone or turn on a dark street or alley where she would likely find no one to help her. It would be hazardous for her not to stop and assess the emergency (simply because the entire length of Aurora Boulevard is a no-parking zone) because the hobbling vehicle would be both a threat to her safety and to other motorists. In the instant case, Valenzuela, upon reaching that portion of Aurora Boulevard close to A. Lake St., noticed that she had a flat tire. To avoid putting herself and other motorists in danger, she did what was best under the situation. As narrated by respondent court: "She stopped at a lighted place where there are people, to verify whether she had a flat tire and to solicit help if needed. Having been told by the people present that her rear right tire was flat and that she cannot reach her home she parked along the sidewalk, about 1 1/2 feet away, behind a Toyota Corona Car." In fact, respondent court noted, Pfc. Felix Ramos, the investigator on the scene of the accident confirmed that Valenzuela's car was parked very close to the sidewalk. The sketch which he prepared after the incident showed Valenzuela's car partly straddling the sidewalk, clear and at a convenient distance from motorists passing the right lane of Aurora Boulevard. This fact was itself corroborated by the testimony

of witness Rodriguez.

Under the circumstances described, Valenzuela did exercise the standard reasonably dictated by the emergency and could not be considered to have contributed to the unfortunate circumstances which eventually led to the amputation of one of her lower extremities. The emergency which led her to park her car on a sidewalk in Aurora Boulevard was not of her own making, and it was evident that she had taken all reasonable precautions.

Obviously in the case at bench, the only negligence ascribable was the negligence of Li on the night of the accident. "Negligence, as it is commonly understood is conduct which creates an undue risk of harm to others." It is the failure to observe that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury. We stressed, in *Corliss vs. Manila Railroad Company*, that negligence is the want of care required by the circumstances.

The circumstances established by the evidence adduced in the court below plainly demonstrate that Li was grossly negligent in driving his Mitsubishi Lancer. It bears emphasis that he was driving at a fast speed at about 2:00 A.M. after a heavy downpour had settled into a drizzle rendering the street slippery. There is ample testimonial evidence on record to show that he was under the influence of liquor. Under these conditions, his chances of effectively dealing with changing conditions on the road were significantly lessened. As Prosser and Keaton emphasized:

[U]nder present day traffic conditions, any driver of an automobile must be prepared for the sudden appearance of obstacles and persons on the highway, and of other vehicles at intersections, such as one who sees a child on the curb may be required to anticipate its sudden dash into the street, and his failure to act properly when they appear may be found to amount to negligence.

Li's obvious unpreparedness to cope with the situation confronting him on the night of the accident was clearly of his own making.

4. STANDARD OF CONDUCT: GOOD FATHER OF A FAMILY

The Supreme Court explained in *Picart vs. Smith* (*supra*, at p. 37) that the standard of conduct used in the Philippines is that of *paterfamilias* in Roman law or that who is referred to in Article 1173 of the Civil Code (in rel. Art. 2178) as a good father of a family. What should be determined in negligence cases is what is foreseeable to a good father of a family. A good father of a family is likewise referred to as the reasonable man, man of ordinary intelligence and prudence, or ordinary reasonable prudent man. In English law, he is sometimes referred to as the man on top of a Clapham omnibus. *(Bolam vs. Friern Hospital Management Committee, 2 All E.R. 119 Queens Bench Div. [1957]).*

Justice Holmes provided a classic discussion on the concept of a reasonable man in The Common Law (107-10 [1881]; see *Corliss vs. Manila Railroad Company, supra*, at p. 37):

> "The standards of the law are standards of general application. The law takes no account of the infinite varieties of temperament, intellect, and education which make the internal character of given act so different in different men. It does not attempt to see men as God sees them, for more than one sufficient reason. In the first place, the impossibility of nicely measuring a man's power and limitations is far clearer than that of ascertaining his knowledge of law, which has been thought to account for what is called the presumption that every man knows the law. But a more satisfactory explanation is, that, when men live in society, a certain average conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If, for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account.
>
> The rule that the law does, in general, determine liability by blameworthiness, is subject to the limitation that minute differences of character are not allowed for. The law considers, in other words, what would be blameworthy in the average man, the man of ordinary intelligence and prudence, and determines liability by that. If we fall below the level in those gifts, it is our misfortune; so much as that we must have our peril, for the reasons just given. But who is intelligent and prudent does not act at his peril, in theory of law. On the contrary, it is only when he fails to exercise the foresight of which he is capable, or exercises it with evil intent, that he is answerable for the consequences.
>
> There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. So it is held that,

in cases where he is the plaintiff, an infant of very tender years is only bound to take precautions of which an infant is capable; the same principle may be cautiously applied where he is defendant. Insanity is more difficult matter to deal with, and no general rule can be laid down about it. There can be no doubt that in many cases, a man may be insane, and yet perfectly capable of taking precautions, and of being influenced by the motives, which the circumstances demand. But if insanity of a pronounced type exists, manifestly incapacitating the sufferer from complying with the rule which he has broken, good sense would require it to be admitted as an excuse.

Taking the qualification last established in connection with the general proposition previously laid down, it will now be assumed that, on one hand, the law presumes or requires a man to possess ordinary capacity to avoid harming his neighbors, unless a clear and manifest incapacity is shown; but that, on the other, it does not in general hold him liable for unintentional injury, unless, possessing such capacity, he might and ought to have foreseen the danger, or, in other words, unless a man of ordinary intelligence and forethought would have been to blame for acting as he did.

Notwithstanding the fact that the grounds of legal liability are moral to the extent above explained, it must be born in mind that law only works within the sphere of the senses. If external phenomena, the manifest acts and omissions, are such as it requires it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is whithin the rules. In other words, the standards of the law are external standards, and, however much may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests it permits, and such as it does not. What the law forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise. . . ."

Winfield and Jolowicz on Torts, said to be the leading tort book in England, contains this description of a reasonable man, although said to be only a rough approximation to exactness:

"x x x In any broad sense can be extracted from various significations of 'reasonable conduct' it might be described as the behaviour of the ordinary person in any particular event or transaction, including in such behaviour obedience to the special directions (if any) which the law gives him for his guidance in that connection. This is, of course, an abstraction. Lord Bowen visualized the reasonable man as 'the man on the Clapham omnibus'; an American writer as 'the man who takes the magazine at home, and in the

> evening pushes the lawnmower in his short sleeves.' He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules nor has he 'the prophetic vision of a clairvoyant.' He will not anticipate folly in all its forms, but he never puts out of consideration the teachings of experience and so will guard against the negligence of others when experience shows such negligence to be common. He is a reasonable man but he is neither a perfect citizen nor a 'paragon of circumspection.'" *(W.V.H. Rogers, Winfield & Jolowicz on Torts, 1998 15th Edition, p. 53).*

A. ATTRIBUTES OF A GOOD FATHER OF A FAMILY.

The Philippine concept of a reasonable man is consistent with the above-quoted description. The law considers what would be reckless, blameworthy or negligent in the man of ordinary intelligence and prudence. The attributes of the actor and the person exposed to the risk are circumstances that are also material in the determination of negligence on the part of the actor and contributory negligence on the part of the plaintiff. There is only one standard, an objective standard.

a. Knowledge and Experience of the Actor.

The prudent man is expected to act according to the circumstances that appear to him at the time of the incident and he is not judged based on his knowledge or experience after the event. *(67 C.J.S 528).* The law does not require the standard of one who is fortified with a gift of prophesy or one who is omniscient of the future *(Picart vs. Smith, supra; Adams vs. Bullock, 227 N.Y. 208, 125 N.E. 93 [1919]).* However, there are matters which a prudent man is conclusively presumed to know based on actual knowledge and experience. For instance, where a particular act is followed from past acts or omissions, one is charged with notice that a similar act or omission, may produce a similar result. *(67 C.J.S 527).* If the actor is familiar with the place of the accident because he always passes by such area, he is also charged with the knowledge of the make-up of the same area.

In *PLDT Company, Inc. vs. Court of Appeals* (No. 57079, September 29, 1989), the plaintiff was not able to recover from the defendant telephone company even if he was injured because of the excavation of the company in the street. He sustained such injuries when his jeep ran over a mound of earth and fell into an open trench dug by the telephone company for its underground conduit system. Although there were no warning signs in the area, the plaintiff was not allowed to recover because he had knowledge of the presence and location of the excavations, having passed on the same street almost everyday.

He was found negligent in exercising due care for his own safety. In *Corliss vs. Manila Railroad Company (supra, p. 685)*, knowledge of the victim was also considered material in determining his negligence in crossing the railroad resulting in his death. The Supreme Court affirmed the trial court's reliance on several circumstances, including the victim's knowledge and familiarity with the set-up of the check point and the existence of the tracks.

A reasonable man is also deemed to have knowledge of facts that a man should be expected to know based on ordinary human experience. For instance, a reasonable man can be expected to know the effect of heavy rains on the road or a railroad track. *(Philippine National Railway vs. Intermediate Appellate Court, 217 SCRA 409, 414 [1993])*. Experience teaches that a driver should anticipate sudden appearance of other vehicles at an intersection or if a driver sees a child on a curb, he may anticipate the child's sudden dash into the street. *(Valenzuela vs. Court of Appeals, supra at p. 671)*. One should also expect children to roam around vacant lots *(Taylor vs. Manila Electric and Light Co., 16 Phil. 8 [1910])* and should be expected to know the natural reaction of animals to frightening objects. *(Picart vs. Smith, supra)*.

A prudent man should also be expected to know basic laws of nature and physics like gravity. For example, a driver is expected to know that his vehicle will accelerate if the street is going downhill. Any person is also expected to know that a boulder might fall from a high place if it was placed there in a precarious state.

b. Children.

The rule that there is one standard of conduct — that of a reasonable man — is subject to certain exceptions or qualifications. Thus, the action of the child will not necessarily be judged according to the standard of an ordinary adult. Neither will an expert be judged based on what a non-expert can foresee.

The rule in this jurisdiction is that "the care and caution required of a child is according to his maturity and capacity only and this is to be determined in each case by the circumstances of the case." *(Taylor vs. Manila Electric Railroad and Light Co., 16 Phil. 8 [1910])*. If a minor is mature enough to understand and appreciate the nature and consequences of his actions, he will be considered negligent if he fails to exercise due care and precaution in the commission of such acts.

The Court explained in *Taylor vs. Manila Electric Railroad and Light Co. (ibid.),* however that "the law fixes no arbitrary age at which a minor can be said to have the necessary capacity to under-

stand and appreciate the nature and consequences of his acts, so as to make it negligence on his part to exercise due care and precaution in the commission of such acts; and indeed it would be impracticable and perhaps impossible so to do, for in the very nature of things the question of negligence necessarily depends on the ability of the minor to understand the character of his own acts and their consequences; and the age at which a minor can be said to have such ability will necessarily vary in accordance with the varying nature of the infinite variety of acts which may be done by him." The Court went on to explain that:

> "x x x But some idea of the presumed capacity of infants under the laws in force in these Islands may be gathered from an examination of the varying ages fixed by our laws at which minors are conclusively presumed to be capable of exercising certain rights and incurring certain responsibilities, though it can not be said that these provisions of law are of much practical assistance in cases such as that at bar, except so far as they illustrate the rule that the capacity of a minor to become responsible for his own acts varies with the varying circumstances of each case."

It should be noted in this connection that under the Revised Penal Code, a child who is age nine (9) or below is exempt from criminal liability. *(Art. 8)*. A child over nine (9) but below fifteen (15) is likewise exempt from criminal liability if he acted without discernment. Under the Family Code and the Child and Youth Welfare Code, the choice of the child who is at least 12 where his custody is in question is to be respected unless there is no valid reason to accord the same with respect. The consent of children who are at least ten (10) of the person who will adopt and the natural parents of the person to be adopted are likewise required in adoption cases.

Applying the provisions of the Revised Penal Code, Judge Sanco takes the view that a child who is nine (9) or below is conclusively presumed to be incapable of negligence. *(1 Sanco, Phil. Law on Torts and Damages, 70-71)*. On the other hand, if the child is above nine (9) but below fifteen (15), there is a disputable presumption of absence of negligence. Judge Sanco's opinion was adopted in *Jarco Marketing Corporation et al. vs. Honorable Court of Appeals, et al.* (G.R. No. 129792, December 21, 1999), where the High Court quoted the following portion of his work:

> "In our jurisdiction, a person under nine years of age is conclusively presumed to have acted without discernment, and is, on that account, exempt from criminal liability. The same presumption and a like exemption from criminal liability obtains in a case of a person over nine and under fifteen years of age, unless

> it is shown that he has acted with discernment. Since negligence may be a felony and a quasi-delict and required discernment as a condition of liability, either criminal or civil, a child under nine years of age is, by analogy, conclusively presumed to be incapable of negligence; and that the presumption of lack of discernment or incapacity for negligence in the case of a child over nine but under fifteen years of age is rebuttable one, under our law. The rule, therefore, is that a child under nine years of age must be conclusively presumed incapable of contributory negligence as a matter of law."

The doctrine in *Jarco Marketing Corporation et al. v. Court of Appeals (ibid.)* therefore modifies the rule laid down in *Taylor v. Manila Electric Railroad and Light Co. (supra.)*. If the child is under nine years, it is no longer necessary to determine his maturity and capacity because he is conclusively presumed to be incapable of negligence. If the child is above nine to fifteen, he is disputably presumed to be incapable of negligence but the opposing party can prove that the child is at such stage of maturity and capacity that he can already determine what a reasonable man would do under the same circumstances.

(1) Liability of children.

It should be noted, however, that the absence of negligence does not necessarily mean absence of liability. Thus, under the Revised Penal Code, a child who is nine years old can still be subsidiarily liable with his properties. *(Art. 101, Revised Penal Code)*. This liability is considered liability without fault. *(1 Aquino, Revised Penal Code 883)*. Similarly, the absence of negligence or intent on the part of the child may not excuse the parents from their vicarious liability under Article 2180 of the Civil Code or Art. 221 of the Family Code because they are liable for their own negligence in the supervision of their child. The minor child, on the other hand, shall be answerable with his own property in an action against him if he has no parents or guardian. The Supreme Court in interpreting the provisions of the Old Civil Code on tort explained that if the theory of the action is *culpa aquiliana,* the minority of the actor does not free him from responsibility for damages. The Court further explained that the liability of an infant in a civil action for his torts is imposed as a mode, not of punishment, but for compensation. If property had been destroyed or other loss was occasioned by a wrongful act, it is just that the loss should fall upon the estate of the wrongdoer rather than that of the guiltless person, and that liability is imposed without reference to the question of moral guilt. Consequently, for every tortious act of

violence or other pure tort, the infant tortfeasor is liable in a civil action to the injured person in the same extent as an adult. *(Magtibay vs. Tionco, 74 Phil. 576, 578-579 [1944]).*

In other words, the effect of the circumstance that the actor is a child would vary if the child is the defendant-actor or the plaintiff. The circumstance becomes material if the child is the person exposed to the risk. If the child is the actor, even if he is legally incapable of discernment because he is, for example, only six (6) years old, the parents or any person exercising parental authority over him may still be liable if they did not exercise proper diligence in supervising the child. The actor himself is liable up to the extent of his properties.

CASES:

JULIAN DEL ROSARIO vs. MANILA ELECTRIC CO.
57 Phil. 478 [1932]

STREET, *J.*:

This action was instituted by Julian del Rosario for the purpose of recovering damages from the Manila Electric Company for the death of his son, Alberto del Rosario, resulting from a shock from a wire used by the defendant for the transmission of electricity. The accident occurred on Dimasalang Street, in the municipality of Caloocan, Province of Rizal. Damages are claimed in the complaint in the amount of P30,000. Upon hearing the case, the trial court absolved the defendant, and the plaintiff appealed.

Shortly after 2 o'clock on the afternoon of August 4, 1930, trouble developed in a wire used by the defendant on Dimasalang Street for the purpose of conducting electricity used in lighting the City of Manila and its suburbs. Jose Noguera, who had charge of a tienda nearby, first noticed that the wire was burning and its connections smoking. In a short while, the wire parted and one of the ends of the wire fell to the ground among some shrubbery close to the way. As soon as Noguera took cognizance of the trouble, he stepped into a garage which was located nearby and asked Jose Soco, the timekeeper, to telephone the Malabon station of the Manila Electric Company that an electrical wire was burning at that place. Soco transmitted the message at 2:25 p.m. and received answer from the station to the effect that they would send an inspector. From the testimony of the two witnesses mentioned, we are justified in the conclusion that information to the effect that the electric wire at the point mentioned had developed trouble was received by the company's servant at the time stated. At the time that message was sent the wire had not yet parted, but from the testimony of Demetrio Bingao, one of the witnesses for the defense, it is clear that the end of the wire was on the ground shortly after 3 p.m.

At 4 p.m. the neighborhood school was dismissed and the children went

home. Among these was Alberto del Rosario, of the age of 9 years, who was a few paces ahead of two other boys, all members of the second grade in the public school. These other two boys were Jose Salvador, of the age of 8, and Saturnino Endrina, of the age of 10. As the three neared the place where the wire was down, Saturnino made a motion as if to touch it. His companion, Jose Salvador, happened to be the son of an electrician and his father had cautioned him never to touch a broken electrical wire, as it might have a current. Jose therefore stopped Saturnino, telling him that the wire might be charged. Saturnino yielded to this admonition and desisted from his design, but Alberto del Rosario, who was somewhat ahead, said, I have for some time been in the habit of touching wires *("Yo desde hace tiempo cojo alambres")*. Jose Salvador rejoined that he should not touch wires as they carry a current, but Alberto, no doubt feeling that he was challenged in the matter, put out his index finger and touch the wire. He immediately fell face downwards, exclaiming *"Ay! madre."* The end of the wire remained in contact with his body which fell near the post. A crowd soon collected, and someone cut the wire and disengaged the body. Upon being taken to St. Luke's Hospital the child was pronounced dead.

The wire was an ordinary number 6 triple weather proof wire, such as is commonly used by the defendant company for the purpose of conducting electricity for lighting. The wire was cased in the usual covering, but this had been burned off for some distance from the point where the wire parted. The engineer of the company says that it was customary for the company to make a special inspection of these wires at least once in six months, and that all of the company's inspectors were required in their daily rounds to keep a lookout for trouble of this kind. There is nothing in the record indicating any particular cause for the parting of the wire.

We are of the opinion that the presumption of negligence on the part of the company from the breakage of this wire has not been overcome, and the defendant is in our opinion responsible for the accident. Furthermore, when notice was received at the Malabon station at 2:25 p.m., somebody should have been dispatched to the scene of the trouble at once, or other measures taken to guard the point of danger; but more than an hour and a half passed before anyone representing the company appeared on the scene, and in the meantime this child had been claimed as a victim.

It is doubtful whether contributory negligence can properly be imputed to the deceased, owing to his immature years and the natural curiosity which a child would feel to do something out of the ordinary, and the mere fact that the deceased ignored the caution of a companion of the age of 8 years does not, in our opinion, alter the case. But even supposing that contributory negligence could in some measure be properly imputed to the deceased, — a proposition upon which the members of the court do not all agree, — yet such negligence would not be wholly fatal to the right of action in this case, not having been the determining cause of the accident. *(Rakes vs. Atlantic, Gulf and Pacific Co., 7 Phil. 359).*

With respect to the amount of damages recoverable, the majority of

the members of this court are of the opinion that the plaintiff is entitled to recover P250 for expenses incurred in connection with the death and burial of the boy. For the rest, in accordance with the precedents cited in *Astudillo vs. Manila Electric Company (55 Phil. 427),* the majority of the court are of the opinion that the plaintiff should recover the sum of P1,000 as general damages for loss of service.

The judgment appealed from is therefore reversed and the plaintiff will recover the defendant the sum of P1,250, with costs of both instances. So ordered.

TAYLOR vs. MANILA ELECTRIC RAILROAD AND LIGHT CO. 16 Phil. 8 [1910]

An action to recover damages for the loss of an eye and other injuries, instituted by David Taylor, a minor, by his father, his nearest relative.

The defendant is a foreign corporation engaged in the operation of a street railway and an electric light system in the city of Manila. Its power plant is situated at the eastern end of a small island in the Pasig River within the city of Manila, known as the Isla del Provisor. The power plant may be reached by boat or by crossing a footbridge, impassable for vehicles, at the westerly end of the island.

The plaintiff, David Taylor, was, at the time when he received the injuries complained of, 15 years of age, the son of a mechanical engineer, more mature than the average boy of his age, and having considerable aptitude and training in mechanics.

On the 30th of September, 1905, plaintiff, with a boy named Manuel Claparols, about 12 years of age, crossed the footbridge of the Isla del Provisor, for the purpose of visiting one Murphy, an employee of the defendant, who had promised to make them a cylinder for a miniature engine. Finding on inquiry that Mr. Murphy was not in his quarters, the boys, impelled apparently by youthful curiosity and perhaps by the unusual interest which both seem to have taken in machinery, spent some time in wandering about the company's premises. The visit was made on a Sunday afternoon, and it does not appear that they saw or spoke to anyone after leaving the power house where they had asked for Mr. Murphy.

After watching the operation of the traveling crane used in handling the defendant's coal, they walked across the open space in the neighborhood of the place where the company dumped the cinders and ashes from its furnaces. Here, they found some twenty or thirty brass fulminating caps scattered on the ground. These caps are approximately of the size and appearance of small pistol cartridges and each has attached to it two long thin wires by means of which it may be discharged by the use of electricity. They are intended for use in the explosion of blasting charges of dynamite, and have in themselves considerable explosive power. After some discussion as to the ownership of caps, and their right to take them, the boys picked up all they could find, hung

them to a stick, of which each took one end, and carried them home. After crossing the footbridge, they met a little girl named Jessie Adrian, less than 9 years old, and all three went to the home of the boy named Manuel. The boys then made a series of experiments with the caps. They thrust the ends of the wires into an electric light socket and obtained no result. They next tried to break the cap with a stone and failed. Manuel looked for a hammer, but could not find one. They then opened one of the caps with a knife, and finding that it was filled with a yellowish substance they got matches, and David held the cap while Manuel applied a lighted match to the contents. An explosion followed, causing more or less serious injuries to all three. Jessie, who, when the boys proposed purring a match to the contents of the cap, became frightened and started to run away, received a slight cut in the neck. Manuel had his hand burned and wounded, and David was struck in the face by several particles of the metal capsule, one of which injured his right eye to such an extent as to necessitate its removal by the surgeons who were called in to care for his wounds.

The evidence does not definitely and conclusively disclose how the caps came to be on the defendant's premises, not how long they had been there when the boys found them. It appeared, however, that some months before the accident, during the construction of the defendant's plant, detonating caps of the same kind as those found by the boys were used in sinking a well at the power plant near the place where the caps were found; and it also appears that at or about the time when these caps were found, similar caps were in use in the construction of an extension of defendant's street car line to Fort William McKinley. The caps when found appeared to the boys who picked them up to have been lying there for a considerable time, and from the place where they were found would seem to have been discarded as defective or worthless and only to be thrown upon the rubbish heap.

No measures seem to have been adapted by the defendant company to prohibit or prevent visitors from entering and walking about its premises unattended, when they felt disposed as to do. As admitted in defendant counsel's brief, "it is undoubtedly true that children in their play sometimes crossed the footbridge to the island;" and, we may add, roamed about at will on the unenclosed premises of the defendant, in the neighborhood of the place where the caps were found. There is no evidence that any effort ever was made to forbid these children from visiting the defendant company's premises, although it must be assumed that the company or its employees were aware of the fact that they not infrequently did so.

Two years before the accident, plaintiff spent four months at sea, as a cabin boy on one of the inter-island transports. Later he took upon work in his father's office learning mechanical drawing and mechanical engineering. About a month after his accident he obtained employment as a mechanical draftsman and continued in the employment for six months at a salary of P2.50 a day; and it appears that he was a boy of more than average intelligence, taller and more mature both mentally and physically than most boys of fifteen.

[The Supreme Court went on to explain that evidence tends to disclose that the caps and detonators belong to the respondent and that they were willfully and knowingly thrown by the company or its employees at the spot where they were found with the expectation that they would be buried out of sight by the ashes which it was engaged in dumping in the neighborhood. The Court also said that it was satisfied that the company or some of its employees either willfully or through oversight left them exposed at a point on its premises which the general public, including children at play, were not prohibited from visiting, and over which the company knew or ought to have known that young boys were likely to roam about in pastime or in play. Nevertheless, no liability was imposed on the company.]

We agree with counsel for appellant that under the Civil Code, as under the generally accepted doctrine in the United States, the plaintiff in an action such as that under consideration, in order to establish his right to a recovery, must establish by competent evidence:

(1) Damages to the plaintiff.

(2) Negligence by act or omission of which defendant personally, or some person for whose acts it must respond, was guilty.

(3) The connection of cause and effect between the negligence and the damage.

The propositions are, or course, elementary, and do not admit of discussion, the real difficulty arising in the application of these principles to the particular facts developed in the case under consideration.

It is clear that the accident could not have happened had not the fulminating caps been left exposed at the point where they were found, or if their owner had exercised due care in keeping them in an appropriate place; but it is equally clear that plaintiff would not have been injured had he not, for his own pleasure and convenience, entered upon defendant's premises, and strolled around thereon without the express permission of the defendant, and had he not picked up and carried away the property of the defendant which he found on its premises, and had he not thereafter deliberately cut open one of the caps and applied a match to its contents.

But counsel for plaintiff contends that because of plaintiff's youth and inexperience, his entry upon defendant company's premises, and the intervention of his action between the negligent act of defendant in leaving the caps exposed on its premises and the accident which resulted in his injury should not be held to have contributed in any wise accident, which should be deemed to be the direct result of defendant's negligence in leaving the caps exposed at the place where they were found by the plaintiff, and this latter the proximate cause of the accident which occasioned the injuries sustained by him.

In support of his contention, counsel for plaintiff relied on the doctrine laid down in many of the courts in the United States in the cases known as the "Torpedo" and "Turntable" cases, and the cases based thereon.

In the typical cases, the question involved has been whether a railroad company is liable for an injury received by an infant of tender years, who from mere idle curiosity, or for purposes of amusement, enters upon the railroad company's premises, at a place where the railroad company knew, or had a good reason to suppose, children who would likely to come, and there found explosive signal torpedoes left exposed by the railroad company's employees, one of which when carried away by the visitor, exploded and injured him; or where such infant found upon the premises a dangerous machine, such as a turntable left in such condition as to make it probable that children in playing with it would be exposed to accident or injury therefrom and where the infant did in fact suffer injury in playing with such machine.

In these, and in a great variety of similar cases, the great weight of authority holds the owner of the premises liable.

[The Supreme Court went on to discuss the rules laid down in the "Torpedo" and "Turntable" cases and held that the same are applicable in this jurisdiction.]

x x x

But while we hold that the entry of the plaintiff upon defendant's property without defendant's express invitation or permission would not have relieved defendant from responsibility for injuries incurred there by the plaintiff, without other fault on his part, if such injury were attributable to the negligence of the defendant, we are of the opinion that under all the circumstances of this case the negligence of the defendant in leaving the caps exposed on its premises was not the proximate cause of the injury received by the plaintiff, which therefore was not, properly speaking, "attributable to the negligence of the defendant," and, on the other hand, we are satisfied that plaintiff's action in cutting open the detonating cap and putting a match to its contents was the proximate cause of the explosion and of the resultant injuries inflicted upon the plaintiff, and that the defendant, therefore, is not civilly responsible for the injuries thus incurred.

Plaintiff contends, upon the authority of the Turntable and Torpedo cases, that because of plaintiff's youth the intervention of his action between the negligent act of the defendant leaving the caps exposed on its premises and the explosion which resulted in his injury should not be held to have contributed in any wise to the accident; and it is because we can not agree with this proposition, although we accept the doctrine on the Turntable and Torpedo cases, that we have thought proper to discuss and to consider that doctrine at length in this decision. As was said in case of *Railroad Co. vs. Stout (supra)*, "While it is the general rule in regard to an adult that entitle him to recover damages for an injury resulting from the fault or negligence of another he must himself have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstance of the case." As we think we have shown,

under the reasoning on which rests the doctrine of the Turntable and Torpedo cases, no fault which would relieve defendant of responsibility for injuries resulting from negligence can be attributed to the plaintiff, a well-grown boy of 15 years of age, because of his entry upon defendant's unenclosed premises without express permission or invitation; but it is a wholly different question whether such a youth can be said to have been free from fault when he willfully and deliberately cut upon the detonating cap, and placed a match to the contents, knowing, as he undoubtedly did, that his action would result in an explosion. On this point, which must be determined by "the particular circumstances of this case," the doctrine laid down in the Turntable and Torpedo cases lends us no direct aid, although it is worthy of observation that in all of the "Torpedo" and analogous cases to which our attention has been directed, the record discloses that the plaintiffs, in whose favor judgments have been affirmed, were of such tender years that they were held not to have the capacity to understand the nature or character of the explosive instruments which fell into their hands.

In the case at bar, plaintiff at the time of the accident was well-grown youth of 15, more mature both mentally and physically than the average boy of his age; he had been to sea as a cabin boy; was able to earn P2.50 a day as a mechanical draftsman thirty days after the injury was incurred; and the record discloses throughout that he was exceptionally well-qualified to take care of himself. The evidence of record leaves no room for doubt that, despite his denials on the witness stands, he well knew the explosive character of the cap with which he was amusing himself. The series of experiments made by him in his attempt to produce an explosion, as described by the little girl who was present, admit of no other explanation. His attempt to discharge the cap by the use of electricity, followed by his efforts to explode it with a stone or a hammer, and the final success of his endeavors brought about by the applications of a match to the contents of the cap, show clearly that he knew what he was about. Nor can there be any reasonable doubt that he had reason to anticipate that the explosion might be dangerous, in view of the fact that the little girl, 9 years of age, who was with him at the time when he put the match to the contents of the cap, became frightened and ran away.

True, he may not have known and probably did not know the precise nature of the explosion which might be expected from the ignition of the contents of the cap, and of course he did not anticipate the resultant injuries which he incurred; but he well knew that a more or less dangerous explosion might be expected from his act, and yet he willfully, recklessly, and knowingly produced the explosion. It would be going far to say that "according to his maturity and capacity" he exercised such "care and caution" as might reasonably be required of him, or that the defendant or anyone else should be held civilly responsible for injuries incurred by him under such circumstances.

The law fixed no arbitrary age at which a minor can be said to have the necessary capacity to understand and appreciate the nature and consequences of his own acts, so as to make it negligence on his part to fail to exercise with due care and precaution in the commission of such acts; and indeed it would

be impracticable and perhaps impossible so to do, for in the very nature of things the question of negligence necessarily depends on the ability of the minor to understand the character of his own acts and their consequences; and the age at which a minor can be said to have such ability will necessarily vary in accordance with the varying nature of the infinite variety of acts which may be done by him. But some idea of the presumed capacity of infants under the laws in force in these Islands may be gathered from an examination of the varying ages fixed by our laws at which minors are conclusively presumed to be capable to exercising certain rights and incurring certain responsibilities, though it can not be said that these provisions of law are of much practical assistance in cases such as that at bar, except so far as they illustrate the rule that the capacity of a minor to become responsible for his own acts varies with the varying circumstances of each case. Under the provisions of the Penal code a minor over fifteen years of age is presumed to be capable of committing a crime and is to be held criminally responsible therefore, although the fact that he is less than eighteen years of age will be taken into consideration as an extenuating circumstance. *(Penal Code, Arts. 8 and 9).* At 10 years of age, a child may, under certain circumstances, choose which parent it prefers to live with. *(Code of Civil Procedure, sec. 771).* At 14, it may petition for the appointment of a guardian (*Id.*, sec. 551), and may consent or refuse to be adopted. (*Id.*, sec. 765).

We are satisfied that the plaintiff in this case had sufficient capacity and understanding to be sensible to the danger to which he exposed himself when he put the match to the contents of the cap; that he was *sui juris* in the sense that his age and his experience qualified him to understand and appreciate the necessity for the exercise of that degree of caution which would have avoided the injury which resulted from his own deliberate act; and that the injury incurred by him must be held to have been the direct and immediate result of his own willful and reckless act, so that while it may be true that these injuries would not have been incurred but for the negligent act of the defendant in leaving the caps exposed on its premises, nevertheless plaintiff's own act was the proximate and principal cause of the accident which inflicted the injury.

x x x

We think it is quite clear that under the doctrine thus stated, the immediate cause of the explosion, the accident which resulted in plaintiff's injury, was his own act of putting a match to the contents of the cap, and that having "contributed to the principal occurrence, as one of its determining factors, he can not recover."

We have not deemed it necessary to examine the effect of plaintiff's action in picking up upon defendant's premises the detonating caps, the property of the defendant, and carrying them away to the home of his friend, as interrupting the relation of cause and effect between the negligent act or omission of the defendant in leaving the caps exposed on its premises and the injuries inflicted upon the plaintiff by the explosion of one of these caps. Under the doctrine of the Torpedo cases, such action on the part of an infant

of very tender years would have no effect in relieving defendant of responsibility, but whether in view of the well known facts admitted in defendant's brief that "boys are snappers-up of unconsidered trifles," a youth of the age and maturity of plaintiff should be deemed without fault in picking up the caps in question under all the circumstances of this case, we neither discuss nor decide.

FEDERICO YLARDE, et al. vs. EDGARDO AQUINO
163 SCRA 697 [1988]
July 29, 1988

In 1963, private respondent Mariano Soriano was the principal of the Gabaldon Primary School, a public educational institution located in Tayug, Pangasinan. Private respondent Edgardo Aquino was a teacher therein. At that time, the school was littered with several concrete blocks which were remnants of the old school shop that was destroyed in World War II. Realizing that the huge stones were serious hazards to the schoolchildren, another teacher by the name of Sergio Banez started burying them one by one as early as 1962. In fact, he was able to bury ten of these blocks all by himself.

Deciding to help his colleague, private respondent Edgardo Aquino gathered eighteen of his male pupils, aged ten to eleven, after class dismissal on October 7, 1963. Being their teacher-in-charge, he ordered them to dig beside a one-ton concrete block in order to make a hole wherein the stone can be buried. The work was left unfinished. The following day, also after classes, private respondent Aquino called four of the original eighteen pupils to continue the digging. These four pupils — Reynaldo Alonso, Fransico Alcantara, Ismael Abaga and Novelito Ylarde, dug until the excavation was one meter and forty centimeters deep. At this point, private respondent Aquino alone continued digging while the pupils remained inside the pit throwing out the loose soil that was brought about by the digging.

When the depth was right enough to accommodate the concrete block, private respondent Aquino and his four pupils got out of the hole. Then, said private respondent left the children to level the loose soil around the open hole while he went to see Banez who was about thirty meters away. Private respondent wanted to borrow from Banez the key to the school workroom where he could get some rope. Before leaving, private respondent Aquino allegedly told the children "not to touch the stone."

A few minutes after private respondent Aquino left, three of the four kids, Alonso, Alcantara and Ylarde, playfully jumped into the pit. Then, without any warning at all, the remaining Abaga jumped on top of the concrete block causing it to slide down towards the opening. Alonso and Alcantara were able to scramble out of the excavation on time but unfortunately for Ylarde, the concrete block caught him before he could get out, pinning him to the wall in a standing position. As a result thereof, Ylarde sustained the following injuries:

x x x

Three days later, Novelito Ylarde died.

Ylarde's parents, petitioners in this case, filed a suit for damages against both private respondents Aquino and Soriano. The lower court dismissed the complaint on the following grounds: (1) that the digging done by the pupils is in line with their course called Work Education; (2) that Aquino exercised the utmost diligence of a very cautious person; and (3) that the demise of Ylarde was due to his own reckless imprudence.

On appeal, the Court of Appeals affirmed the Decision of the lower court.

Petitioners based their action against private respondent Aquino on Article 2176 of the Civil Code for his alleged negligence that caused their son's death while the complaint against respondent Soriano as the head of school is founded on Article 2180 of the same Code.

x x x

With this in mind, the question We need to answer is this: Were there acts and omissions on the part of private respondent Aquino amounting to fault or negligence which have direct causal relation to the death of his pupil Ylarde? Our answer is in the affirmative. He is liable for damages.

From a review of the record of this case, it is very clear that private respondent Aquino acted with fault and gross negligence when he: (1) failed to avail himself of services of adult manual laborers and instead utilized his pupils aged ten to eleven to make an excavation near the one-ton concrete stone which he knew to be a very hazardous task; (2) required the children to remain inside the pit even after they had finished digging, knowing that the huge block was lying nearby and could be easily pushed or kicked aside by any pupil who by chance may go to the perilous area; (3) ordered them to level the soil around the excavation when it was so apparent that the huge stone was at the brink of falling; (4) went to a place where he would not be able to check on the children's safety; and (5) left the children close to the excavation, an obviously attractive nuisance.

The negligent act of private respondent Aquino in leaving his pupils in such a dangerous site has a direct causal connection to the death of the child Ylarde. Left by themselves, it was but natural for the children to play around. Tired from the strenuous digging, they just had to amuse themselves with whatever they found. Driven by their playful and adventurous instincts and not knowing the risk they were facing, three of them jumped into the hole while the other one jumped on the stone. Since the stone was so heavy and the soil was loose from the digging, it was also a natural consequence that the stone would fall into the hole beside it, causing injury on the unfortunate child caught by its heavy weight. Everything that occurred was the natural and probable effect of the negligent acts of private respondent Aquino. Needless to say, the child Ylarde would not have died were it not for the unsafe situation created by private respondent Aquino which exposed the lives of

all the pupils concerned to real danger.

We cannot agree with the finding of the lower court that the injuries which resulted in the death of the child Ylarde were caused by his own reckless imprudence. It should be remembered that he was only ten years old at the time of the incident. As such, he is expected to be playful and daring. His actuations were natural to a boy his age. Going back to the facts, it was not only him but the three of them who jumped into the hole while the remaining boy jumped on the block. From this, it is clear that he only did what any other ten-year old child would do in the same situation.

In ruling that the child Ylarde was imprudent, it is evident that the lower court did not consider his age and maturity. This should not be the case. The degree of care required to be exercised must vary with the capacity of the person endangered to care for himself. A minor should not be held to the same degree of care as an adult, but his conduct should be judged according to the average conduct of persons of his age and experience. The standard of conduct to which a child must conform for his own protection is that degree of care ordinarily exercised by children of the same age, capacity, discretion, knowledge and experience under the same or similar circumstances. Bearing this in mind, We cannot charge the child Ylarde with reckless imprudence.

The court is not persuaded that the digging done by the pupils can pass as part of their Work Education. A single glance at the picture showing the excavation and the huge concrete block would reveal a dangerous site requiring the attendance of strong, mature laborers and not ten-year old grade-four pupils. We cannot comprehend why the lower court saw it otherwise when private respondent Aquino himself admitted that there were no instructions from the principal requiring what the pupils were told to do. Nor was there any showing that it was included in the lesson plan for their Work Education. Even the Court of Appeals made mention of the fact that respondent Aquino decided all by himself to help his co-teacher Banez bury the concrete remnants of the old school shop. Furthermore, the excavation should not be placed in the category of school gardening, planting trees, and the like as these undertakings do not expose the children to any risk that could result in death or physical injuries.

The contention that private respondent Aquino exercised the utmost diligence of a very cautious person is certainly without cogent basis. A reasonably prudent person would have foreseen that bringing children to an excavation site, and more so, leaving them there all by themselves, may result in an accident. An ordinarily careful human being would not assume that a simple warning "not to touch the stone" is sufficient to cast away all the serious danger that a huge concrete block adjacent to an excavation would present to the children. Moreover, a teacher who stands in *loco parentis* to his pupils would have made sure that the children are protected from all harm in his company.

We close by categorically stating that a truly careful and cautious per-

son would have acted in all contrast to the way private respondent Aquino did. Were it not for his gross negligence, the unfortunate incident would not have occurred and the child Ylarde would probably be alive today, a grown-man of thirty-five. Due to his failure to take the necessary precautions to avoid the hazard, Ylarde's parents suffered great anguish all these years.

c. Physical Disability.

In The Common Law, Justice Holmes explained that the weaknesses of a person will not be an excuse in negligence cases. A weak, clumsy or accident prone person must come up to the standard of a reasonable man, otherwise, he will be considered negligent. Justice Holmes, therefore, subscribes to the view of the Romans. In *Justinian's Digest of Roman Law*, Ulpian is credited with the following explanation:

> "8. And the law is just the same if one misuses a drug, or if having operated efficiently, the aftercare is neglected; the wrongdoer will not go free, but is deemed to be guilty of negligence. Furthermore, if a mule-driver cannot control his mules because he is inexperienced and as a result they run down somebody's slave, he is generally said to be liable on grounds of negligence. It is the same if it is because of weakness that he cannot hold back his mules – and it does not seem unreasonable that weakness should be deemed negligence, for one should undertake a task in which he knows, or ought to know, that his weakness may be a danger to others. The legal position is just the same for a person who through inexperience or weakness cannot control a horse he is riding." *(C.P. Kolbert translation, 1979 Ed., p. 75).*

However, the rule is different if the defect is not a mere weakness but one amounting to real disability. The Constitution recognizes the rights of disabled persons. In fact, it mandates the creation of a "special agency for disabled persons for their rehabilitation, self-development and self-reliance, and their integration in the mainstream of the society." *(Section 13, Article XIII, 1987 Constitution).* The same principle for the integration of the disabled in the mainstream of society is being upheld under existing laws, particularly Republic Act No. 7277 otherwise known as the Magna Carta for Disabled Persons.

Nevertheless, integration of a disabled person in the mainstream of society does not mean that he will be treated exactly the same way as one who is not. A person who is physically disabled cannot be expected to act as if he is not disabled. Thus, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable person under like disability. For example, in the case of a blind

man, he must take the precautions, be they more or less, which the ordinary reasonable man would take if he were blind. *(Roberts vs. State of Lousiana, 396 So. 2d 566 [1981], citing W. Prosser, The Law of Torts, Section 32, at Pages 151-152, 4th ed., 1971).*

A person who is suffering from physical disability must, however, refrain from activities which a reasonable person suffering from such disability would not undertake. Obviously, a blind person should refrain from driving altogether.

CASES:

UNITED STATES vs. BONIFACIO
34 Phil. 65 [1916]

CARSON, *J.*:

The appellant in this case was charged in the court below with *homicidio por imprudencia temeraria* (homicide committed with reckless negligence), and was convicted of *homicidio* committed with simple negligence and sentenced to four months and one day of *arresto mayor* and to pay the costs of the proceedings.

The information charges the commission of the offense as follows:

"On or about the 31st day of October of the present year, 1913, in the barrio of Santa Rita of the municipality of Batangas, Batangas, the accused, being an engineer and while conducting the freight train which was going to the municipality of Bauan, at about 10 o'clock in the morning of the said day saw that Eligio Castillo, a deaf-mute, was traveling along the railroad track, and as the said Castillo did not get off of the said track in spite of the whistles or warnings given by the accused, the accused did maliciously and criminally cause the said train to run over the said Castillo, thereby killing him instantly; an act committed with violation of law."

On the 31st of October, 1913, Eligio Castillo, a deaf-mute, was run down and killed, while attempting to cross the railroad track in the barrio of Santa Rita, Batangas, by an engine on which the accused was employed as engineer. The deaf-mute stepped out on the track from an adjoining field shortly before the accident, walked along one side of the track for some little distance and was killed as he attempted, for some unknown reason, to cross over to the other side.

When the accused engineer first saw the deceased, he was walking near the track, in the same direction as that in which the train was running. The train, a heavy freight train, had just rounded a curve, and the man in front was about 175 meters ahead of the engine. The engineer immediately blew his whistle twice, and noticing, a few moments afterwards, that the man in front did not respond to the warning by stepping aside from the track, he tried to slow down the engine, but did not succeed in stopping in time to avoid

running down the pedestrian. He did not attempt to stop his engine when he first saw the man walking along the side of the track; but he claims that he did all in his power to slow down a few moments afterwards, that is to say after he had blown his whistle without apparently attracting the attention of the pedestrian, who, about that time, turned and attempted to cross the track.

The only evidence as to the rate of speed at which the train was running at the time of the accident was the testimony of the accused himself, who said that his indicator showed that he was travelling at the rate of 35 kilometers an hour, the maximum speed permitted under the railroad regulations for freight trains on that road.

There was a heavy decline in the track from the turn at the curve to a point some distance beyond the place where the accident took place, and the undisputed evidence discloses that a heavy freight train running at the rate of 35 miles an hour could not be brought to a stop on that decline in much less than one hundred and fifty meters.

We think that the mere statement of facts, as disclosed by the undisputed evidence of record, sufficiently and conclusively demonstrates that the death of the deaf-mute was the result of a regrettable accident, which was unavoidable so far as this accused was concerned.

It has been suggested that, had the accused applied his brakes when he first saw the man walking near the track, after his engine rounded the curve, he might have stopped the train in time to have avoided the accident, as it is admitted that the distance from the curve to the point where the accident occurred was about 175 meters.

But there is no obligation on an engine driver to stop, or even to slow down his engine, when he sees an adult pedestrian standing or walking on or near the track, unless there is something in the appearance or conduct of the person on foot which would cause a prudent man to anticipate the possibility that such person could not, or would not avoid the possibility of danger by stepping aside. Ordinarily, all that may properly be required of an engine driver under such circumstances is that he give warning of his approach, by blowing his whistle or ringing his bell until he is assured that the attention of the pedestrian has been attracted to the oncoming train.

Of course it is the duty of an engine driver to adopt every measure in his power to avoid the infliction of injury upon any person who may happen to be on the track in front of his engine, and to slow down, or stop altogether if that be necessary, should he have reason to believe that only by doing so can an accident be averted.

But an engine driver may fairly assume that all persons walking or standing on or near the railroad track, except children of tender years, are aware of the danger to which they are exposed; and that they will take reasonable precautions to avoid accident, by looking and listening for the approach of trains, and stepping out of the way of danger when their attention

is directed to an oncoming train.

Any other rule would render it impracticable to operate railroads so as to secure the expeditious transportation of passengers and freight which the public interest demands. If engine drivers were required to slow down or stop their trains every time they see a pedestrian on or near the track of the railroad it might well become impossible for them to maintain a reasonable rate of speed. As a result, the general traveling public would be exposed to great inconvenience and delay which may be, and is readily avoided by requiring all persons approaching a railroad track, to take reasonable precautions against danger from trains running at high speed.

There was nothing in the appearance or conduct of the victim of the accident in the case at bar which would have warned the accused engine driver that the man walking along the side of the track was a deaf-mute, and that despite the blowing of the whistle and the noise of the engine, he was unconscious of his danger. It was not until the pedestrian attempted to cross the track, just in front of the train, that the accused had any reason to believe that his warning signals had not been heard, and by that time it was too late to avoid the accident. Under all the circumstances, we are satisfied that the accused was without fault; and that the accident must be attributed wholly to the reckless negligence of the deaf-mute, in walking on the track without taking the necessary precautions to avoid danger from a train approaching him from behind.

ROBERTS vs. STATE OF LOUISIANA
396 So. 2d 566 [1981]

[Mike Burson is totally blind. He has been operating a concession stand inside the Post Office Buildings since 1974. It is one of twenty-three vending stands operated by blind persons under a program implemented by the State of Louisiana. On September 1, 1977, at about 12:45 in the afternoon, operator Mike Burson left his concession stand to go to the men's bathroom located at the Post Office Building. As he was walking down the hall, he bumped into the plaintiff who fell to the floor and injured his hip. Plaintiff was 75 years old, stood 5'6" and weighed approximately 100 pounds. Burson on the other hand, was 25 to 26 years old, stood approximately 6' and weighed 165 pounds. Plaintiff contends that operator Burson traversed the area from his concession stand to the men's bathroom in a negligent manner. Plaintiff focused on the operator's failure to use his cane even though he had it with him in his concession stand.]

"A careful review of the record in this instance reveals that Burson was acting as a reasonably prudent blind person would under these particular circumstances.

x x x

On the date of the incident in question, Mike Burson testified that he left his concession stand and was on his way to the bathroom when he bumped

the plaintiff. He, without hesitancy, admitted that at the time he was not using his cane, explaining that he relies on his facial sense which he feels is an adequate technique for short trips inside the familiar building. Burson testified that he does use a cane to get to and from work.

x x x

Plaintiff makes much of Burson's failure to use a cane when traversing the halls of the post office building. Yet, our review of the testimony received at the trial indicates that it is not uncommon for blind people to rely on other techniques when moving around in a familiar setting. For example George Marzloff, the director of the Division of Blind Services, testified that he can recommend to the blind operators that they should use a cane but he knows that when they are in a setting in which they are comfortable, he would say that nine out of ten will not use a cane and in his personal opinion, if the operator is in a relatively busy area, the cane can be more of a hazard than an asset.

x x x

Upon review of the record, we feel that plaintiff has failed to show that Burson was negligent. Burson testified that he was very familiar with his sorroundings, having worked there for three and a half years. He had special mobility training and his reports introduced into evidence indicate his good mobility skills. He explained his decision to rely on his facial sense instead of his cane for these short trips in a manner which convinces us that it was a reasoned decision. Not only was Burson's explanation adequate, there was additional testimony from other persons indicating that such decision is not an unreasonable one. Also important is the total lack of evidence in the record showing that at the time of the incident, Burson engaged in any acts which may be characterized as negligence on his part. For example, there is nothing showing that Burson was walking too fast, not paying attention, et cetera. Under all of these circumstances, we conclude that Mike Burson was not negligent."

d. Experts and Professionals.

An expert should exhibit the care and skill of one ordinarily skilled in the particular field that he is in. In fact, when a person holds himself out as being competent to do things requiring professional skills, he will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily skilled in the particular work which he attempted to do. *(Culion Ice, Fish & Electric Co., Inc. vs. Philippine Motors Corporation, No. 32611, November 3, 1930, 55 Phil. 129).*

The Supreme Court explained in *Far Eastern Shipping Company vs. Court of Appeals* (297 SCRA 30, 64 [1998]) that an act may be negligent if it is done without the competence that a reasonable person in the position of the actor would recognize as necessary to

prevent it from creating an unreasonable risk of harm to another. Those who undertake any work calling for special skills are required not only to exercise reasonable care in what they do but also possess a standard minimum of special knowledge and ability. Every man who offers his services to another, and is employed, assumes to exercise in the employment such skills he possesses, with a reasonable degree of diligence. In all these employment where peculiar skill is requisite, if one offers his services he is understood as holding himself out to the public as possessing the degree of skill commonly possessed by others in the same employment, and if his pretentions are unfounded, he commits a species of fraud on every man who employs him in reliance on his public profession.

The above-cited *Far Eastern Shipping Company* case involved a compulsory pilot of a seagoing vessel. A pilot in maritime law is a person duly qualified to conduct a vessel into or out of ports, or in certain waters. It is more generally understood as a person who was taken on board at a particular place for the purpose of conducting a ship through a river, road or channel, or from a port. In some states and localities, it is quite common to provide for compulsory pilotage and to enact safety laws requiring vessels approaching their ports to take on board pilots duly licensed under local law. (*supra*, p. 60). Thus, upon assuming the office of a compulsory pilot, the latter is held to the universally accepted high standards of care and diligence required of a pilot, whereby he assumes to have skill and knowledge in respect to navigation in the particular waters over which his license extends superior to and more to be trusted than that of the master. A pilot should have a thorough knowledge of general and local regulations and physical conditions affecting the vessel in his charge and the waters for which he is licensed, such as a particular harbor or river. He is not held to the highest possible degree of skill and care demanded by the circumstances, but must have and exercise the ordinary skill and care demanded by the circumstances, and usually shown by an expert in his profession. Under extraordinary circumstances, a pilot must exercise extraordinary care. *(p. 61)*.

The rule regarding experts is demonstrated in *United States vs. Pineda* (37 Phil. 456, 462-464), involving pharmacists. The Supreme Court explained that the profession of pharmacy is one demanding care and skill. It requires the highest degree of prudence, thoughtfulness, and vigilance and the most exact and reliable safeguards consistent with the reasonable conduct of business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poison for harmless medicine. “In other words,

the care required must be commensurate with the danger involved and skill employed must correspond with the superior knowledge of the business which the law demands."

The rule regarding experts is applicable not only to professionals, like doctors, pilots and others, who have undergone formal education. In *Sofia Fernando, et al. vs. Court of Appeals* (208 SCRA 714 [1992]), an invitation to bid was issued to different persons for the re-emptying of the septic tank in a public market in Davao City. Later, a non-winning bidder named Mr. Bertulano, with four other companions were found dead inside the septic tank. It appeared that the five victims entered the septic tank and proceeded to re-empty the same without the consent of proper authorities. When the heirs of the victims sued for damages, they were denied recovery by the Supreme Court explaining, among others that the accident in the case occurred because the victims on their own and without authority from proper authorities of the city opened the septic tank. The Court observed that:

> "Considering the nature of the task of emptying a septic tank especially one which has not been cleaned for years, an ordinarily prudent person should undoubtedly be aware of the attendant risks. The victims are no exception; more so with Mr. Bertulano, an old hand in this kind of service, who is presumed to know the hazards of the job. His failure, therefore, and that of his men to take precautionary measures for their safety was the proximate cause of the accident. In *Cullion Ice, Fish and Elect. Co. vs. Philippine Motors Corporation* (55 Phil. 129, 133), We held that when a person holds himself out as being competent to do things requiring professional skill, he will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily skilled in the particular work which he attempts to do."

Care required must also be commensurate with the danger that the activity entails. Thus, where the performance of work involves danger to the public unless performed with skill, the ordinary prudent man is deemed to have such required skill. *(57 Am. Jur. 2d 420).* For instance, a person hoisting a heavy safe in a public place where people are constantly passing is bound to use such care as the nature of the employment and the situation and circumstances require of a prudent person experienced and skilled in such work. *(ibid.).* Similarly, a person engaged in the business of selling explosives or even mere firecrackers should exercise due care commensurate with the demands of such dangerous activity.

CASE:

CULION ICE, FISH, AND ELECTRIC CO. vs. PHIL. MOTORS CORPORATION
55 Phil. 129 [1930]

This action was instituted in the Court of First Instance of Manila by Culion Ice, Fish and Electric Co., Inc., for the purpose of recovering from the Philippine Motors Corporation the sum of P11,350.00, with interest and costs. Upon hearing the case, the trial court gave judgment in favor of the plaintiff to recover of the defendant the sum of P9,850.00, with interest at 6 per centum per annum from March 24, 1927, the date of the filing of the complaint, until satisfaction of the judgment, with costs. From this judgment the defendant appealed.

The plaintiff and defendant are domestic corporations; and at the time of the incident with which we are here concerned; H.D. Cranston was the representative of the plaintiff in the City of Manila. At the same time the plaintiff was the registered owner of the motor schooner Gwendoline, which was used in the fishing trade in the Philippine Islands. In January, 1925, Cranston decided, if practicable, to have the engine on Gwendoline changed from a gasoline consumer to a crude oil burner, expecting thereby to effect economy in the cost of running the boat. He therefore made known his desire to McLeod & Co., a firm dealing in tractors, and was told by McKellar, of said company, that he might make inquiries of the Philippine Motors Corporation, which had its office on Ongpin Street, in the City of Manila. Cranston accordingly repaired to the office of the Philippine Motors Corporation and had a conference with C.E. Quest, its manager, who agreed to do the job, with the understanding that payment should be made upon completion of the work.

The Philippine Motors Corporation was at this time engaged in business as an automobile agency, but, under its charter, it had authority to deal in all sorts of machinery engines and motors, as well as to build, operate, buy and sell the same and the equipment thereof. Quest, as general manager, had full charge of the corporation in all its branches.

As a result of the aforesaid interview, Quest, in company with Cranston, visited the Gwendoline while it lay at anchor in the Pasig river, and the work of effecting the change in the engine was begun and conducted under the supervision of Quest, chiefly by a mechanic whom Quest took with him to the boat. In this work, Quest had the assistance of the members of the crew of the Gwendoline, who had been directed by Cranston to place themselves under Quest's directions.

Upon preliminary inspection of the engine, Quest came to the conclusion that the principal thing necessary to accomplish the end in view was to install a new carburetor, and a Zenith carburetor was chosen as the one most adapted to the purpose. After this appliance had been installed, the engine was tried with gasoline as a fuel, supplied from the tank already in

use. The result of this experiment was satisfactory. The next problem was to introduce into the carburetor the baser fuel, consisting of a low grade of oil mixed with distillate. For this purpose, a temporary tank to contain the mixture was placed on deck above and at a short distance from the compartment covering the engine. This tank was connected with the carburetor by a piece of tubing, which was apparently not well fitted at the point where it was connected with the tank. Owing to this fact, the fuel mixture leaked from the tank and dripped down into the engine compartment. The new fuel line and that already in use between the gasoline tank and the carburetor were so fixed that it was possible to change from the gasoline fuel to the mixed fuel. The purpose of this arrangement was to enable the operator to start the engine on gasoline and then, after the engine had been operating for a few moments, to switch to the new fuel supply.

In the course of the preliminary work upon the carburetor and its connections, it was observed that the carburetor was flooding, and that the gasoline, or other fuel, was trickling freely from the lower part of the carburetor to the floor. This fact was called to Quest's attention, but he appeared to think lightly of the matter and said that, when the engine had gotten to running well, the flooding would disappear.

After preliminary experiments and adjustments had been made, the boat was taken out into the bay for a trial run at about 5 p.m., or a little later, on the evening of January 30, 1925. The first part of the course was covered without any untoward development, other than the fact that the engine stopped a few times, owing no doubt to the use of an improper mixture of fuel. In the course of the trial, Quest remained outside of the engine compartment and occupied himself with making experiments in the matter of mixing the crude oil with distillate, with a view of ascertaining what proportion of the two elements would give best results in the engine.

As the boat was coming in from this run, at about 7:30 p.m., and when passing near Cavite, the engine stopped, and connection again had to be made with the gasoline line to get a new start. After this had been done, the mechanic or engineer, switched to the tube connecting with the new mixture. A moment later a back fire occurred in the cylinder chamber. This caused a flame to shoot back into the carburetor, and instantly the carburetor and adjacent parts were covered with a mass of flames, which the members of the crew were unable to subdue. They were therefore compelled, as the fire spread, to take to a boat, and their escape was safely effected, but the Gwendoline was reduced to a mere hulk. The salvage from the wreck, when sold, brought only the sum of P150.00. The value of the boat, before the accident occurred, as the court found, was P10,000.00.

A study of the testimony leads us to the conclusion that the loss of this boat was chargeable to the negligence and lack of skill of Quest. The temporary tank in which the mixture was prepared was apparently at too great an elevation from the carburetor, with the result that when the fuel line opened, the hydrostatic pressure in the carburetor was greater that the delicate parts

of the carburetor could sustain. This was no doubt the cause of the flooding of the carburetor; and the result was that, when the back fire occurred, the external parts of the carburetor, already saturated with gasoline, burst into flames, whence the fire was quickly communicated to the highly inflammable material nearby. Ordinarily a back fire from an engine would not be followed by any disaster, but in this case the leak along the pipe line and the flooding of the carburetor had created a dangerous situation, which a prudent mechanic, versed in repairs of this nature, would have taken precautions to avoid. The back fire may have been due either to the fact that the spark was too advanced or the fuel improperly mixed.

In this connection it must be remembered that when a person holds himself out as being competent to do things requiring professional skill, he will be held liable for negligence if he fails to exhibit the care and skill of one ordinarily skilled in the particular work which he attempts to do. The proof shows that Quest had had ample experience in fixing the engines of automobiles and tractors, but it does not appear that he was experienced in the doing of similar work on boats. For this reason, possibly, the dripping of the mixture from the tank on deck and the flooding of the carburetor did not convey to his mind an adequate impression of the danger of fire. But a person skilled in that particular sort of work would, we think, have been sufficiently warned from those circumstances to cause him to take greater and adequate precautions against the danger. In other words Quest did not use the skill that would have been exhibited by one ordinarily expert in repairing gasoline engines on boats. There was here, in our opinion, on the part of Quest, a blameworthy antecedent inadvertence to possible harm, and this constitutes negligence. The burning of the Gwendoline may be said to have resulted from accident, but this accident was in no sense an unavoidable accident. It would not have occurred but for Quest's carelessness or lack of skill. The test of liability is not whether the fire was accidental in a sense, but whether Quest was free from blame.

We therefore see no escape from the conclusion that this accident is chargeable to lack of skill or negligence in effecting the changes which Quest undertook to accomplish; and even supposing that our theory as to the exact manner in which the accident occurred might appear to be in some respects incorrect, yet the origin of the fire is not so inscrutable as to enable us to say that it was *casus fortuitus*.

The trial judge seems to have proceeded on the idea that, inasmuch as Quest had control of the Gwendoline during the experimental run, the defendant corporation was in the position of a bailee and that, as a consequence the burden of proof was on the defendant to exculpate itself from responsibility by proving that the accident was not due to the fault of Quest. We are unable to accede to this point of view. Certainly, Quest was not in charge of the navigation of the boat on this trial run. His employment contemplated the installation of new parts in the engine only, and it seems rather strained to hold that the defendant corporation had thereby become bailee of its owner's yard, or a mechanic who repairs a coach without taking it to his shop, are

not bailees, and their rights and liabilities are determined by the general rules of law, under their contract. The true bailee acquires possession and what is usually spoken of as special property in the chartted bailed. As a consequence of such possession and special property, the bailee is given a lien for his compensation. These ideas seem to be incompatible with the situation now under consideration. But though defendant cannot be held liable on the supposition that the burden of proof has not been sustained by it in disproving the negligence of its manager, we are nevertheless of the opinion that the proof shows by a clear preponderance that the accident to the Gwendoline and the damages resulting therefrom are chargeable to the negligence or lack of skill of Quest.

This action was instituted about two years after the accident in question had occurred, and after Quest had ceased to be the manager of the defendant corporation and had gone back to the United States. Upon these facts, the defendant bases the contention that the action should be considered stale. It is sufficient reply to say that the action was brought within the period limited by the statute of limitations and the situation is not one where the defense of laches can be properly invoked.

e. Nature of Activity.

In some instances, persons impose upon themselves certain obligations and non-compliance therewith will be considered negligence. For example, a railroad company may impose upon itself the obligation to operate a gate at a railroad crossing even at night and close the gate every time a train passes in order to avoid causing injury. In such a case, if a gate is open, the same shall constitute an invitation to the public to pass without fear of danger and failure to operate the gate conveniently constitutes negligence. *(Consolacion Junio vs. Manila Railroad Company, 58 Phil. 176 [1933]).*

There are activities, however, which by nature impose duties to exercise a higher degree of diligence. Banks, for instance, "handle daily transactions involving millions of pesos. By the very nature of their work, the degree of responsibility, care and trustworthiness expected of their employees and officials is far greater than those of ordinary clerks and employees. For obvious reasons, the banks are expected to exercise the highest degree of diligence in the selection and supervision of their employees." *(Bank of Philippine Islands vs. Court of Appeals, 216 SCRA 51, 71 [1992]).*

Common carriers are also required to exercise utmost diligence in the performance of their functions. Article 1733 imposes the duty on common carriers to exercise extraordinary diligence in the vigilance over their passengers and transported goods.

In *Smith Bell Dodwell Shipping Agency Corporation vs. Catalino Borja (G.R. No. 143008, June 10, 2002)*, the Supreme Court took into consideration the fact that the carrier was carrying highly inflammable materials. The petitioner's vessel was carrying dangerous inflammable chemicals but its officers and crew failed to take the necessary precaution to prevent any accident. An explosion occurred setting the vessel afire. The private respondent, who was then on board while performing his functions as customs inspector, was forced to jump out of the ship resulting in his permanent disability.

f. Intoxication.

Mere intoxication is not negligence, nor does the mere fact of intoxication establish want of ordinary care. It is but a circumstance to be considered with the other evidence tending to prove negligence. It is a general rule that it is immaterial whether a man is drunk or sober if no want of ordinary care or prudence can be imputed to him, and no greater degree of care is required to be exercised by an intoxicated man for his own protection than a sober one. If one's conduct is characterized by a proper degree of care and prudence, it is immaterial whether he is drunk or sober. *(Wright vs. Manila Electric Co., 28 Phil. 122 [1914]).* In other words, intoxication is of little consequence in negligence cases if it was not shown that such drunkenness contributed to the accident or that the accident would have been avoided had he been sober. *(U.S. vs. Crame, 30 Phil. 2 [1915]).* For example, the plaintiff cannot be considered negligent based on the sole fact that he was intoxicated when he fell into an uncovered hole in the sidewalk of a public street. "A drunken man is as much entitled to a safe street, as a sober one, and much more in need of it." *(Robinson vs. Pioche, Bayerque & Co., 5 Cal. 460 [1855], cited in Richard A. Epstein, Cases and Materials on Torts, 1995 Ed., p. 187).*

However, as pointed out earlier, intoxication may be one of the circumstances to be considered to prove negligence. For instance, intoxication may be considered to prove negligence in driving a motor vehicle. As explained by the Supreme Court, driving exacts a more than usual toll on the senses. While driving, the body releases catecholamines in response to 'alerting' or threatening conditions (called 'fight' or 'flight' conditions by physiologists) rendering the individual, through his reflexes, senses and other alerting mechanisms responsive to these conditions. Alcohol dulls these normal bodily responses. *(Valenzuela vs. Court of Appeals, supra, p. 77, citing Best and Taylor, Physiological Basis of Medical Practice, 81 [1993]).* However, differ-

ent persons have different reactions to liquor. A person may take as much as several bottles of beer or several glasses of hard liquor and still remain sober and unaffected by the alcoholic drink. *(Nitura vs. Employees' Compensation Commission, 201 SCRA 278, 282-283 [1991]).*

Moreover, proof of intoxication may in proper cases establish a presumption of negligence. Driving under the influence of alcohol is a violation of traffic regulations. Under Article 2185 of the Civil Code, it is presumed that a person driving a motor vehicle has been negligent if at the time of the mishap, he was violating any traffic regulation.

CASE:

E. M. WRIGHT vs. MANILA ELECTRIC R. R. & LIGHT CO.
G.R. No. 7760. October 1, 1914

MORELAND, *J.*:

This is an action brought to recover damages for injuries sustained in an accident which occurred in Caloocan on the night of August 8, 1909.

The defendant is a corporation engaged in operating an electric street railway in the city of Manila and its suburbs, including the municipality of Caloocan. The plaintiff's residence in Caloocan fronts on the street along which defendant's tracks run, so that to enter his premises from the street, plaintiff is obliged to cross defendant's tracks. On the night mentioned, plaintiff drove home in a calesa and in crossing the tracks to enter his premises the horse stumbled, leaped forward, and fell, causing the vehicle to strike one of the rails with great force. The fall of the horse and the collision of the vehicle with the rails, resulting in a sudden stop, threw plaintiff from the vehicle and caused the injuries complained of.

It is undisputed that at the point where plaintiff crossed the tracks on the night in question not only the rails were above-ground, but that the ties upon which the rails rested projected from one-third to one-half of their depth out of the ground, thus making the tops of the rails some 5 or 6 inches or more above the level of the street.

It is admitted that the defendant was negligent in maintaining its tracks as described, but it is contended that the plaintiff was also negligent in that he was intoxicated to such an extent at the time of the accident that he was unable to take care of himself properly and that such intoxication was the primary cause of the accident.

The trial court held that both parties were negligent, but that the plaintiff's negligence was not as great as defendant's and under the authority of the case of *Rakes vs. A. G. & P. CO.* (7 Phil. Rep., 359) apportioned the

damages and awarded plaintiff a judgment of P1,000.

The question before us is stated by the defendant thus:

"Accepting the findings of the trial court that both plaintiff and defendant were guilty of negligence, the only question to be considered is whether the negligence of plaintiff contributed to the 'principal occurrence' or 'only to his own injury.' If the former, he cannot recover; if the latter, the trial court was correct in apportioning the damages."

The question as stated by plaintiff is as follows: "The main question at issue is whether or not the plaintiff was negligent, and, if so, to what extent. If the negligence of the plaintiff was the primary cause of the accident then, of course, he cannot recover; if his negligence had nothing to do with the accident but contributed to his injury, then the court was right in apportioning the damages, but if there was no negligence on the part of the plaintiff, then he should be awarded damages adequate to the injury sustained."

In support of the defendant's contention counsel says:

"Defendant's negligence was its failure properly to maintain the track; plaintiff's negligence was his intoxication; the 'principal occurrence' was plaintiff's fall from his calesa. It seems clear that plaintiff's intoxication contributed to the fall; if he had been sober, it can hardly be doubted that he would have crossed the track safely, as he had done a hundred times before."

While both parties appealed from the decision, the defendant on the ground that it was not liable and the plaintiff on the ground that the damages were insufficient according to the evidence, and while the plaintiff made a motion for a new trial upon the statutory grounds and took proper exception to the denial thereof, thus conferring upon this court jurisdiction to determine the questions of fact, nevertheless, not all of the testimony taken on the trial, so far as can be gathered from the record, has been brought to this court. There seem to have been two hearings, one on the 31st of August and the other on the 28th of September. The evidence taken on the first hearing is here; that taken on the second is not. Not all the evidence taken on the hearings being before the court, we must refuse, under our rules, to consider even that evidence which is here; and, in the decision of this case, we are, therefore, relegated to the facts stated in the opinion of the court and the pleadings filed.

A careful reading of the decision of the trial court leads us to the conclusion that there is nothing in the opinion which sustains the conclusion of the court that the plaintiff was negligent with reference to the accident which is the basis of this action. Mere intoxication is not negligence, nor does the mere fact of intoxication establish a want of ordinary care. It is but a circumstance to be considered with the other evidence tending to prove negligence. It is the general rule that it is immaterial whether a man is drunk or sober if no want of ordinary care or prudence can be imputed to him, and no greater degree of care is required to be exercised by an intoxicated man for his own protection than by a sober one. If one's conduct is characterized by a proper degree of care and prudence, it is immaterial whether he is drunk or sober. (*Ward vs.*

Chicago etc., R. R. Co., 85 Wis., 601; *H. & T. C. R. Co. vs. Reason*, 61 Tex., 613; *Alger vs. Lowell*, 3 Allen, Mass., 402; *Central R. R. Co. vs. Phinazee*, 93 Ga., 488; *Maguire vs. Middlesex R. R. Co.*, 115 Mass., 239; *Meyer vs. Pacific R. R. Co.*, 40 Mo., 151; *Chicago & N. W. R. R. Co. vs. Drake,* 33 Ill. App., 114.)

If intoxication is not in itself negligence, what are the facts found by the trial court and stated in its opinion upon which may be predicated the finding that the plaintiff did not use ordinary care and prudence and that the intoxication contributed to the injury complained of? After showing clearly and forcibly the negligence of the defendant in leaving its tracks in the condition in which they were on the night of the injury, the court has the following to say and it is all that can be found in its opinion, with reference to the negligence of the plaintiff: "With respect to the condition in which Mr. Wright was on returning to his house on the night in question, the testimony of Doctor Kneedler who was the physician who attended him all hour after the accident, demonstrates that he was intoxicated.

"If the defendant or its employees were negligent by reason of having left the rails and a part of the ties uncovered in a street where there is a large amount of travel, the plaintiff was no less negligent, he not having abstained from his custom of taking more wine than he could carry without disturbing his judgment and his self-control, he knowing that he had to drive a horse and wagon and to cross railroad tracks which were to a certain extent dangerous by reason of the rails being elevated above the level of the street.

"If the plaintiff had been prudent on the night in question and had not attempted to drive his conveyance while in a drunken condition, he would certainly have avoided the damages which he received, although the company, on its part, was negligent in maintaining its tracks in a bad condition for travel.

"Both parties, therefore, were negligent and both contributed to the damages resulting to the plaintiff, although the plaintiff, in the Judgment of the court, contributed in greater proportion to the damages than did the defendant."

As is clear from reading the opinion, no facts are stated therein which warrant the conclusion that the plaintiff was negligent. The conclusion that if he had been sober he would not have been injured is not warranted by the facts as found. It is impossible to say that a sober man would not have fallen from the vehicle under the conditions described. A horse crossing the railroad tracks with not only the rails but a portion of the ties themselves aboveground stumbling by reason of the unsure footing and falling, the vehicle crashing against the rails with such force as to break a wheel, this might be sufficient to throw a person from the vehicle no matter what his condition; and to conclude that, under such circumstances, a sober man would not have fallen while a drunken man did, is to draw a conclusion which enters the realm of speculation and guesswork.

It having been found that the plaintiff was not negligent, it is unnecessary to discuss the question presented by the appellant company with refer-

ence to the applicability of the case of *Rakes vs. A. G. & P. Co.*, above; and we do not find facts in the opinion of the court below which justify a larger verdict than the one found.

g. Insanity.

Under the Revised Penal Code, an insane person is exempt from criminal liability. However, by express provision of law, there may be civil liability even when the perpetrator is held to be exempt from criminal liability. "Such is the case of a lunatic or demented person who, in spite of his deranged mind, is still reasonably and justly liable with his property for the consequences of his acts, even though they be performed unwittingly. Law and society are under obligation to protect him and, when so declared liable with his property for reparation and indemnification, he is still entitled to reservation of what is necessary for his decent maintenance, but this protection does not exclude liability for damages caused to those who may have the misfortune to suffer the consequences of his act." *(U.S. vs. Bagay, 20 Phil. 142, 146).*

The same rule is applicable under the Civil Code. The insanity of a person does not excuse him or his guardian from liability based on quasi-delict. *(Articles 2180 and 2182, Civil Code).* This means that the act or omission of the person suffering from mental defect will be judged using the standard test of a reasonable man.

The bases for holding a permanently insane person liable for his tort are as follows: (a) Where one of two innocent persons must suffer a loss it should be borne by the one who occasioned it; (b) to induce those interested in the estate of the insane person (if he has one) to restrain and control him; and (c) the fear that an insanity defense would lead to false claims of insanity to avoid liability. *(Breunig vs. American Family Insurance Co., 173 N.W. 2d 619 [1970]).*

It should be noted, however, that there are rare cases in the United States when a person may escape liability by invoking his mental disorder. Thus, a driver of a motor vehicle is not liable if he was suddenly overcome without forewarning by a mental disorder or disability which incapacitated him from conforming his conduct to the standards of a reasonable man under like circumstances. It was explained that it is unjust to hold a man responsible for his conduct which he is incapable of avoiding and which incapability was unknown to him prior to the accident. *(Breunig vs. American Family Insurance Co., ibid.).*

h. Women.

There is no question that when it comes to physical features, there is a distinction between man and woman. A man is generally physically stronger than a woman and the same should be taken into consideration in determining if the defendant, who is a woman, was negligent. The Supreme Court adopted the following rule in *Jose Cangco vs. Manila Railroad Co.* [G.R. No. 12191, October 14, 1918]:

> "We are of the opinion that the correct doctrine relating to this subject is that expressed in Thompson's work on Negligence (vol. 3, sec. 3010) as follows:
>
> "The test by which to determine whether the passenger has been guilty of negligence in attempting to alight from a moving railway train, is that of ordinary or reasonable care. It is to be considered whether an ordinarily prudent person, *of the age, sex and condition of the passenger*, would have acted as the passenger acted under the circumstances disclosed by the evidence. This care has been defined to be, not the care which may or should be used by the prudent man generally, but the care which a man of ordinary prudence would use under similar circumstances, to avoid injury." *(Thompson, Commentaries on Negligence, vol. 3, sec. 3010).*
>
> Or, if we prefer to adopt the mode of exposition used by this court in *Picart vs. Smith* (37 Phil. 809), we may say that the test is this: Was there anything in the circumstances surrounding the plaintiff at the time he alighted from the train which would have admonished a person of average prudence that to get off the train under the conditions then existing was dangerous? If so, the plaintiff should have desisted from alighting; and his failure so to desist was contributory negligence.
>
> As the case now before us presents itself, the only fact from which a conclusion can be drawn to the effect that the plaintiff was guilty of contributory negligence is that he stepped off the car without being able to discern clearly the condition of the platform and while the train was yet slowly moving. In considering the situation thus presented, it should not be overlooked that the plaintiff was, as we find, ignorant of the fact that the obstruction which was caused by the sacks of melons piled on the platform existed; and as the defendant was bound by reason of its duty as a public carrier to afford to its passengers facilities for safe egress from its trains, the plaintiff had a right to assume, in the absence of some circumstance to warn him to the contrary, that the platform was clear. The place, as we have already stated, was dark, or dimly lighted, and this also is proof of a failure upon the part of the defendant in the performance of a duty owing by it to

the plaintiff; for if it were by any possibility conceded that it had a right to pile these sacks in the path of alighting passengers, placing of them in that position gave rise to the duty to light the premises adequately so that their presence would be revealed.

As pertinent to the question of contributory negligence on the part of the plaintiff in this case the following circumstances are to be noted: The company's platform was constructed upon a level higher than that of the roadbed and the surrounding ground. The distance from the steps of the car to the spot where the alighting passenger would place his feet on the platform was thus reduced, thereby decreasing the risk incident to stepping off. The nature of the platform, constructed as it was of cement material, also assured to the passenger a stable and even surface on which to alight. Furthermore, the plaintiff was possessed of the vigor and agility of young manhood, and it was by no means so risky for him to get off while the train was yet moving as the same act would have been in an aged or feeble person. *In determining the question of contributory negligence in performing such act — that is to say, whether the passenger acted prudently or recklessly — the age, sex, and physical condition of the passenger are circumstances necessarily affecting the safety of the passenger, and should be considered. Women, it has been observed, as a general rule, are less capable than men of alighting with safety under such conditions, as the nature of their wearing apparel obstructs the free movement of the limbs.* Again, it may be noted that the place was perfectly familiar to the plaintiff, as it was his daily custom to get on and off the train at this station. There could, therefore, be no uncertainty in his mind with regard either to the length of the step which he was required to take or the character of the platform where he was alighting. Our conclusion is that the conduct of the plaintiff in undertaking to alight while the train was yet slightly under way was not characterized by imprudence and that therefore he was not guilty of contributory negligence." (emphasis supplied)

The problem, however, arises if the question involves attitude. The question may be posed: Can we apply the same objective standard to women that we are applying to a man or are we to assume that there is a fundamental difference between the reaction or attitude of women compared to men given the same set of facts? Although there is no unequivocal statement of the rule, *Valenzuela vs. Court of Appeals* cited earlier, appears to require a different standard of care for women under the circumstances indicated therein. The Supreme Court seemed to say that the conduct to be expected of women is different from that of a man. Thus, the Court explained:

"While the emergency rule applies to those cases in which

> reflective thought, or the opportunity to adequately weigh a threatening situation is absent, the conduct which is required of an individual in such cases is dictated not exclusively by the suddenness of the event which absolutely negates throughful care, but by the over-all nature of the circumstances. A woman driving a vehicle suddenly crippled by a flat tire on a rainy night will not be faulted for stopping at a point which is both convenient for her to do so and which is not a hazard to other motorists. She is not expected to run the entire boulevard in search for a parking zone or turn on a dark street or alley where she would likely find no one to help her. It would be hazardous for her not to stop and assess the emergency (simply because the entire length of Aurora Boulevard is a no-parking zone) because the hobbling vehicle would be both a threat to her safety and to other motorists. In the instant case, Valenzuela, upon reaching that portion of Aurora Boulevard close to A. Lake St., noticed that she had a flat tire. To avoid putting herself and other motorists in danger, she did what was best under the situation. As narrated by respondent court: "She stopped at a lighted place where there are people, to verify whether she had a flat tire and to solicit help if needed. Having been told by the people present that her rear right tire was flat and that she cannot reach her home she parked along the sidewalk, about 1 1/2 feet away, behind a Toyota Corona Car." In fact, respondent court noted, Pfc. Felix Ramos, the investigator on the scene of the accident confirmed that Valenzuela's car was parked very close to the sidewalk. The sketch which he prepared after the incident showed Valenzuela's car partly straddling the sidewalk, clear and at a convenient distance from motorists passing the right lane of Aurora Boulevard. This fact was itself corroborated by the testimony of witness Rodriguez."

Is the Court saying that a man driving a vehicle, suddenly crippled by a flat tire on a rainy night, should be faulted for stopping at a point which is both convenient for him to do so and which is not a hazard to other motorists? Is he expected to run the entire boulevard in search for a parking zone or turn on a dark street or alley where he would likely find no one to help him? Would it be not hazardous for him to stop and assess the emergency because the hobbling vehicle would be both a threat to his safety and to other motorists? It is believed that it can also be reasonably argued that the same conclusion that was reached by the Court can be reached if it was a man who was in the position of the actor in *Valenzuela*. A man is not necessarily as brave as the Court may presume him to be. On the other hand, many women may find the conclusion of the Court as too patronizing. They may find it insulting to be treated in such a stereotypical manner.

Dean Guido Calabresi believes that there should be uniform

standard of care for men and women. He explained in one of his lectures:

> "All of this argues that before we move to the standard of a reasonably prudent person, *linguistically,* we must make sure that what we have put into that standard is not simply a carryover of male attributes. We must be careful lest we simply apply sexist precedents and cases. We must not just take the old lawn-mowing man on the Clapham Omnibus, call him a person, and think we have done the job. We must work to define a person, and think we have done the job. We must work to define a *person* who is reasonably prudent, and reasonable behavior, may be male in some regards, but will in other regards be female. We must do this not because tort law *directly* shapes much of the behavior or many of the attitudes that are important to society. We must do it, rather, because what law does in general *is* crucial to shaping fundamental societal attitudes and behavior.
>
> This is not to say, once the society, the legal system, works its way toward this one, non-sexist standard, and that the standard should not apply *equally* across the board, to men and women both. It is not to say that reasonable prudence should be different for men and women. That is a different issue altogether and I am more than inclined to accept the notion that the standard should be the same for men and women. We should, I think, either men's and women's rooms *or* ladies' and gentlemen's rooms. (Though when we come to deal with other cultural and religious attitudes we may well decide that at times a single, unitary standard is less desirable than more diverse one applying to different groups.) It is just that in choosing such a single standard we ought not simply and mindlessly choose the previous male one (or for that matter, the previous female one), but work toward a new standard that might include the better parts of both past stereotypes." *(Calabresi, Ideals, Beliefs, Attitudes, and the Law, First Ed., 1985, pp. 31-32).*

5. STANDARD vs. SPECIFIC RULES

In legal philosophy, there is an old debate on the choice of correct legal norm — a debate on the choice between rules and standards. Rules are legal norms that are formal and mechanical. They are triggered by a few easily identified factual matters and are opaque in application to the values that they are designed to serve (example, drive at not more than 60 k.p.h.). Standards, on the other hand, are flexible, context-sensitive legal norms that require evaluative judgments in their application (example, drive safely). However, there are legal norms that are hybrid, in that they are both rule-like and standard-like. *(Larry Alexander and Ken Kress, Against Legal*

Principles, reproduced in Law and Interpretation, Essays in Legal Philosophy, 1995 Ed., Ed. By Andrei Marmor, p. 280).

The discussions in the preceding sections make it clear that standards are the legal norms that are being followed in deciding negligence cases. Courts apply a standard in the light of the circumstances obtaining in the particular case they are deciding. The courts do not prescribe specific rules of conduct to be followed by all persons. "The standard of reasonable care is set by law but its application in a particular case is a question of fact in the sense that propositions of good sense which are applied by one judge in one case should not be regarded as propositions of law. If that were the case, the system would collapse under the weight of accumulated precedent." *(W.V.H. Rogers, Winfield & Jolowicz on Torts, 1998 15th Ed., p. 179).* What results is that the courts in each case must balance all conflicting interests and consider all the circumstances.

The dichotomy of rules and standards was highlighted in *Corliss vs. The Manila Railroad Company* (*supra*, at page 37). In the said case, the Supreme Court pointed out the opinion of Justice Holmes in one railroad case that seemed to indicate that setting the standard means specifying what to do in a given situation. The opinion had been interpreted to suggest that a driver who is traversing a railroad crossing must, at all times, stop and see if there is an oncoming locomotive. What was suggested then was a mechanical and inflexible rule. It should be pointed out in this connection that Justice Holmes predicted in his work, *The Common Law*, that the accumulated findings of juries should eventually crystallize into increasingly precise legal rules.

Justice Cardozo, however expressed the view that specific rules of conduct cannot be imposed. The Supreme Court explained in *Corliss* that:

> "4. The fourth assigned error is deserving of a more extended treatment. Plaintiff-appellant apparently had in mind this portion of the opinion of the lower court: "The weight of authorities is to the effect that a railroad track is in itself a warning or a signal of danger to those who go upon it, and that those who, for reasons of their own, ignore such warning, do so at their own risk and responsibility. Corliss, Jr., who undoubtedly had crossed the checkpoint frequently, if not daily, must have known that locomotive engines and trains usually pass at that particular crossing where the accident had taken place."
>
> Her assignment of error, however, would single out not the

above excerpt from the decision appealed from but what to her is the apparent reliance of the lower court on *Mestres vs. Manila Electric Railroad & Light Co. and United States vs. Manabat & Pasibi.* In the *Manabat* case, the doctrine announced by this Court follows: "A person in control of an automobile who crosses a railroad, even at a regular road crossing, and who does not exercise that precaution and that control over it as to be able to stop the same almost immediately upon the appearance of a train, is guilty of criminal negligence, providing a collision occurs and injury results. Considering the purposes and the general methods adopted for the management of railroads and railroad trains, we think it is incumbent upon one approaching a railroad crossing to use all of his faculties of seeing and hearing. He should approach a railroad crossing cautiously and carefully. He should look and listen and do everything that a reasonably prudent man would do before he attempts to cross the track." The Mestres doctrine in a suit arising from a collision between an automobile and a street car is substantially similar. Thus: "It may be said, however, that, where a person is nearing a street crossing toward which a car is approaching, the duty is on the party to stop and avoid a collision who can most readily adjust himself to the exigencies of the case, and where such person can do so more readily, the motorman has a right to presume that such duty will be performed."

It is true, as plaintiff-appellant would now allege, that there has been a drift away from the apparent rigid and inflexible doctrine thus set forth in the two above cases as evidenced by *Lilius vs. Manila Railroad Co.*, the controlling facts of which, however, are easily distinguishable from what had been correctly ascertained in the present case. Such a deviation from the earlier principle announced is not only true of this jurisdiction but also of the Untied States.

This is made clear by Prosser. Speaking of a 1927 decision by Justice Holmes, he had the following to say: "Especially noteworthy in this respect is the attempt of Mr. Justice Holmes, in *Baltimore & Ohio Railway vs. Goodman*, to 'lay down a standard once for all,' which would require an automobile driver approaching a railroad crossing with an obstructed view to stop, look and listen, and if he cannot be sure otherwise that no train is coming, to get out of the car. The basic idea behind this is sound enough; it is by no means proper care to cross a railroad track without taking reasonable precautions against a train, and normally such precautions will require looking, hearing, and a stop, or at least slow speed, where the view is obstructed."

Then, barely seven years later, in 1934, came *Pokora vs. Wabash Railway,* where, according to Prosser, it being shown that "the only effective stop must be made upon the railway

tracks themselves, in a position of obvious danger, the court disregarded any such uniform rule, rejecting the 'get out of the car' requirement as 'an uncommon precaution, likely to be futile and sometimes even dangerous,' and saying that the driver need not always stop. 'Illustrations such as these,' said Mr. Justice Cardozo, 'bear witness to the need for caution in framing standards of behavior that amount to rules of law . . . Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal."

The Supreme Court explained that "what Justice Cardozo announced would merely emphasize what was set forth earlier that each and every case on questions of negligence is to be decided in accordance with the peculiar circumstances that present themselves. There can be no hard and fast rule. There must be that observance of the degree of care, precaution, and vigilance which the situation demands."

CASES:

BALTIMORE & OHIO R.R. vs. GOODMAN
275 U.S. 66, 48 SUP. CT. 24

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suite brought by the widow and administratrix of Nathan Goodman against the petitioner for causing his death by running him down at a grade crossing. The defense is that Goodman's own negligence caused the death. At the trial, the defendant asked the Court to direct a verdict for it, but the request, and others looking to the same direction, were refused, and the plaintiff got a verdict and a judgment which was affirmed by the Circuit Court of Appeals. *(10 F.[2d] 58).*

Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than sixty miles an hour. The line was straight, but it said by the respondent that Goodman "had no practical view" beyond a section house two hundred and forty three feet north of the crossing until he was about twenty feet from the first rail, or, as the respondent argues, twelve feet from danger, and then the engine was still obscured by the section house. He had been driving at the rate of ten or twelve miles an hour, but had cut down his rate to five or six miles at about forty feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes

upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train to stop for him. In such circumstances, it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near, he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true as said in *Flannelly vs. Delaware & Hudson Co.*, 225 U.S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once and for all by the Courts. *(See Southern Pacific Co. vs. Berkshire, 254 U.S. 415, 417, 419).*

POKORA vs. WABASH RY. CO.
292 U.S. 98, 54 SUP. CT. 580 [1934]

MR. JUSTICE CARDOZO delivered the opinion of the Court.

John Pokora, driving his truck across a railway grade crossing in the city of Springfield, Ill., was struck by a train and injured. Upon the trial of his suit for damages, the District Court held that he had been guilty of contributory negligence, and directed a verdict for the defendant. The Circuit Court of Appeals (one judge dissenting) affirmed [66 F.2d 166], resting its judgment on the opinion of this court in *B. & O.R. Co. vs. Goodman*, 275 U.S. 66, 48 S. Ct. 24, 25, 72 L. Ed. 167, 56 A.L.R. 645. A writ of *certiorari* brings the case here.

Pokora was an ice dealer, and had come to the crossing to load his truck with ice. The tracks of the Wabash Railway are laid along Tenth street, which runs north and south. There is a crossing at Edwards street running east and west. Two ice depots are on opposite corners of Tenth and Edwards streets; one at the northeast corner, the other at the southwest. Pokora, driving west along Edwards street, stopped at the first of these corners to get his load of ice, but found so many trucks ahead of him that he decided to try the depot on the other side of the way. In his crossing of the railway, the accident occurred.

The defendant has four tracks on Tenth street; a switch track on the east, then the main track, and then two switches. Pokora, as he left the northeast corner where his truck had been stopped, looked to the north for approaching trains. He did this at a point about ten or fifteen feet east of the switch ahead of him. A string of box cars standing on the switch, about five to ten feet from the north line of Edwards street, cut off his view of the tracks beyond him to the north. At the same time he listened. There was neither bell nor whistle. Still listening, he crossed the switch, and reaching the main track was struck by a passenger train coming from the north at a speed of twenty-five to thirty miles an hour.

The argument is made, however, that our decision in *B. & O.R. Co. vs. Goodman, supra,* is a barrier in the plaintiff's path, irrespective of the conclusion that might commend itself if the question were at large. There is no doubt that the opinion in that case is correct in its result. Goodman, the driver, traveling only five or six miles an hour, had, before reaching the track, a clear space of eighteen feet within which the train was plainly visible. With the opportunity, he fell short of the legal standard of duty established for a traveler when he failed to look and see. This was decisive of the case. But the court did not stop there. It added a remark, unnecessary upon the facts before it, which has been a fertile source of controversy. "In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look."

There is need at this stage to clear the ground of brushwood that may obscure the point at issue. We do not now inquire into the existence of a duty to stop, disconnected from a duty to get out and *reconnoitre*. The inquiry, if pursued, would lead us into the thickets of conflicting judgments. Some courts apply what is often spoken of as the Pennsylvania rule, and impose an unyielding duty to stop, as well as to look and listen, no matter how clear the crossing or the tracks on either side.

Other courts, the majority, adopt the rule that the traveler must look and listen, but that the existence of a duty to stop depends upon the circumstances, and hence generally, even if not invariably, upon the judgment of the jury. The subject has been less considered in this court, but in none of its opinions is there a suggestion that at any and every crossing the duty to stop is absolute, irrespective of the danger. Not even in *B. & O. R. Co. vs. Goodman, supra*, which goes farther than the earlier cases, is there support for such a rule. To the contrary, the opinion makes it clear that the duty is conditioned upon the presence of impediments whereby sight and hearing become inadequate for the traveler's protection.

Choice between these diversities of doctrine is unnecessary for the decision of the case at hand. Here, the fact is not disputed that the plaintiff did stop before he started to cross the tracks. If we assume that by reason of the box cars, there was a duty to stop again when the obstructions had been cleared, that duty did not arise unless a stop could be made safely after the point of clearance had been reached. *(See e.g., Dobson v. St. Louis-S.F. Ry. Co., supra).* For reasons already stated, the testimony permits the inference that the truck was in the zone of danger by the time the field of vision was enlarged. No stop would then have helped the plaintiff if he remained seated on his truck, or so the triers of the facts might find. His case was for the jury, unless as a matter of law he was subject to a duty to get out of the vehicle before it crossed the switch, walk forward to the front, and then, afoot, survey the scene. We must say whether his failure to do this was negligence so obvious and certain that one conclusion and one only is permissible for rational and candid minds.

Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and *reconnoitre* is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion, the hidden train may be upon him. Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, above five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction. At times the course of safety may be different. One can figure to oneself a roadbed so level and unbroken that getting out will be a gain. Even then the balance of advantage depends on many circumstances and can be easily disturbed. Where was Pokora to leave his truck after getting out to *reconnoitre*? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat. The defendant did not show whether there was a locomotive at the forward end, or whether the cars were so few that a locomotive could be seen. If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless. One must remember that while the traveler turns his eyes in one direction, a train or a loose engine may be approaching from the other.

Illustrations such as these bear witness to the need for caution in framing standards of behavior that amount to rules of law. The need is the more urgent when there is no background of experience out of which the standards have emerged. They are then, not the natural flowerings of behavior in its customary forms, but rules artificially developed, and imposed from without. Extraordinary situations may not wisely or fairly be subjected to tests or regulations that are fitting for the commonplace or normal. In default of the guide of customary conduct, what is suitable for the traveler caught in a mess where the ordinary safeguards fail him is for the judgment of a jury. . . . The opinion in Goodman's Case has been a source of confusion in the federal courts to the extent that it imposes a standard for application by the judge, and has had only wavering support in the courts of the states. We limit it accordingly.

The judgment should be reversed, and the cause remanded for further proceedings in accordance with this opinion.

It is so ordered.

PRECIOLITA V. CORLISS vs. THE MANILA RAILROAD CO.
27 SCRA 674 [1969]

FERNANDO, *J.*:

Youth, the threshold of life, is invariably accompanied by that euphoric sense of well-being, and with reason. The future, bright with promise, looms ahead. One's powers are still to be tested, but one feels ready for whatever challenge may come his way. There is that heady atmosphere of self-confidence, at times carried to excess. The temptation to take risks is there, ever so often, difficult, if not impossible, to resist. There could be then a lessening of prudence and foresight, qualities usually associated with age. For death seems so remote and contingent an event. Such is not always the case though, and a slip may be attended with consequences at times unfortunate, even fatal.

Some such thought apparently was in the mind of the lower court when it dismissed the complaint for recovery of damages filed by plaintiff-appellant, Preciolita V. Corliss, whose husband, the late Ralph W. Corliss, was, at the tender age of twenty-one, the victim of a grim tragedy, when the jeep he was driving collided with a locomotive of defendant-appellee Manila Railroad Company, close to midnight on the evening of February 21, 1957, at the railroad crossing in Balibago, Angeles, Pampanga, in front of the Clark Air Force Base. In the decision appealed from, the lower court, after summarizing the evidence, concluded that the deceased "in his eagerness to beat, so to speak, the oncoming locomotive, took the risk and attempted to reach the other side, but unfortunately he became the victim of his own miscalculation."

The negligence imputed to defendant-appellee was thus ruled out by the lower court, satisfactory proof to that effect, in its opinion, being lacking. Hence, this appeal direct to us the amount sought in the concept of damages reaching the sum of P282,065.40. An examination of the evidence of record fails to yield a basis for a reversal of the decision appealed from. We affirm.

According to the decision appealed from, there is no dispute as to the following: "In December 1956, plaintiff, 19 years of age, married Ralph W. Corliss, Jr., 21 years of age, that Corliss, Jr. was an air police of the Clark Air Force Base; that at the time of the accident, he was driving the fatal jeep; that he was then returning in said jeep, together with a P.C. soldier, to the Base; and that Corliss, Jr. died of serious burns at the Base Hospital the next day, while the soldier sustained serious physical injuries and burns."

Then came a summary of the testimony of two of the witnesses for plaintiff-appellant. Thus: "Ronald J. Ennis, a witness of the plaintiff, substantially declared in his deposition, that at the time of the accident, he was awaiting transportation at the entrance of Clark Field, which was about 40 to 50 yards away from the tracks and that while there he saw the jeep coming towards the Base. He said that said jeep slowed down before reaching the crossing, that it made a brief stop but that it did not stop — dead stop.

Elaborating, he declared that while it was slowing down, Corliss, Jr. shifted into first gear and that was what he meant by a brief stop. He also testified that he could see the train coming from the direction of San Fernando and that he heard a warning but that it was not sufficient enough to avoid the accident." Also: "Virgilio de la Paz, another witness of the plaintiff, testified that on the night of February 21, 1957, he was at the Balibago checkpoint and saw the train coming from Angeles and a jeep going towards the direction of Clark Field. He stated that he heard the whistle of the locomotive and saw the collision. The jeep, which caught fire, was pushed forward. He helped the P.C. soldier. He stated that he saw the jeep running fast and heard the tooting of the horn. It did not stop at the railroad crossing, according to him."

After which reference was made to the testimony of the main witness for defendant-appellee, Teodorico Capili, "who was at the engine at the time of the mishap," and who "testified that before the locomotive, which had been previously inspected and found to be in good condition, approached the crossing, that is, about 300 meters away, he blew the siren and repeated it in compliance with the regulations until he saw the jeep suddenly spurt, and that although the locomotive was running between 20 and 25 kilometers an hour and although he had applied the brakes, the jeep was caught in the middle of the tracks."

[The Supreme Court ruled that the above finding as to the non-existence of negligence attributable to defendant-appellee Manila Railroad Company is binding following the rule that findings of fact of the trial court are binding on the appellate court.]

x x x

Nor is the result different even if no such presumption were indulged in and the matter examined as if we were exercising original and not appellate jurisdiction. The sad and deplorable situation in which plaintiff-appellant now finds herself, to the contrary notwithstanding, we find no reason for reversing the judgment of the lower court.

This action is predicated on negligence, the Civil Code making clear that whoever by act or omission causes damage to another, there being negligence, is under obligation to pay for the damage done. Unless it could be satisfactorily shown, therefore, that defendant-appellee was guilty of negligence then it could not be held liable. The crucial question, therefore, is the existence of negligence.

The above Civil Code provision, which is reiteration of that found in the Civil Code of Spain, formerly applicable in this jurisdiction, had been interpreted in earlier decisions. Thus, in *Smith vs. Cadwallader Gibson Lumber Co.*, Manresa was cited to the following effect: "Among the questions most frequently raised and upon which the majority of cases have been decided with respect to the application of this liability, are those referring to the determination of the damage or prejudice, and to the fault or negligence of the person responsible therefor. These are the two indispensable factors in

the obligations under discussion, for without damage or prejudice there can be no liability, and although this element is present no indemnity can be awarded unless arising from some person's fault or negligence."

Negligence was defined by us in two 1912 decisions, *United States vs. Juanillo and United States v. Barias Cooley's* formulation was quoted with approval in both the Juanillo and Barias decisions. Thus: "Judge Cooley, in his work on Torts (3d ed.), Sec. 1324, defines negligence to be: 'The failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury.'" There was likewise a reliance on *Ahern vs. Oregon Telephone Co.* Thus: "Negligence is want of the care required by the circumstances. It is a relative or comparative, not an absolute term and its application depends upon the situation of the parties and the degree of care and vigilance which the circumstances reasonably require. Where the danger is great, a high degree of care is necessary, and the failure to observe it is a want of ordinary care under the circumstances."

To repeat, by such a test, no negligence could be imputed to defendant-appellee, and the action of plaintiff-appellant must necessarily fail. The facts, being what they are, compel the conclusion that the liability sought to be fastened on defendant-appellee had not arisen.

Plaintiff-appellant, in her brief, however, would seek a reversal of the judgment appealed from on the ground that there was a failure to appreciate the true situation. Thus, the first three assigned errors are factual in character. The third assigned error could be summarily disposed of. It would go against the evidence to maintain the view that the whistle was not sounded and the brakes not applied at a distance of 300 meters before reaching the crossing.

The first two assigned errors would make much of the failure of the lower court to hold that the crossing bars not having been put down and there being no guard at the gate-house, there still was a duty on the part of Corliss to stop his jeep to avoid a collision and that Teodorico Capili, who drove the engine, was not qualified to do so at the time of the accident. For one cannot just single out a circumstance and then confidently assign to it decisive weight and significance. Considered separately, neither of the two above errors assigned would call for a judgment different in character. Nor would a combination of acts allegedly impressed with negligence suffice to alter the result. The quantum of proof required still had not been met. The alleged errors fail of their desired effect. The case for plaintiff-appellant, such as it was, had not been improved. There is no justification for reversing the judgment of the lower court.

It cannot be stressed too much that the decisive considerations are too variable, too dependent in the last analysis upon a common sense estimate of the situation as it presented itself to the parties for us to be able to say that this or that element having been isolated, negligence is shown. The factors that enter the judgment are too many and diverse for us to imprison them in

the formula sufficient of itself to yield the correct answer to the multi-faceted problems the question of negligence poses. Every case must be dependent on its facts. The circumstances indicative of lack of due care must be judged in the light of what could reasonably be expected of the parties. If the objective standard of prudence be met, then negligence is ruled out.

In this particular case, it would be to show less than fidelity to the controlling facts to impute negligence to defendant-appellee. The first three errors assigned certainly do not call for that conclusion.

x x x

What Justice Cardozo announced would merely emphasize what was set forth earlier that each and every case on questions of negligence is to be decided in accordance with the peculiar circumstances that present themselves. There can be no hard and fast rule. There must be that observance of the degree of care, precaution, and vigilance which the situation demands. Thus, defendant-appellee acted. It is undeniable then that no negligence can rightfully be imputed to it.

What commends itself for acceptance is this conclusion arrived at by the lower court: "Predicated on the testimonies of the plaintiff's witnesses, on the knowledge of the deceased and his familiarity with the setup of the checkpoint, the existence of the tracks; and on the further fact that the locomotive had blown its siren or whistle, which was heard by said witnesses, it is clear that Corliss, Jr. was so sufficiently warned in advance of the oncoming train that it was incumbent upon him to avoid a possible accident — and this consisted simply in stopping his vehicle before the crossing and allowing the train to move on. A prudent man under similar circumstances would have acted in this manner. This, unfortunately, Corliss, Jr. failed to do."

VICTORINO CUSI and PILAR POBRE vs. PHILIPPINE NATIONAL RAILWAYS
G.R. No. L-29889, May 31, 1979

GUERRERO, *J.*:

Direct appeal from the decision of the Court of First Instance of Rizal ordering defendant-appellant to indemnify the plaintiffs-appellees in the total amount of Two Hundred Thirty-Nine Thousand and Six Hundred Forty-Eight Pesos, and Seventy-Two Centavos (P239,648.72) for injuries received in a collision caused by the gross negligence of defendant-appellant, plus Ten Thousand Pesos (P10,000.00) as attorney's fees and expenses of litigation.

Upon the amended and supplemental complaints for damages filed by plaintiffs-appellees, the spouses Victorino Cusi and Pilar Pobre before the Court of First Instance of Rizal against the Manila Railroad Company, now the Philippine National Railways and duly answered by the latter and after due hearing, the following facts appear as undisputed: On the night

of October 5, 1963, plaintiffs-appellees attended a birthday party inside the United Housing Subdivision in Parañaque, Rizal. After the party which broke up at about 11 o'clock that evening, the plaintiffs-appellees proceeded home in their Vauxhall car with Victorino Cusi at the wheel. Upon reaching the railroad tracks, finding that the level crossing bar was raised and seeing that there was no flashing red light, and hearing no whistle from any coming train, Cusi merely slackened his speed and proceeded to cross the tracks. At the same time, a train bound for Lucena traversed the crossing, resulting in a collision between the two. The impact threw the plaintiffs-appellees out of their car which was smashed. One Benjamin Franco, who came from the same party and was driving a vehicle right behind them, rushed to their aid and brought them to San Juan de Dios Hospital for emergency treatment. Later, the plaintiffs-appellees were transferred to the Philippine General Hospital. A week later, Mrs. Cusi transferred to the Manila Doctors Hospital where Dr. Manuel Rivera, head of the Orthopedic and Fracture Service of the Philippine General Hospital, performed on her a second operation and continued to treat her until her discharge from the hospital on November 2, 1963. Thereafter, Dr. Rivera treated her as an out-patient until the end of February, 1964 although by that time the fractured bones had not yet healed. Mrs. Cusi was also operated on by Dr. Francisco Aguilar, Director of the National Orthopedic Hospital, in May, 1964 and in August, 1965, after another operation in her upper body from the chest to the abdomen, she was placed in cast for some three (3) months and her right arm immobilized by reason of the cast.

x x x

As the action is predicated on negligence, the New Civil Code making clear that "whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done," the crucial question posed in the petition at bar is the existence of negligence on the part of defendant-appellant as found by the lower court.

1. The question of negligence being one of fact, the lower court's finding of negligence on the part of the defendant-appellant deserves serious consideration by the Court. It commands great respect and weight, the reason being that the trial judge, having the advantage of hearing the parties testify and of observing their demeanor on the witness stand, is better situated to make conclusions of facts. Thus, it has been the standing practice of appellate courts to accord lower court's judgments the presumption of correctness. And unless it can be shown that error or errors, substantial in character, be shown in the conclusion arrived at, or that there was abuse in judicial scrutiny, We are bound by their judgments. On this ground alone. We can rest the affirmance of the judgment appealed from.

2. Nor is the result different even if no such presumption were indulged in, that is, even if We were to resolve whether or not there exist compelling reasons for an ultimate reversal.

The judicial pronouncement below that the gross negligence of defend-

ant-appellant was the proximate cause of the collision has been thoroughly reviewed by this Court and we fully affirm the same.

Negligence has been defined by Judge Cooley in his work on Torts (3d. ed.), sec. 1324 as "the failure to observe for the protection of the interests of another person that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury." By such a test, it can readily be seen that there is no hard and fast rule whereby such degree of care and vigilance is measured, it is dependent upon the circumstances in which a person finds himself so situated. All that the law requires is that it is always incumbent upon a person to use that care and diligence expected of reasonable men under similar circumstances.

These are the circumstances attendant to the collision. Undisputably, the warning devices installed at the railroad crossing were manually operated; there were only 2 shifts of guards provided for the operation thereof — one, the 7:00 A.M. to 3:00 P.M. shift, and the other, the 3:00 P.M. to 11:00 P.M. shift. On the night of the accident, the train for Lucena was on an unscheduled trip after 11:00 P.M. During that precise hour, the warning devices were not operating for no one attended to them. Also, as observed by the lower court, the locomotive driver did not blow his whistle, thus: ". . . he simply sped on without taking an extra precaution of blowing his whistle from a distance of 50 to 10 meters from the crossing. That the train was running at full speed is attested to by the fact that notwithstanding the application of the emergency brakes, the train did not stop until it reached a distance of around 100 meters."

These facts assessed together show the inadequacy, nay, the absence, of precautions taken by the defendant-appellant to warn the travelling public of the impending danger. It is clear to Us that as the signal devices were wholly manually-operated, there was an urgent need for a flagman or guard to man the crossing at all times. As it was, the crossing was left unattended to after eleven o'clock every night and on the night of the accident. We cannot in all reason justify or condone the act of the defendant-appellant allowing the subject locomotive to travel through the unattended crossing with inoperative signal devices, but without sending any of its employees to operate said signal devices so as to warn oncoming motorists of the approach of one of its locomotives. It is not surprising therefore that the inoperation of the warning devices created a situation which was misunderstood by the riding public to mean safe passage. Jurisprudence recognizes that if warning devices are installed in railroad crossings, the travelling public has the right to rely on such warning devices to put them on their guard and take the necessary precautions before crossing the tracks. A need, therefore, exists for the railroad company to use reasonable care to keep such devices in good condition and in working order, or to give notice that they are not operating, since if such a signal is misunderstood it is a menace. Thus, it has been held that if a railroad company maintains a signalling device at a crossing to give warning of the approach of a train, the failure of the device to operate is generally held to be evidence of negligence, which maybe considered with all the circumstances of the case in determining whether the railroad company

was negligent as a matter of fact.

The set of circumstances surrounding the collision subject of this case is very much similar to that of *Lilius vs. Manila Railroad Company*, 59 Phil. 758 (1934), where this Court upheld the lower court's finding of negligence on the part of defendant locomotive company upon the following facts —

> ". . . on the part of the defendant company, for not having had on that occasion any semaphore at the crossing at Dayap, to serve as a warning to passersby of its existence in order that they might take the necessary precautions before crossing the railroad; and, on the part of its employees — the flagman and switchman, for not having remained at his post at the crossing in question to warn passersby of the approaching train; the station master, for failure to send the said flagman and switchman to his post on time; and the engineer, for not having taken the necessary precautions to avoid an accident, in view of the absence of said flagman and switchman, by slackening his speed and continuously ringing the bell and blowing the whistle before arriving at the crossing."

Defendant-appellant rests its defense mainly on Section 56(a) of the Motor Vehicle Law. Thus:

> "Section 56(a) — Traversing through streets and railroad crossing, etc. — All vehicles moving on the public highways shall be brought to a full stop before traversing any 'through street' or railroad crossing. Whenever any such 'through street' or crossing is so designated and signposted, it shall be unlawful for the driver of any vehicle to fail to stop within twenty meters but not less than two and one-half meters from such 'through street' or railroad crossing."

The defense presupposes that the failure of plaintiffs-appellees to stop before proceeding to traverse the crossing constitutes contributory negligence, thereby precluding them from recovering indemnity for their injuries and damages.

The candor of defendant-appellant in interposing such a defense is doubtful. As seemingly observed by the lower court, the defense, through inadvertence or deliberateness, did not pursue further the excepting clause of the same section, thus to go on:

> "Provided, however, that the driver of a passenger automobile or motorcycle may instead of coming to a full stop, slow down to not more than ten kilometers per hour whenever it is apparent that no hazard exists."

After a thorough perusal of the facts attendant to the case, this Court is in full accord with the lower court. Plaintiff-appellee Victorino Cusi had exercised all the necessary precautions required of him as to avoid injury to himself and to others. We find no need for him to have made a full stop; relying on his faculties of sight and hearing, Victorino Cusi had no reason to

anticipate the impending danger. The record shows that the spouses Cusi previously knew of the existence of the railroad crossing, having stopped at the guardhouse to ask for directions before proceeding to the party. At the crossing, they found the level bar raised, no warning lights flashing nor warning bells ringing, nor whistle from an oncoming train. They safely traversed the crossing. On their return home, the situation at the crossing did not in the least change, except for the absence of the guard or flagman. Hence, on the same impression that the crossing was safe for passage as before, plaintiff-appellee Victorino Cusi merely slackened his speed and proceeded to cross the tracks, driving at the proper rate of speed for going over railroad crossings. Had defendant-appellant been successful in establishing that its locomotive driver blew his whistle to warn motorists of his approach to compensate for the absence of the warning signals, and that Victorino Cusi, instead of stopping or slackening his speed, proceeded with reckless speed and regardless of possible or threatened danger, then We would have been put in doubt as to the degree of prudence exercised by him and would have, in all probability, declared him negligent. But as the contrary was established, we remain convinced that Victorino Cusi had not, through his own negligence, contributed to the accident so as to deny him damages from the defendant-appellant.

6. OTHER FACTORS TO CONSIDER IN DETERMINING NEGLIGENCE

There are certain cases where other factors determine the presence or absence of negligence. Discussed hereunder are the effects of violation of statute and rules, practice and custom.

A. VIOLATION OF RULES AND STATUTES.

a. Statutes and Ordinances.

Violation of statute may be treated either as (1) a circumstance which establishes a presumption of negligence, (2) negligence *per se* or (3) a circumstance which should be considered together with other circumstances as evidence of negligence. *(Marinduque Iron Mines Agents, Inc. vs. The Workmen's Compensation Commission, 99 Phil. 480, 484-485 [1956]).* It is up to the legislature or the Court to select which competing theory should be applied in a particular jurisdiction.

In several cases, the Supreme Court consistently held that violation of statutory duty is negligence *per se. (Cipriano vs. Court of Appeals, 263 SCRA 711, 717 [1996]; F.F. Cruz and Co., Inc. vs. Court of Appeals, 164 SCRA 731 [1988]; Teague vs. Fernandez, 51 SCRA 181).* "The reason for this rule is that the statute or ordinance becomes the standard of care or conduct to which the reasonably prudent person is held. Failure to follow the statute involved constitutes a breach

of the legal duty imposed and fixed by the statute. Since negligence is a breach of legal duty, the violator of a statute is then negligent as a matter of law." *(Walz vs. Hudson, 327 N.W. 2d 120 [1982]).* At times, the definite and inflexible standard of care of the traditional reasonably prudent man may be, in the opinion of the Legislature, an insufficient measure of the care that should be exercised to guard against a recognized danger. The Legislature may, by statute, prescribe additional safeguards and may define the duty and standard of care in rigid terms. When the Legislature has spoken, the standard of care required is no longer what the reasonably prudent man would do under the circumstances but what the Legislature has commanded. *(Tedla vs. Ellman, 280 N.Y. 124, 19 N.E. 2D 987 [1939]).*

However, not all statutory enactments prescribe inflexible commands that must be followed. Some may prescribe general rules of conduct which must be followed under usual conditions. When unusual conditions occur, strict observance may defeat the purpose of the rule and may even lead to adverse results. *(Tedla vs. Ellman, ibid.).* For instance, a statute or ordinance requiring all persons to walk on the sidewalk may be construed as subject to an exception permitting pedestrians to walk on the road itself, if doing so will prevent an accident.

Moreover, there are specific cases when the statute expressly provides that violation of statutory duty merely establishes a presumption of negligence. These include cases covered by Articles 2184 and 2185 of the Civil Code.

The rule that violation of statute is negligence *per se* was applied in *F.F. Cruz and Co. Inc. vs. Court of Appeals* (164 SCRA 733 [1988]). In the said case, the defendant was found guilty of negligence since it failed to construct a firewall between its property and plaintiff's residence that sufficiently complies with the pertinent city ordinances. As a result, the plaintiff's house was burned when fire originating from defendant's furniture manufacturing shop spread to plaintiff's house.

b. Administrative Rules.

With respect to the rules promulgated by administrative agencies, the Supreme Court observed in one case that "there is practically unanimity in the proposition that violation of a rule promulgated by a Commission or Board is not negligence *per se* but it may be evidence of negligence." *(Marinduque Iron Mines Agents, Inc. vs. The Workmen's Compensation Commission, supra, citing C.J.S., Vol. 65, p. 427).*

However, in *Cipriano vs. Court of Appeals (supra),* the Supreme Court considered violation of a Ministry (Department) Order which was issued pursuant to and to implement a statute as negligence *per se*. Petitioner in said case was the owner of an establishment engaged in rustproofing of vehicles. Private respondent's car, that was brought to the petitioner's shop for rustproofing, was burned when fire destroyed the same shop. It was established later that petitioner failed to comply with the requirement of Presidential Decree No. 1572 to register with the Department of Trade and Industry as well as Ministry Order No. 32 issued by the same Department requiring all covered enterprises to secure insurance coverage. Such failure to comply with the statute and administrative regulation was considered negligence *per se*.

c. Private Rules of Conduct.

The same rule applies to rules imposed by private individuals like an employer. The order or prohibition of an employer "couldn't be of greater obligation than the rule of a Commission or Board" and violation thereof is merely a "possible evidence of negligence." *(Marinduque Iron Mines Agents, Inc. vs. The Workmen's Compensation Commission, supra).* In the last cited case, the employees of the petitioner were prohibited by the employer from riding its hauling trucks. One of the employees violated such prohibition and rode one of the truck. The same employee died because the truck turned over and hit a coconut tree while the driver was negligently trying to overtake another truck. The heirs of the deceased were able to recover despite his violation of the rules of the employer.

d. Proximate Cause.

It is important to emphasize, however, that in any event, the requisites of quasi-delict must still be complete before an action based thereon can prosper. Although violation of statute is negligence *per se* (or even in case negligence is merely presumed), the plaintiff must still present proof that the proximate cause of his injury is the negligence of the defendant. Proof must be presented that there was causal connection between the negligence or violation of statute and the injury. Absent such proof, the defendant will not be held liable. *(Honoria Delgado Vda. de Gregorio, et al. vs. Go Chong Bing, 102 Phil. 556 [1957]; Dunkle, et al. vs. Emil Landert, 23 CAR 2s 1083).* In other words, the rule that no liability attaches unless it appears that there was a causal connection between the negligent act or omission charged and the injury is applicable where the act or omission complained of constitutes a violation of some statute or ordinance

even though such violation constitutes negligence *per se* or is *prima facie* evidence of negligence. *(65 CJS 1143-1144).* Hence, the Supreme Court ruled in *United States vs. Bonifacio (supra)* that even if the driver violated traffic rules by going beyond the speed limit, there would still be no liability on account thereof because causal relation was not established. Thus, the Supreme Court explained:

The provisions of Article 568 of the Criminal Code under which the accused was convicted are as follows:

x x x x x x x x x

"Any person who, while violating any regulation, shall, by any act imprudence or negligence not amounting to reckless imprudence, commit an offense, shall suffer the penalty of *arresto mayor* in its medium and maximum degrees."

This does not mean that in every case in which one accidentally injures or kills another he is criminally liable therefor, if at the moment he happens to be guilty of a violation of some petty regulation (reglamento). The injury or death must have resulted from some "imprudence or negligence" (imprudencia or negligencia) on his part. True, it need only be slight negligence, if accompanied by a violation of the regulations, but the relation of cause and effect must exist between the negligence or imprudence of the accused and the injury inflicted. If it appears that the injury in no wise resulted from the violation of the regulations, or the negligent conduct of the accused, he incurs no criminal liability under the provisions of this article.

Viada, in his commentaries on this article of the Penal Code (vol. 3, p. 685), sets out the following question and answer which clearly discloses that a conviction thereunder cannot be maintained, unless there was culpable negligence in the violation of a duly prescribed regulation; and unless, further, the latter was the proximate and immediate cause of the injury inflicted:

"Question No. 17. — A pharmacist left his store forgetting and leaving behind the keys to the case where the most powerful drugs were kept. During his absence his clerk filed a prescription which he believed was duly made out by a physician but which, in fact, was signed by an unauthorized person. The prescription called for certain substances which were afterwards employed to procure an abortion. These substances, according to a medical report, were of a poisonous and extremely powerful nature such as should be most carefully safeguarded and only expended after ratification of the prescription in accordance with article 20 of the ordinance relating to the practice of pharmacy. Under these circumstances would it be proper to consider the pharmacist as

guilty of the offense of simple imprudence with violation of the regulation of the said faculty? The Supreme Court has decided this question in the negative on the ground that the fact of the pharmacist having forgotten and left behind, during the short time he was out walking, the key of the closet in which, in conformity with the pharmacy ordinances, he kept the most powerful and active drugs, properly considered, does not constitute the culpable negligence referred to in Article 581 of the Penal Code, nor was it the proximate and immediate cause of the said prescription being filled in his store without being properly ratified by the physician who signed it, as required by the said ordinances. The Court held, therefore, that the trial court committed an error of law in holding the appellant liable. *(Decision of December 23, 1881; Official Gazette of April 14, 1832).*"

See also the recent decision of the Tribunal Supremo de España dated July 11, 1906, wherein the doctrine is reaffirmed in a case involving the alleged negligence of certain railroad employees in handling railroad cars.

Doubtless a presumption of negligence will frequently arise from the very fact that an accident occurred at the time when the accused was violating a regulation; especially if the regulation has for its object the avoidance of such an accident. But this presumption may, of course, be rebutted in criminal as well as in civil cases by competent evidence. In the Federal Court of the United States the rule is stated as follows:

"Where a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions the burden is upon her of showing that her fault could not have been a contributory cause of the collision." (7 Cyc., 370 and numerous other cases there cited).

The evidence of record in the case at bar clearly and satisfactorily discloses that even if the train was running at a speed slightly in excess of the maximum speed prescribed in the regulations, that fact had no causal relation to the accident and in no wise contributed to it."

The Supreme Court reiterated the rule in *Sanitary Steam Laundry, Inc. vs. Court of Appeals* (300 SCRA 20 [1998]). In the said case, the petitioner claimed that the defendant corporation was negligent because it violated Article III, Section 2 of R.A. No. 4136, known as the Land Transportation and Traffic Code, which provides that "no person operating any vehicle shall allow more passengers or more freight or cargo in his vehicle than its registered carry capacity" and Article IV, Section 3(e) which states that "every motor vehicle of more than one meter of projected width, while in use on any public high-

way shall bear tow headlights . . . which not later than one-half hour after sunset and until at least one-hour before sunrise and whenever weather conditions so require, shall both be lighted." The Supreme Court explained that the alleged violations contributed to the collision between the vehicles. The petitioner, however, had the burden of showing a causal connection between the injury received and the violation of the Land Transportation and Traffic Code. He must show that the violation of the statute was the proximate or legal cause of the injury or that it substantially contributed thereto. Negligence, consisting in whole or in part, of violation of law, like any other negligence, is without legal consequence unless it is a contributing cause of the injury (pp. 26-29).

In some cases, however, proof of violation of statute and damage to the plaintiff may itself establish proximate cause. These are cases where the damage to the plaintiff is the damage which is sought to be prevented by the statute. *(Teague vs. Fernandez, 51 SCRA 181 [1973]).*

CASE:

VDA. DE GREGORIO vs. GO CHING BING
102 Phil. 556 [1957]

This is an appeal from a judgment of the Court of First Instance of Davao absolving defendant from liability for the accidental death of Quirico Gregorio. It came to this Court as the amount demanded in the complaint is more than P50,000.

On or before June 2, 1952, defendant was the owner of a truck. He had a driver and a cargador or driver's helper by the name of Francisco Romera. In the afternoon of June 2, 1952, defendant ordered Romera to drive his truck, with instructions to follow another truck driven by his driver and help the latter in crossing Sumlog river which was then flooded, should it be unable to cross the river because of the flood. Romera at that time was not a licensed driver. He only had a student's permit, issued to him on March 31, 1952 (Exhibit "1"). The truck started from the town of Lupon at about 5:30 o'clock in the afternoon, driven by Romera. Some persons boarded the truck and among them was one policeman by the name of Venancio Orfanel. While the truck was on the way, it made a stop and then Orfanel took the wheel from Romera, while the latter stayed on the driver's left, reclined on a spare tire inside of the truck. As to the circumstances under which Orfanel was able to take hold of and drive the truck, there is some dispute and this matter will be taken up later in the decision.

While the truck was being driven by Orfanel, with another truck ahead

of it driven by defendant's driver, it so happened that they came to a truck that was trying to park on the left side of the road. Romera suggested to Orfanel that he shift to low gear and Orfanel did so. But as they approached the parking truck, and in order to avoid colliding with it, Orfanel swerved the truck towards the right. It so happened that at that time two pedestrians were on the right side of the road. As the truck had swerved to the right and was proceeding to hit the said pedestrians, Romera told Orfanel to apply the brake, but Orfanel instead of doing so put his foot on the gasoline and the truck did not stop but went on and hit and ran over one of the pedestrians, by the name of Quirico Gregorio. The plaintiffs-appellants in this action are Gregorio's widow and his children and heirs. Because of the accident, Orfanel was prosecuted for homicide with reckless imprudence. He pleaded guilty to the charge and was sentenced accordingly.

As hinted above, an important issue in the case has relation to the circumstances under which Orfanel was able to take hold of the wheel and drive the truck. To sustain the theory that defendant's cargador Francisco Romera was negligent, plaintiffs introduced one Javier A. Dayo as a witness. According to this witness the truck was speeding at the rate of 20 miles an hour. According to him also, while the truck was about to pass by the house of one Lucio, running at a speed of 20 miles per hour, he heard Romera shouting "hand brake! hand brake!"; that both Orfanel and Romera tried to turn the driver's wheel to the left and direct the truck towards the left to avoid the collision. According to this witness also, Romera gave the wheel to Orfanel voluntarily upon the request of the latter.

Plaintiffs also sought to prove that Romera gave the truck voluntarily to the policeman by presenting the affidavit of Romera made on June 3, 1952 (Exhibit "1"). This affidavit, however, is inadmissible as evidence against the defendant because it is hearsay with respect to him. It may not be considered as part of the *res gestae* either, because the affidavit was taken one day after the incident.

Against the above evidence, the defendant testified that he gave positive instructions to Romera not to allow anybody to drive the truck, and Romera himself testified that he had warned Orfanel that his master prohibited him from allowing anybody to drive the truck, but that as Orfanel was a uniformed policeman and insisted that he drive the truck, and that as he believed that the policeman knew how to drive, he let him drive the truck.

We are of the belief that defendant's claim that Romera gave the wheel to the policeman for fear of, or out of respect for, the latter, has been proved by a preponderance of the evidence. The testimony of witness Dayo is not corroborated by any other testimony. As he testified that he was two meters behind Romera, he could not have noticed with exactness the circumstances under which the policeman was able to get hold of the wheel and drive the truck and his testimony in that respect cannot be believed. We are, therefore, forced to the conclusion that the defendant's cargador, or Francisco Romera, gave the wheel to Orfanel out of respect for the latter, who was a uniformed policeman and because he believed that the latter had both the ability and

the authority to drive the truck, especially as he himself had only a student's permit and not a driver's license.

The court *a quo* dismissed the action on the ground that as the death or accident was caused by an act or omission of a person who is not in any way related to the defendant, and as such act or omission was punishable by law, and as a matter of fact he had already been punished therefor, no civil liability should be imposed upon the defendant. Against this decision the plaintiffs have appealed to this Court, contending that when defendant permitted his cargador, who was not provided with a driver's license, to drive the truck, he thereby violated the provisions of the Revised Motor Vehicle Law *(section 28, Act No. 3992),* and that this constitutes negligence *per se. (People vs. Santos, et al., CA-G.R. Nos. 1088-1089R).* But admitting for the sake of argument that the defendant had so violated the law, or may be deemed negligent in entrusting the truck to one who is not provided with a driver's license, it is clear that he may not be declared liable for the accident because his negligence was not the direct and proximate cause thereof. The leading case in this jurisdiction on negligence is that of *Taylor vs. Manila Electric Railroad and Light Company (16 Phil. 8).* Negligence as a source of obligation both under the civil law and in American cases was carefully considered and it was held:

"We agree with counsel for appellant that under the Civil Code, as under the generally accepted doctrine in the United States, the plaintiff in an action such as that under consideration, in order to establish his right to a recovery, must establish by competent evidence:

"(1) Damages to the plaintiff.

"(2) Negligence by act or omission of which defendant personally, or some person for whose acts it must respond, was guilty.

"(3) The connection of cause and effect between the negligence and the damage." *(Taylor vs. Manila Electric Railroad and Light Co., supra, p. 15).*

In accordance with the decision of the Supreme Court of Spain, in order that a person may be held guilty for damage through negligence, it is necessary that there be an act or omission on the part of the person who is to be charged with the liability and that damage is produced by the said act or omission.

"In accordance with the fundamental principle of proof, that the burden thereof is upon the plaintiff, it is apparent that it is the duty of him who shall claim damages to establish their existence. The decisions of April 9, 1896, and March 18, July 6, and September 27, 1898, have especially supported the principle, the first setting forth in detail the necessary points of the proof, which are two: An Act or omission on the part of the person who is to be charged with the liability, and the production of the damage by said act or omission.

"This includes, by inference, the establishment of relation of cause or

effect between the act or the omission and the damage; the latter must be the direct result of one of the first two. As the decision of March 22, 1881, said, it is necessary that the damages result immediately and directly from an act performed culpably and wrongfully; 'necessarily presupposing a legal ground for imputability.'" *(Taylor vs. Manila Electric Railroad and Light Co., supra, p. 28).*

It is evident that the proximate, immediate and direct cause of the death of the plaintiffs' intestate was the negligence of Orfanel, a uniformed policeman, who took the wheel of the truck from defendant's cargador, in spite of the protest of the latter. The reason for absolving the defendant therefor is not because the one responsible for the accident had already received indemnification for the accident, but because there is no direct and proximate causal connection between the negligence or violation of the law by the defendant to the death of the plaintiffs' intestate.

e. Negligence *per se* rule reconsidered.

Statutes may also provide specific rules of conduct to be observed in a given situation and may even impose penal sanctions in case the rule is not observed. In those cases, the law already determines in advance what a reasonable man should do under certain circumstances. Example of statutes that provide for specific rules are the National Building Code and the Fire Code of the Philippines.

More specific rules are likewise provided for by administrative agencies that are tasked to enforce and implement statutory mandate. In the field of environmental protection, for instance, administrative agencies may provide for specific guidelines pointing out what every individual is supposed to do before proceeding with a particular project. Thus, the rules of the Laguna Lake Development Authority provide for specific requirements before an industrial development can proceed in its area of jurisdiction. Similarly, the Department of Environment and Natural Resources may promulgate rules specifying particular acts that must be performed by owners of commercial establishments and the equipment that should be installed by them.

As explained earlier, the weight of authority is that violation of statute is negligence *per se*. Although there is authority for the view that violation of administrative rules merely constitute evidence of negligence on the part of the violator, there is also authority for the view that violation of administrative rules is also negligence *per se*. It is believed that the better rule is to consider violation of statute or administrative rules as a circumstance that gives rise to a presumption of negligence unless the law provides otherwise. It is not consistent with the demands of justice and equity to put citizens in straightjackets consisting of detailed prescriptions with no room for

exceptions or discretion.

Legal theorist *H.L.A. Hart* commented that communications of standards of behaviour, however smoothly they work over the great mass of ordinary cases, will, at some point where their application is in question, prove indeterminate. They will have what has been termed an "open texture." He went on further to explain:

> "x x x So far we have presented this, in the case of legislation, as a general feature of human language; uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open-textured. It is, however, important to appreciate why, apart from this dependence on language as it actually is, with its characteristics of open texture, we should not cherish, even as an ideal, the conception of a rule so detailed that the question whether it applied or not to a particular case was always settled in advance, and never involved, at the point of actual application, a fresh choice between open alternatives. Put shortly, the reason is that the necessity for such choice is thrust upon us because we are men, not gods. It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact; the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility. We could make rules, the application of which to particular cases never called for a further choice. Everything could be known, and for everything, since it could be known, something could be done and specified in advance by rule. This would be a world fit for 'mechanical' jurisprudence.
>
> Plainly, this world is not our world; human legislators can have no such knowledge of all possible combinations of circumstances which the future may bring. This inability to anticipate brings with it a relative indeterminacy of aim. x x x" *(H.L.A. Hart, Concept of the Law, 1997 Ed., p. 128).*

The rigidity of the rule that violation of statute is negligence *per se* would necessarily result in a finding of negligence even if they should be excluded from the operation of the rule "to give effect to reasonable social aims." On the other hand, the rule that will give rise merely to a presumption of negligence would give room for human handicaps to operate. It will allow the defendant in negligence

cases to prove that his case is one of those unanticipated cases where the rule is inapplicable. There would be no harm to the injured party because if the said harm caused by the defendant is the harm sought to be prevented by the statute, then it can only mean that the defendant will not be able to rebut the presumption of negligence.

This view is a matter of equity and is supported by the philosophical musings of the great Aristotle in his extremely influential writing *Nicomachean Ethics* (Book 5, x, 3-7). He expounded that:

> "The source of the difficulty is that equity, though just, is not legal justice, but a rectification of legal justice. The reason for this is that law is always a general statement, yet there are cases which is not possible to cover in a general statement. In matters therefore, where, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognisant of the case in question. Hence, while the equitable is just, and is superior to one sort of justice, it is not superior to absolute justice, but only to the error due to its absolute statement. This is the essential nature of the equitable; it is a rectification of law where law is defective because of its generality. In fact, this is the reason why things are not all determined by law; it is because there are some cases for which it is impossible to lay down a law, so that a special ordinance becomes necessary. For what is itself indefinite can only be measured by an indefinite standard, like the leaden rule used by Lesbian builders; just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case." *(Harris Rackham translation, 1996 Ed., pp. 133-134).*

B. PRACTICE AND CUSTOM.

Justice Holmes said that "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *(Texas & Pac. Ry. vs. Behymer, 189 U.S. 468, 470 [1903]).* Such statement is equally applicable in this jurisdiction. Compliance with the practice and custom in a community will not automatically result

in a finding that the actor is not guilty of negligence. On the other hand, non-compliance with the custom or practice in a community does not necessarily mean that the actor was negligent.

The rule was applied by the Supreme Court in *Yamada vs. Manila Railroad Co. (33 Phil. 11, 12-13 [1915]).* In that case, an automobile was struck by a train while the former was crossing the tracks. The owner of the automobile tried to establish the absence of negligence on the part of the driver of the automobile by presenting evidence that there was a custom established among automobile drivers of Manila by which they habitually drove their cars over the railroad crossings without slackening speed. The Supreme Court rejected the argument by ruling that: "To this the obvious reply may be made, for the moment admitting the existence of the custom, that a practice which is dangerous to human life cannot ripen into custom which will protect anyone who follows it. To go upon a railroad crossing without making any effort to ascertain the approach of a train is so hazardous an act and one so dangerous to life, that no one may be permitted to excuse himself who does it, provided injury results. One who performs an act so inherently dangerous cannot, when an accident occurs, take refuge behind the plea that others have performed the same act safely."

It could very well be that the custom in a community is the correct way of doing things under certain circumstances. The way of doing things in a particular situation may, in fact, have ripened into custom precisely because it is how a reasonable man would act under the same circumstances. The very reason why they have been permitted by society is that they are beneficial rather than prejudicial *(S.D. Martinez v. Van Buskirk, G.R. No. L-5691, December 27, 1910).*

CASE:

S. D. MARTINEZ, et al. vs. WILLIAM VAN BUSKIRK
G.R. No. L-5691, December 27, 1910

MORELAND, *J.*:

The facts found by the trial court are undisputed by either party in this case. They are —

"That on the 11th day of September, 1908, the plaintiff, Carmen Ong de Martinez, was riding in a carromata on Calle Real, district of Ermita, city of Manila, P.I., along the left-hand side of the street as she was going, when a delivery wagon belonging to the defendant used for the purpose of transportation of fodder by the defendant, and to which was attached a pair

of horses, came along the street in the opposite direction to that in which said plaintiff was proceeding, and that thereupon the driver of the said plaintiff's carromata, observing that the delivery wagon of the defendant was coming at great speed, crowded close to the sidewalk on the left-hand side of the street and stopped, in order to give defendant's delivery wagon an opportunity to pass by, but that instead of passing by the defendant's wagon and horses ran into the carromata occupied by said plaintiff with her child and overturned it, severely wounding said plaintiff by making a serious cut upon her head, and also injuring the carromata itself and the harness upon the horse which was drawing it.

x x x x x x x x x

"These facts are not disputed, but the defendant presented evidence to the effect that the cochero, who was driving his delivery wagon at the time the accident occurred, was a good servant and was considered a safe and reliable cochero; that the delivery wagon had sent to deliver some forage at Paco Livery Stable on Calle Herran, and that for the purpose of delivery thereof, the cochero driving the team as defendant's employee tied the driving lines of the horses to the front end of the delivery wagon and then went back inside of the wagon for the purpose of unloading the forage to be delivered; that while unloading the forage and in the act of carrying some of it out, another vehicle drove by the driver of which cracked a whip and made some other noises, which frightened the horses attached to the delivery wagon and they ran away, and the driver was thrown from the inside of the wagon out through the rear upon the ground and was unable to stop the horses; that the horses then ran up and on which street they came into collision with the carromata in which the plaintiff, Carmen Ong de Martinez, was riding."

The defendant himself was not with the vehicle on the day in question.

Upon these facts the court below found the defendant guilty of negligence and gave judgment against him for P442.50, with interest thereon at the rate of 6 percent per annum from the 17th day of October, 1908, and for the costs of the action. The case is before us on an appeal from that judgment.

There is no general law of negligence in the Philippine Islands except that embodied in the Civil Code. The provisions of that code pertinent to this case are —

> "Art. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.
>
> "Art. 1903. The obligation imposed by preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.
>
> "The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.
>
> "Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

> "Owners or directors of an establishment or enterprise are equally liable for the damages caused by the employees in the service of the branches in which the latter may be employed or on account of their duties.
>
> "The State is liable in this sense when it acts through a special agent, but not when the damages should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.
>
> "Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.
>
> "The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage."

Passing the question whether or not an employer who has furnished a gentle and tractable team and a trusty and capable driver is, under the last paragraph of the above provisions, liable for the negligence of such driver in handling the team, we are of the opinion that the judgment must be reversed upon the ground that the evidence does not disclose that the cochero was negligent.

While the law relating to negligence in this jurisdiction may possibly be some what different from that in Anglo-Saxon countries, a question we do not now discuss, the rules under which the fact of negligence is determined are, nevertheless, generally the same. That is to say, while the law designating the person responsible for a negligent act may not be the same here as in many jurisdictions, the law determining what is a negligent act is the same here, generally speaking, as elsewhere. *(Supreme Court of Spain, 4 December, 1903; 16 May, 1893; 27 June, 1894; 9 April, 1896; 14 March, 1901; 2 March, 1904; 7 February, 1905; 16 June, 1905; 23 June, 1905; 13 April, 1903; 7 March, 1902; 12 June, 1900; 2 March, 1907; 18 March, 1898; 3 June, 1901).*

It appears from the undisputed evidence that the horses which caused the damage were gentle and tractable; that the cochero was experienced and capable; that he had driven one of the horses several years and the other five or six months; that he had been in the habit, during all that time, of leaving them in the condition in which they were left on the day of the accident; that they had never run away up to that time and there had been, therefore, no accident due to such practice; that to leave the horses and assist in unloading the merchandise in the manner described on the day of the accident was the custom of all cochero who delivered merchandise of the character of that which was being delivered by the cochero of the defendant on the day in question, which custom was sanctioned by their employers.

In our judgment, the cochero of the defendant was not negligent in leaving the horses in the manner described by the evidence in this case, either under Spanish or American jurisprudence. *(Lynch vs. Nurdin, 1 Q. B., 422;*

Rumsey vs. Nelson, 58 Vt., 590; Drake vs. Mount, 33 N. J. L., 442; Hoboken Land and Improvement Co. vs. Lally, 48 N. J. L., 604; Wasmer vs. D. L. & W. R. R. Co., 80 N. Y., 212).

In the case of *Hayman vs. Hewitt* (Peake N. P. Cas., pt. 2, p. 170), Lord Kenyon said:

> "He was performing his duty while removing the goods into the house, and, if every person who suffered a cart to remain in the street while he took goods out of it was obliged to employ another to look after the horses, it would be impossible for the business of the metropolis to go on.

In the case of *Griggs vs. Fleckenstein* (14 Minn., 81), the court said:

> "The degree of care required of the plaintiff, or those in charge of his horse, at the time of the injury, is that which would be exercised by a person of ordinary care and prudence under like circumstances. It can not be said that the fact of leaving the horse unhitched is in itself negligence. Whether it is negligence to leave a horse unhitched must be depend upon the disposition of the horse; whether he was under the observation and control of some person all the time, and many other circumstances; and is a question to be determined by the jury from the facts of each case."

In the case of *Belles vs. Kellner* (67 N. J. L., 255), it was held that it was error on the part of the trial court to refuse to charge that "it is not negligence for the driver of a quiet, gentle horse to leave him unhitched and otherwise unattended on the side of a public highway while the driver is upon the sidewalk loading goods on the wagon." The said court closed its opinion with these words:

> "There was evidence which could have fully justified the jury in finding that the horse was quiet and gentle, and that the driver was upon the sidewalk loading goods on the wagon, at time of the alleged injury, and that the horse had been used for years in that way without accident. The refusal of the trial court to charge as requested left the jury free to find verdict against the defendant, although the jury was convinced that these facts were proven.

In the case of *Southworth vs. Ry. Co. (105 Mass., 342)*, it was held:

> "That evidence that a servant, whom traders employed to deliver goods, upon stopping with his horse and wagon to deliver a parcel at a house from fifty to a hundred rods from a railroad crossing, left the horse unfastened for four or five minutes while he was in the house, knowing that it was not afraid of cars, and having used it for three or four months without ever hitching it or knowing it to start, is not conclusive, as a matter of law, of a want of due care on his part."

The duty, a violation of which is claimed to be negligence in the respect in question, is to exercise reasonable care and prudence. Where reasonable

care is employed in doing an act not itself illegal or inherently likely to produce damage to others, there will be no liability, although damage in fact ensues. *(Milwaukee Ry. Co. vs. Arms, 91 U. S. 489; Parrott vs. Wells, 15 Wall., 524; Brown vs. Kendall, 6 Cushing, 292; Jackson Architectural Iron Works vs. Hurlbut, 158 N. Y., 34; Westerfield vs. Levis, 43 La. An., 63; Niosi vs. Empire Steam Laundry, 117 Cal., 257).*

The act of defendant's driver in leaving the horses in the manner proved was not unreasonable or imprudent. Acts the performance of which has not proved destructive or injurious and which have, therefore, been acquiesced in by society for so long a time that they have ripened into custom, can not be held to be themselves unreasonable or imprudent. Indeed, the very reason why they have been permitted by society is that they are beneficial rather than prejudicial. Accidents sometimes happen and injuries result from the most ordinary acts of life. But such are not their natural or customary results. To hold that, because such an act once resulted in accident or injury, the actor is necessarily negligent, is to go far. The fact that the doctrine of *res ipsa loquitur* is sometimes successfully invoked in such a case, does not in any sense militate against the reasoning presented. That maxim at most only creates a *prima facie* case, and that only in the absence of proof of the circumstances under which the act complained of was performed. It is something invoked in favor of the plaintiff before defendant's case showing the conditions and circumstances under which the injury occurred, the creative reason for the doctrine of *res ipsa loquitur* disappears. This is demonstrated by the case of *Inland and Seaboard Costing Co. vs. Tolson* (139 U.S., 551), where the court said (p. 554):

> ". . . The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day and in smooth water, was thrown with such force against a wharf properly built, as to tear up some of the planks of the flooring, this would be *prima facie* evidence of negligence on the part of the defendant's agent in making the landing, unless upon the whole evidence in the case this *prima facie* evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under control of her officers and carefully managed by them, evidence that such damage was done in this case was *prima facie*, and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed."

There was presented in this case, and by the plaintiffs themselves, not only the fact of the runaway and the accident resulting therefrom, but also the conditions under which the runaway occurred. Those conditions showing of themselves that the defendant's cochero was not negligent in the management of the horse, the *prima facie* case in plaintiffs' favor, if any, was destroyed as soon as made.

It is a matter of common knowledge as well as proof that it is the universal practice of merchants to deliver merchandise of the kind of that being delivered at the time of the injury, in the manner in which that was then

being delivered; and that it is the universal practice to leave the horses in the manner in which they were left at the time of the accident. This is the custom in all cities. It has not been productive of accidents or injuries. The public, finding itself unprejudiced by such practice, has acquiesced for years without objection. Ought the public now, through the courts, without prior objection or notice, to be permitted to reverse the practice of decades and thereby make culpable and guilty one who had every reason and assurance to believe that he was acting under the sanction of the strongest of all civil forces, the custom of a people? We think not."

C. COMPLIANCE WITH RULES AND STATUTES.

While violation of statute may be considered negligence *per se,* non-compliance is not *sine qua non* of negligence. In addition, one cannot avoid a charge of negligence by showing that the act or omission complained of was of itself lawful or not violative of any statute or ordinance. Compliance therewith is not conclusive that there was no negligence. *(65 C.J.S. 471).* Thus, the defendant can still be held liable for negligence even if he can establish that he was driving below the speed limit. Compliance with the speed limit is not conclusive that he was not negligently driving his car. It can even be established that he was not negligent even if he was driving at a rate of speed beyond that required in a place where there are people crossing the street.

7. DEGREES OF NEGLIGENCE

In some jurisdictions, degrees of negligence are not recognized and courts therein consider that the word "gross" does not have legal significance. A striking expression of this view is found in the statement that gross negligence is merely ordinary negligence with a vituperative epithet. *(67 C.J.S 543, citing Travellers Insurance Co. vs. Reed Co., 135 SW 2d 611; see also People vs. Vistan, 42 Phil. 107, citing U.S. vs. Gomez, G.R. No. 14068, January 19, 1919).*

In the Philippines, the presence of gross negligence is statutorily recognized. Article 2231 of the Civil Code provides that "(i)n quasi-delicts exemplary damages may be granted if the defendant acted with gross negligence." Hence, although it is very difficult, if not impossible, to draw the line between ordinary negligence and gross negligence, courts are compelled to rule on the existence of gross negligence.

Gross negligence is defined in this jurisdiction as negligence where there is "want of even slight care and diligence." *(Amadeo vs. Rio Y Olabarrieta, Inc., 95 Phil. 33).* It is also characterized as implying conscious indifference to consequences; pursuing a course of

conduct which would naturally and probably result to injury; utter disregard of consequences. *(Marinduque Iron Mines Agents, Inc. vs. The Workmen's Compensation Commission, supra, citing 38 Am. Jur. 691).*

There are legal writers who believe that gross negligence is similar to reckless imprudence under Article 365 of the Revised Penal Code. *(Padilla, Civil Law, Civil Code Annotated, Vol. VII-A, 1994 Ed., p. 413).*

CASES:

NEGROS NAVIGATION CO., INC. vs.
THE COURT OF APPEALS
G.R. No. 110398, November 7, 1997

This is a petition for review on *certiorari* of the decision of the Court of Appeals affirming with modification the Regional Trial Court's award of damages to private respondents for the death of relatives as a result of the sinking of petitioner's vessel.

In April of 1980, private respondent Ramon Miranda purchased from the Negros Navigation Co., Inc. four special cabin tickets (Nos. 74411, 74412, 74413 and 74414) for his wife, daughter, son and niece who were going to Bacolod City to attend a family reunion. The tickets were for Voyage No. 457-A of the M/V Don Juan, leaving Manila at 1:00 p.m. on April 22, 1980.

The ship sailed from the port of Manila on schedule. At about 10:30 in the evening of April 22, 1980, the Don Juan collided off the Tablas Strait in Mindoro, with the M/T Tacloban City, an oil tanker owned by the Philippine National Oil Company (PNOC) and the PNOC Shipping and Transport Corporation (PNOC/STC). As a result, the M/V Don Juan sank. Several of her passengers perished in the sea tragedy. The bodies of some of the victims were found and brought to shore, but the four members of private respondents' families were never found.

Private respondents filed a complaint on July 16, 1980 in the Regional Trial Court of Manila, Branch 34, against the Negros Navigation, the Philippine National Oil Company (PNOC), and the PNOC Shipping and Transport Corporation (PNOC/STC), seeking damages for the death of Ardita de la Victoria Miranda, 48, Rosario V. Miranda, 19, Ramon V. Miranda, Jr., 16, and Elfreda de la Victoria, 26.

In its answer, petitioner admitted that private respondents purchased ticket numbers 74411, 74412, 74413 and 74414; that the ticket numbers were listed in the passenger manifest; and that the Don Juan left Pier 2, North Harbor, Manila on April 22, 1980 and sank that night after being rammed by the oil tanker M/T Tacloban City, and that, as a result of the collision,

some of the passengers of the M/V Don Juan died. Petitioner, however, denied that the four relatives of private respondents actually boarded the vessel as shown by the fact that their bodies were never recovered. Petitioner further averred that the Don Juan was seaworthy and manned by a full and competent crew, and that the collision was entirely due to the fault of the crew of the M/T Tacloban City.

On January 20, 1986, the PNOC and petitioner Negros Navigation Co., Inc. entered into a compromise agreement whereby petitioner assumed full responsibility for the payment and satisfaction of all claims arising out of or in connection with the collision and releasing the PNOC and the PNOC/STC from any liability to it. The agreement was subsequently held by the trial court to be binding upon petitioner, PNOC and PNOC/STC. Private respondents did not join in the agreement.

x x x

[After trial, the court rendered judgment on February 21, 1991 in favor of the private respondents ordering all the defendants to pay jointly and severally to the plaintiffs actual damages, compensatory damages for loss of earning capacity, compensatory damages for wrongful death, moral damages, exemplary damages, and attorney's fees. On appeal, the Court of Appeals affirmed the decision of the Regional Trial Court with modifications. The case was elevated to the Supreme Court on a petition for review. The Supreme Court affirmed the finding that the victims were passengers of "Don Juan" and went on to explain that there was gross negligence.]

Second. In finding petitioner guilty of negligence and in failing to exercise the extraordinary diligence required of it in the carriage of passengers, both the trial court and the appellate court relied on the findings of this Court in *Mecenas vs. Intermediate Appellate Court*, which case was brought for the death of other passengers. In that case, it was found that although the proximate cause of the mishap was the negligence of the crew of the M/T Tacloban City, the crew of the Don Juan was equally negligent as it found that the latter's master, Capt. Rogelio Santisteban, was playing mahjong at the time of collision, and the officer on watch, Senior Third Mate Rogelio De Vera, admitted that he failed to call the attention of Santisteban to the imminent danger facing them. This court found that Capt. Santisteban and the crew of the M/V Don Juan failed to take steps to prevent the collision or at least delay the sinking of the ship and supervise the abandoning of the ship.

Petitioner Negros Navigation was found equally negligent in tolerating the playing of mahjong by the ship captain and other crew members while on board the ship and failing to keep the M/V Don Juan seaworthy so much so that the ship sank within 10 to 15 minutes of its impact with the M/T Tacloban City.

In addition, the Court found that the Don Juan was overloaded. The Certificate of Inspection, dated August 27, 1979, issued by the Philippine

Coast Guard Commander at Iloilo City stated that the total number of persons allowed on the ship was 864, of whom 810 are passengers, but there were actually 1,004 on board the vessel when it sank, 140 persons more than the maximum number that could be safely carried by it.

Taking these circumstances together, and the fact that the M/V Don Juan, as the faster and better-equipped vessel, could have avoided a collision with the PNOC tanker, this Court held that even if the Tacloban City had been at fault for failing to observe an internationally-recognized rule of navigation, the Don Juan was guilty of contributory negligence. Through Justice Feliciano, this Court held:

The grossness of the negligence of the "Don Juan" is underscored when one considers the foregoing circumstances in the context of the following facts: Firstly, the "Don Juan" was more than twice as fast as the "Tacloban City." The "Don Juan's" top speed was 17 knots; while that of the "Tacloban City" was 6.3 knots. Secondly, the "Don Juan" carried the full complement of officers and crew members specified for a passenger vessel of her class. Thirdly, the "Don Juan" was equipped with radar which was functioning that night. Fourthly, the "Don Juan's" officer on-watch had sighted the "Tacloban City" on his radar screen while the latter was still four (4) nautical miles away. Visual confirmation of radar contact was established by the "Don Juan" while the "Tacloban City" was still 2.7 miles away. In the total set of circumstances which existed in the instant case, the "Don Juan," had it taken seriously its duty of extraordinary diligence, could have easily avoided the collision with the "Tacloban City." Indeed, the "Don Juan" might well have avoided the collision even if it had exercised ordinary diligence merely.

It is true that the "Tacloban City" failed to follow Rule 18 of the International Rules of the Road which requires two (2) power-driven vessels meeting end on or nearly end on each to alter her course to starboard (right) so that each vessel may pass on the port side (left) of the other. The "Tacloban City," when the two (2) vessels were only three-tenths (0.3) of a mile apart, turned (for the second time) 15° to port side while the "Don Juan" veered hard to starboard . . . [But] "route observance" of the International Rules of the Road will not relieve a vessel from responsibility if the collision could have been avoided by proper care and skill on her part or even by a departure from the rules.

In the petition at bar, the "Don Juan" having sighted the "Tacloban City" when it was still a long way off was negligent in failing to take early preventive action and in allowing the two (2) vessels to come to such close quarters as to render the collision inevitable when there was no necessity for passing so near to the "Tacloban City" as to create that hazard or inevitability, for the "Don Juan" could choose its own distance. It is noteworthy that the "Tacloban City," upon turning hard to port shortly before the moment of collision, signalled its intention to do so by giving two (2) short blasts with its horn. The "Don Juan" gave no answering horn blast to signal its own intention and proceeded to turn hard to starboard.

We conclude that Capt. Santisteban and Negros Navigation are properly

held liable for gross negligence in connection with the collision of the "Don Juan" and "Tacloban City" and the sinking of the "Don Juan" leading to the death of hundreds of passengers.

Petitioner criticizes the lower court's reliance on the *Mecenas* case, arguing that, although this case arose out of the same incident as that involved in Mecenas, the parties are different and trial was conducted separately. Petitioner contends that the decision in this case should be based on the allegations and defenses pleaded and evidence adduced in it or, in short, on the record of this case.

The contention is without merit. What petitioner contends may be true with respect to the merits of the individual claims against petitioner but not as to the cause of the sinking of its ship on April 22, 1980 and its liability for such accident, of which there can only be one truth. Otherwise, one would be subscribing to the sophistry: truth on one side of the Pyrenees, falsehood on the other!

BENGUET ELECTRIC COOPERATIVE, INC.
vs. COURT OF APPEALS, ET AL.
G.R. No. 127326, December 23, 1999

This case involves a review on *certiorari* of the Decision of the Court of Appeals affirming with modification the decision of the Regional Trial Court of Baguio City, and ordering petitioner Benguet Electric Cooperative, Inc. (BENECO) to pay Caridad O. Bernardo, as guardian *ad litem* of the three (3) minor children of the late Jose Bernardo P50,000.00 as indemnity for his death, with interest thereon at the legal rate from February 6, 1985, the date of the filing of the complaint, until fully paid, P100,000.00 for moral damages, P20,000.00 for exemplary damages, another P20,000.00 for attorney's fees, P864,000.00 for net income loss for the remaining thirty (30) years of the life expectancy of the deceased, and to pay the costs of suit.

The appellate court dismissed for lack of merit the counterclaim of BENECO against the Bernardos and its third party complaint against Guillermo Canave, Jr., as well as the latter's counterclaim.

For five (5) years up to the time of his death, Jose Bernardo managed a stall at the Baguio City meat market. On 14 January 1985 at around 7:50 in the morning, Jose, together with other meat vendors went out of their stalls to meet a jeepney loaded with slaughtered pigs in order to select the meat they would sell for the day. Jose was the very first to reach the parked jeepney. Grasping the handlebars at the rear entrance of the vehicle, and as he was about to raise his right foot to get inside, Jose suddenly stiffened and trembled as though suffering from an epileptic seizure. Romeo Pimienta who saw Jose thought he was merely joking but noticed almost in disbelief that he was already turning black. In no time the other vendors rushed to Jose and they discovered that the antenna of the jeepney bearing the pigs had gotten entangled with an open electric wire at the top of the roof of a meat

stall. Pimienta quickly got hold of a broom and pried the antenna loose from the open wire. But shortly after, Jose released his hold on the handlebars of the jeep only to slump to the ground. He died shortly in the hospital. Cause of his death was "cardio-respiratory arrest secondary to massive brain congestion with petheccial hemorrhage, brain bilateral pulmonary edema and congestion and endocardial petecchial hemorrhage and dilation (history of electrocution)."

On 6 February 1985, Caridad O. Bernardo, widow of Jose Bernardo, and their minor children, Jojo, Jeffrey and Jo-an, all surnamed Bernardo, filed a complaint against BENECO before the Regional Trial Court of Baguio City for a sum of money and damages arising from the electrocution of Jose Bernardo. In the same civil action, BENECO filed a third-party complaint against Guillermo Canave, Jr., the jeepney owner.

In its decision dated 15 August 1994, the trial court ruled in favor of the Bernardos and ordered BENECO to pay them damages. Both petitioner and private respondents herein appealed to the Court of Appeals. On 5 November 1996 the appellate court promulgated its Decision which BENECO now assails contending *inter alia* that the appellate court gravely erred in ordering BENECO to pay damages in light of the clear evidence that it was third-party defendant Canave's fault or negligence which was the proximate and sole cause, or at least the principal cause, of the electrocution and death of Jose Bernardo.

First, BENECO questions the award of damages by respondent court notwithstanding a clear showing that the electrocution and death of Jose Bernardo were directly attributable to the fault and negligence of jeepney owner Guillermo Canave, Jr.

The records of the case show that respondent court did not commit any reversible error in affirming the findings of the trial court that BENECO was solely responsible for the untimely death of Jose Bernardo through accidental electrocution. According to the trial court, which we find substantiated by the records.

Through Virgilio Cerezo, a registered master electrician and presently the Chief Electrical Building Inspector of the General Services Division of the City of Baguio, who was tasked to investigate the electrocution of Bernardo, the plaintiffs adduced proof tending to show that the defendant BENECO installed a No. 2 high voltage main wire distribution line and a No. 6 service line to provide power at the temporary meat market on Hilltop Road. It put up a three-inch G.I. pipe pole to which the No. 2 main line was strung on top of a stall where a service drop line was connected. The height of the electrical connection from the No. 2 line to the service line was barely eight (8) to nine (9) feet (Exhibit "E"; See Exhibit "D-1") which is in violation of the Philippine Electrical Code which requires a minimum vertical clearance of fourteen (14) feet from the level of the ground since the wiring crosses a public street. Another violation according to Cerezo, is that the main line connected to the service line was not of rigid conduit wiring but totally exposed

without any safety protection. *(ibid.).* Worse, the open wire connections were not insulated *(ibid.);* (See Exhibits "D-6," "D-6-A," "D-7"). The jeep's antenna which was more than eight (8) feet high (Exhibit "D-9") from the ground (It is about six to seven feet long and mounted on the left fender which is about three feet above the ground) got entangled with the open wire connections (Exhibit "D-8"), thereby electrically charging its handlebars which Bernardo held on to enter the vehicle resulting in his electrocution.

While Vedasto Augusto, an electrical engineer and the line superintendent in the electrical department of the defendant BENECO, admitted that the allowable vertical clearance of the service drop line is even 15 feet from the ground level and not only 14 feet, he and Jose Angeles, then an instrument man or surveyor of the BENECO, insisted that BENECO installed (they do not know by whom in particular) from the Apollo Building nearby a service drop line carrying 220 volts which was attached to a G.I. pipe pole (Exhibits "1" and "1-A"). The vertical clearance of the point of attachment of the service drop line on the G.I. post to the ground is 15.5 feet (Exhibit "1-B"), which is more than the allowable 15-foot clearance. To this service drop line was connected the service entrance conductor (Exhibit "1-D") to supply power inside the premises to be serviced through an electric meter. At the lower portion of the splicing or connecting point between the service drop line and the service entrance conductor is a three to four-inch bare wire to serve as a ground. They saw the bare wire because the splicing point was exposed as it was not covered with tape (Exhibit "1-E"). The antenna of the jeep which electrocuted Bernardo got entangled with this exposed splicing point.

Augusto claimed that it was not BENECO's job to splice or connect the service entrance conductor to the service drop line but rather the owner of the premises to be serviced whose identity they did not, however, determine.

Significantly, on cross-examination, Augusto admitted that the service drop line that BENECO installed did not end at the point to which it is attached to the G.I. post. Rather, it passed through a spool insulator that is attached to the post (Exhibit "1-F") and extended down to where the service entrance conductor is spliced with the result that the exposed splicing point (Exhibit "1-E") is only about eight (8) feet from the ground level.

There is no question that as an electric cooperative holding the exclusive franchise in supplying electric power to the towns of Benguet province, its primordial concern is not only to distribute electricity to its subscribers but also to ensure the safety of the public by the proper maintenance and upkeep of its facilities. It is clear to us then that BENECO was grossly negligent in leaving unprotected and uninsulated the splicing point between the service drop line and the service entrance conductor, which connection was only eight (8) feet from the ground level, in violation of the Philippine Electrical Code. BENECO's contention that the accident happened only on January 14, 1985, around seven (7) years after the open wire was found existing in 1978, far from mitigating its culpability, betrays its gross neglect in performing its duty to the public. By leaving an open live wire unattended for years, BENECO

demonstrated its utter disregard for the safety of the public. Indeed, Jose Bernardo's death was an accident that was bound to happen in view of the gross negligence of BENECO.

BENECO theorizes in its defense that the death of Jose Bernardo could be attributed to the negligence of Canave, Jr., in parking his jeepney so close to the market stall which was neither a parking area nor a loading area, with his antenna so high as to get entangled with an open wire above the Dimasupil store. But this line of defense must be discarded. Canave's act of parking in an area not customarily used for that purpose was by no means the independent negligent act adverted to by BENECO in citing *Manila Electric Co. vs. Ronquillo*. Canave was well within his right to park the vehicle in the said area where there was no showing that any municipal law or ordinance was violated nor that there was any foreseeable danger posed by his act. One thing however is sure, no accident would have happened had BENECO installed the connections in accordance with the prescribed vertical clearance of fifteen (15) feet.

8. PROOF OF NEGLIGENCE

A. BURDEN OF PROOF.

Section 1 of Rule 131 of the Revised Rule Court defines burden of proof as the duty of a party to present evidence on the facts in issue necessary to establish his claim or defenses by the amount of evidence required by law. It is up for the plaintiff to establish his cause of action or the defendant to establish his defense. Thus, if the plaintiff alleged in his complaint that he was damaged because of the negligent acts of the defendant, the plaintiff has the burden of proving such negligence. *(Taylor vs. Mla Electric Railroad supra, citing Scaevola, Jurisprudencia del Codigo Civil, vol. 6, pp. 551, 552)*. It is even presumed that a person takes ordinary care of his concerns. *(Sec. 3[d], Rule 131)*. The quantum of proof required is preponderance of evidence. *(Sec.1, Rule 133, Revised Rules of Court)*.

The rule, however, admits of certain exceptions. There are exceptional cases when the rules or the laws provide for cases when negligence is presumed.

B. PRESUMPTIONS.

The Civil Code provides for the following cases when the existence of negligence is presumed.

> "Art. 2184. x x x It is disputably presumed that a driver was negligent, if he had been found guilty of reckless driving or

violating traffic regulations at least twice within the next preceding two months. x x x

Art. 2185. Unless there is proof to the contrary, it is presumed that a person driving a motor vehicle has been negligent if at the time of the mishap, he was violating any traffic regulation.

x x x x x x x x x

"Art. 2188. There is *prima facie* presumption of negligence on the part of the defendant if the death or injury results from his possession of dangerous weapons or substances, such as firearms and poison, except when the possession or use thereof is indispensable in his occupation or business."

It should be noted, however, that the party invoking such presumption must still establish certain preconditions before the presumption can operate. Thus, Article 2185 requires proof that there was a violation of a traffic regulation while Article 2188 requires proof of possession of dangerous weapons or substances, such as firearms and poison.

Presumption of negligence may also arise because of certain contractual relationship between the parties. Thus, the Civil Code provides for a presumption of negligence in case a passenger was injured in an accident involving his carrier. *(Article 1735, Civil Code).*

C. RES IPSA LOQUITUR.

Another rule which is relied upon in negligence cases is the doctrine of *res ipsa loquitur* – the thing speaks for itself. Its function is to aid the plaintiff in proving the elements of a negligence case by circumstantial evidence. *(Epstein, p. 294).*

The doctrine was restated in *Layugan vs. Intermediate Appellate Court (167 SCRA 376, cited in MA-AO Sugar Central Co., Inc., et al. vs. Hon. Court of Appeals, et al., G.R. No. 83491, August 27, 1990)* thus: "Where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care." The requisites for the application of the doctrine were enumerated in *Rogelio Ramos v. Court of Appeals, et al. (G.R. No. 124354, December 29, 1999)* as follows:

1. The accident is of a kind which ordinarily does not occur in the absence of someone's negligence;

2. It is caused by an instrumentality within the exclusive control of the defendant or defendants; and

3. The possibility of contributing conduct which would make the plaintiff responsible is eliminated.

In the above requisites, the fundamental element is the "control of the instrumentality" which caused the damage. Such element of control must be shown to be within the dominion of the defendant. In order to have the benefit of the rule, a plaintiff, in addition to proving injury or damage; must show a situation where it is applicable, and must establish that the essential elements of the doctrine were present in a particular incident. (*ibid.*)

The Supreme Court explained the nature of the rule in *Layugan v. Intermediate Appellate Court (supra.)*:

The doctrine of *Res ipsa loquitur* as a rule of evidence is peculiar to the law of negligence which recognizes that *prima facie* negligence may be established without direct proof and furnishes a substitute for specific proof of negligence. The doctrine is not a rule of substantive law but merely a mode of proof or a mere procedural convenience. The rule, when applicable to the facts and circumstances of a particular case, is not intended to and does not dispense with the requirement of proof of culpable negligence on the part of the party charged. It merely determines and regulates what shall be *prima facie* evidence thereof and facilitates the burden of plaintiff of proving a breach of the duty of due care. The doctrine can be invoked when and only when, under the circumstances involved, direct evidence is absent and not readily available. Hence, it has generally been held that the presumption of inference arising from the doctrine cannot be availed of, or is overcome, where plaintiff has knowledge and testifies or presents evidence as to the specific act of negligence which is the cause of the injury complained of or where there is direct evidence as to the precise cause of the accident and all the facts and circumstances attendant on the occurrence clearly appear. Finally, once the actual cause of injury is established beyond controversy, whether by the plaintiff or by the defendant, no presumptions will be involved and the doctrine becomes inapplicable when the circumstances have been so completely elucidated that no inference of defendant's liability can reasonably be made, whatever the source of the evidence, as in this case."

The Supreme Court further explained the doctrine in *Rogelio Ramos, et al. vs. Court of Appeals, et al. (supra.)*:

Res ipsa loquitur is a Latin phrase which literally means "the thing or the transaction speaks for itself." The phrase *"res ipsa loquitur"* is a maxim for the rule that the fact of the occur-

> rence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's *prima facie* case, and present a question of fact for defendant to meet with an explanation. Where the thing which caused the injury complained of is shown to be under the management of the defendant or his servants and the accident is such as in ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from or was caused by the defendant's want of care.
>
> x x x
>
> However, much has been said the *res ipsa loquitur* is not a rule of substantive law and, as such, does not create or constitute an independent or separate ground of liability. Instead, it is considered as merely evidentiary or in the nature of a procedural rule. It is regarded as a mode of proof, of a mere procedural convenience since it furnishes a substitute for, and relieves a plaintiff of, the burden of producing specific proof of negligence. In other words, mere invocation and application of the doctrine does not dispense with the requirement of proof of negligence. It is simply a step in the process of such proof, permitting the plaintiff to present along with the proof of the accident, enough of the attending circumstances to invoke the doctrine, creating an inference or presumption of negligence, and to thereby place on the defendant the burden of going forward with the proof.

a. Rationale.

The doctrine of *res ipsa loquitur* is simply a recognition of the postulate that, as a matter of common knowledge and experience, the very nature of certain types of occurrences may justify an inference of negligence on the part of the person who controls the instrumentality causing the injury in the absence of some explanation by the defendant who is charged with negligence. It is grounded in the superior logic of ordinary human experience and on the basis of such experience or common knowledge, negligence may be deduced from the mere occurrence of the accident itself. Hence, *res ipsa loquitur* is applied in conjunction with the doctrine of common knowledge (*Rogelio Ramos, et al. vs. Court of Appeals, et al., ibid.*)

Another theoretical basis for the doctrine is its necessity, *i.e.,* that necessary evidence is absent or not available. The *res ipsa loquitur* doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it and that the plaintiff has no such knowledge, and therefore is com-

pelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence. The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person (*D.M. Consunji, Inc. v. Court of Appeals, G.R. No. 137873, April 20, 2001, 357 SCRA 249, 258).*

It has been said that the doctrine of *res ipsa loquitur* furnishes a bridge by which a plaintiff, without knowledge of the cause, reaches over to defendant who knows or should know the cause, for any explanation of care exercised by the defendant in respect of the matter of which the plaintiff complains. The *res ipsa loquitur* doctrine is a rule of necessity, in that it proceeds on the theory that under the peculiar circumstances in which the doctrine is applicable, it is within the power of the defendant to show that there was no negligence on his part, and direct proof of defendant's negligence is beyond plaintiff's power. Accordingly, some courts add to the three prerequisites for the application of the res ipsa loquitur doctrine the further requirement that for the res ipsa loquitur doctrine to apply, it must appear that the injured party had no knowledge or means of knowledge as to the cause of the accident, or that the party to be charged with negligence has superior knowledge or opportunity for explanation of the accident (*D.M. Consunji v. Court of Appeals, ibid., at pp. 258-259).*

b. Cases when the doctrine was applied.

In *Africa vs. Caltex (Phil.), Inc.* (G.R. No. L-12986, March 31, 1966, 16 SCRA 448 [1966]), the Supreme Court applied the doctrine of *res ipsa loquitur* and adjudged defendant Caltex liable for the damage done to the property of its neighbor when fire broke out in a Caltex service station while gasoline from a tank truck was being unloaded into an underground storage tank through a hose and the fire spread to and burned neighboring houses. The principle applies with equal force because the gasoline station, with all its appliances, equipment and employees, was under the control of the defendant. A fire occurred therein and spread to and burned the neighboring houses. The persons who knew or could have known how the fire started were the defendant and their employees, but they gave no explanation thereof whatsoever. It is a fair and reasonable inference that the incident happened because of want of care. The Supreme Court cited a strikingly similar case of *Jones vs. Shell Petroleum Corporation, et al.* (171 So. 447):

> "Arthur O. Jones is the owner of a building in the city of

Hammon which in the year 1934 was leased to the Shell Petroleum Corporation for a gasoline filling station. On October 8, 1934, during the term of the lease, while gasoline was being transferred, from the tank wagon, also operated by the Shell Petroleum Corporation, to the underground tank of the station, a fire started with resulting damages to the building owned by Jones. Alleging that the damages to his building amounted to $516.95, Jones sued the Shell Petroleum Corporation for the recovery of that amount. The judge of the district court, after hearing the testimony, concluded that plaintiff was entitled to a recovery and rendered judgment in his favor for $427.82. The Court of Appeals for the First Circuit reversed this judgment, on the ground the testimony failed to show with reasonable certainty any negligence on the part of the Shell Petroleum Corporation or any of its agents or employees. Plaintiff applied to this Court for a Writ of Review which was granted, and the case is now before us for decision."

In resolving the issue of negligence, the Supreme Court of Louisiana held:

"Plaintiff's petition contains two distinct charges of negligence — one relating to the cause of the fire and the other relating to the spreading of the gasoline about the filling station.

"Other than an expert to assess the damages caused plaintiff's building by the fire, no witnesses were placed on the stand by the defendant.

"Taking up plaintiff's charge of negligence relating to the cause of the fire, we find it established by the record that the filling station and the tank truck were under the control of the defendant and operated by its agents or employees. We further find from the uncontradicted testimony of plaintiff's witnesses that fire started in the underground tank attached to the filling station while it was being filled from the tank truck and while both the tank and the truck were in charge of and being operated by the agents or employees of the defendant, extended to the hose and tank truck, and was communicated from the burning hose, tank truck, and escaping gasoline to the building owned by the plaintiff.

Predicated on these circumstances and the further circumstance of defendant's failure to explain the cause of the fire or to show its lack of knowledge of the cause, plaintiff has evoked the doctrine of *res ipsa loquitur*. There are many cases in which the doctrine may be successfully invoked and this, we think, is one of them.

Where the thing which caused the injury complained of is shown to be under the management of defendant or his servants

> and the accident is such as in the ordinary course of things does not happen if those who have its management or control use proper care, it affords reasonable evidence, in absence of explanation by defendant, that the accident arose from want of care. (45 C.J. 768, p. 1193).
>
> "This statement of the rule of *res ipsa loquitur* has been widely approved and adopted by the courts of last resort. Some of the cases in this jurisdiction in which the doctrine has been applied are the following, *viz.; Maus vs. Broderick, 51 La. Ann. 1153, 25 So. 977; Hebert vs. Lake Charles Ice etc., Co., 111 La. 522, 35 So. 731, 64 L.R.A. 101, 100 Am. St. Rep. 505; Willis vs. Vicksburg, etc., R. Co., 115 La. 53, 38 So. 892; Bents vs. Page, 115 La. 560, 39 So. 599."*

Similarly, the Supreme Court applied the doctrine in *F.F. Cruz and Co., Inc. vs. The Court of Appeals, et al.* (G.R. No. L-52732, August 29, 1988), an action for damages on the property of the plaintiff which was destroyed because of the fire that started in and razed the furniture manufacturing shop of the defendant. The furniture manufacturing shop of defendant in Caloocan City was situated adjacent to the residence of respondent. Sometime in August 1971, the plaintiff first approached the defendant's plant manager, to request that a firewall be constructed between the shop and plaintiff's residence. The request was repeated several times but they fell on deaf ears. In the early morning of September 6, 1974, fire broke out in defendant's shop. Defendant's employees, who slept in the shop premises, tried to put out the fire, but their efforts proved futile. The fire spread to plaintiff's house. Both the shop and the house were razed to the ground. The cause of the conflagration was never discovered. The National Bureau of Investigation found specimens from the burned structures negative for the presence of inflammable substances. The facts of the case likewise called for the application of the doctrine considering that in the normal course of operations of a furniture manufacturing shop, combustible material such as wood chips, sawdust, paint, varnish and fuel and lubricants for machinery may be found thereon.

The doctrine was applied in *Republic of the Philippines vs. Luzon Stevedoring Corp.* (G.R. No. L-21749, September 29, 1967) which was decided under the following factual background: "In the early afternoon of August 17, 1960, barge L-1892, owned by the Luzon Stevedoring Corporation was being towed down the Pasig river by tugboats "Bangus" and "Barbero," also belonging to the same corporation, when the barge rammed against one of the wooden piles of the

Nagtahan bailey bridge, smashing the posts and causing the bridge to list. The river, at the time, was swollen and the current swift, on account of the heavy downpour in Manila and the surrounding provinces on August 15 and 16, 1960." The Court made an inference of negligence ruling that:

> "As to the first question considering that the Nagtahan bridge was an immovable and stationary object and uncontrovertedly provided with adequate openings for the passage of water craft, including barges like that of appellant's, it is undeniable that the unusual event that the barge, exclusively controlled by appellant, rammed the bridge supports raises a presumption of negligence on the part of appellant or its employees manning the barge or the tugs that towed it. For in the ordinary course of events, such a thing does not happen if proper care is used. In Anglo-American Jurisprudence, the inference arises by what is known as the *"res ipsa loquitur"* rule. *(Scott vs. London Docks, Co., 2 H & C 596; San Juan Light & Transit Co. vs. Requena, 224 U.S. 89, 56 L. Ed., 680; Whitwell vs. Wolf, 127 Minn. 529, 149 N.W. 299; Bryne vs. Great Atlantic & Pacific Tea Co., 269 Mass. 130; 168 N.E. 540; Gribsby vs. Smith, 146 S.W. 2d 719)."*

It should be noted that the ruling in *Republic of the Philippines vs. Luzon Stevedoring Corporation* is also supported by another evidentiary rule in American Jurisprudence that was explained by the Supreme Court in *Far Eastern Shipping Company vs. Court of Appeals* (297 SCRA 59). The rule is that there is a presumption of fault against a moving vessel that strikes a stationary object such as a dock or navigational aid. In admiralty, this presumption does more than merely require the ship to go forward and produce some evidence on the presumptive matter. The moving vessel must show that it was without fault or that the collision was occasioned by the fault of the stationary object or was the result of inevitable accident. It has been held that such vessel must exhaust every reasonable opportunity which the circumstances admit and show that in each, they did all that reasonable care required. In absence of sufficient proof in rebuttal, the presumption of fault attaches to a moving vessel which collides with a fixed object and makes a *prima facie* case of fault against the vessel. The Supreme Court, quoting American jurisprudence, explained that logic and experience support this presumption:

> "The common sense behind the rule makes the burden a heavy one. Such accidents simply do not occur in the ordinary course of things unless the vessel has been mismanaged in some way. It is not sufficient for the respondent to produce witnesses to testify that as soon as the danger became apparent everything

> possible was done to avoid the accident. The question remains, How then did the collision occur? The answer must be either that, in spite of the testimony of the witnesses, what was done was too little or too late or, if not, then the vessel was at fault for being in a position in which an unavoidable collision would occur. *(ibid., citing Patterson Oil Terminals vs. The Port Covington, 109 F. Supp. 953, 954 [E D Pa. 1952]).*

In *Batiquin vs. Court of Appeals* (258 SCRA 334 [1996]), the Supreme Court applied the doctrine to a doctor who performed a simple caesarian section on the plaintiff. It appears that soon after leaving the hospital, the plaintiff suffered abdominal pains, complained of being feverish and lost her appetite. She consulted the defendant doctor who gave her medicines. Later, the plaintiff returned to work but abdominal pains kept on recurring. When the pains became unbearable, she went to another doctor who found that the plaintiff had infections in her uterus and ovaries. When she was operated on, a piece of rubber was found on the right side of her uterus which could have been a torn section of a surgeon's glove. The Supreme Court ruled that all the requisites for recourse to the doctrine of *res ipsa loquitur* are present. "First, the entire proceedings of the caesarian section were under the exclusive control of Dr. Batiquin (defendant). In this light, the (plaintiffs) were bereft of direct evidence as to the actual culprit or the exact cause of the foreign object finding its way into (plaintiff) Villegas's body, which, needless to say, does not occur unless through the intervention of negligence. Second, since aside from the caesarian section, (plaintiff) underwent no other operation which could have caused the offending piece of rubber to appear in the uterus, it stands to reason that such could only have been a by-product of the caesarian section performed by (defendant). The (defendants), in this regard, failed to overcome the presumption of negligence arising from resort to the doctrine of *res ipsa loquitur*. Dr. Batiquin is therefore liable for negligently leaving behind a piece of rubber in (plaintiff's) abdomen and for all the adverse effects thereof."

Similarly, the Court of Appeals found reason to apply the doctrine in *Bernal vs. Alonzo* (12 CAR [2s] 792.) because of the presence inside the peritonial cavity of a patient of a surgical gauze reported as missing after a ceasarian operation. *(See more discussions regarding doctors in Chapter 3).*

Although the Supreme Court did not refer to it by name, the doctrine of *res ipsa loquitur* was, in effect, applied in *Gotesco Investment Corporation vs. Chatto* (210 SCRA 18, 28 [1992]). The plaintiffs therein were injured because the ceiling of a moviehouse where they

were in collapsed. The owner of the moviehouse could not explain why the ceiling collapsed. The Supreme Court relied on the following explanation in *Corpus Juris Secundum* (Vol. 86, p. 718):

> "Where a patron of a theater or other place of public amusement is injured, and the thing that caused the injury is wholly and exclusively under the control and management of the defendant, and the accident is such as in the ordinary course of events would not have happened if proper care had been exercised, its occurrence raises a presumption or permits an inference of negligence on the part of the defendant."

In *Cebu Shipyard and Engineering Works vs. William Lines, et al*. (G.R. No. 132607, May 5, 1999), the Supreme Court sustained the application of the doctrine when one of the vessels of William Lines caught fire and sank while it was in the dockyard of the petitioner for annual dry-docking and repair. The Supreme Court ruled that all the requirements for the application of the doctrine were present. First, the fire that consumed the vessel would not have happened in the ordinary course of things if reasonable care and diligence had been exercised. Second, the agency charged with negligence was the petitioner that had control over the vessel when it was docked for annual repairs. The High Court also observed that the other responsible causes including the conduct of the plaintiff and third persons were sufficiently eliminated by evidence.

The Supreme Court sustained the finding of the Court of Appeals in *D.M. Consunji v. Court of Appeal (supra.)* that the doctrine was applicable to a case where the private respondent's husband fell down from the 14th floor of a building to the basement while he was working in petitioner's construction project, resulting in his death. The construction site was within the exclusive control and management of petitioner. It has a safety engineer, a project superintendent, a carpenter leadman and others who were in complete control of the situation therein. The circumstances of any accident that would occur therein were peculiarly within the knowledge of the petitioner or its employees. On the other hand, the private respondent widow was not in a position to know what caused the accident. No worker is going to fall from the 14th floor of a building to the basement while performing work in a construction site unless someone is negligent; thus, the first requisite for the application of the rule of *res ipsa loquitur* was present. The construction site with all its paraphernalia and human resources that likely caused the injury was under the exclusive control and management of appellant; thus, the second requisite was also present. No contributory negligence was attributed to the private respondent's deceased husband; thus, the last requisite

was also present.

Ludo and Luym Corporation v. Court of Appeals (G.R. No. 125483, February 1, 2001, 351 SCRA 35) involved the private wharf belonging to the petitioner that was used by vessels for loading and unloading copra and other processed products. Among the wharf's facilities are fender pile clusters for docking and mooring. It was established that while a vessel belonging to the private respondent was docking at petitioner's wharf, it rammed and destroyed a fender pile cluster. It was ruled in the said case that all the requisites for recourse to the doctrine of *res ipsa loquitur* exist because the vessel was under the exclusive control of its officers and crew. Petitioner did not have direct evidence on what transpired within as the officer and crew maneuvered the vessel to its berthing place. No other possible cause of the damage was likewise established.

c. Cases when doctrine was held inapplicable.

The facts in the above-cited *Layugan* case, which did not warrant the application of the doctrine are as follows: On May 15, 1979 while at Baretbet, Bagabag, Nueva Vizcaya, the plaintiff and a companion were repairing the tire of their cargo truck which was parked along the right side of the National Highway. Defendant's truck, driven recklessly by Daniel Serrano bumped the plaintiff and as a result, plaintiff was injured and hospitalized. It was established during the trial that an early warning device in the form of a lighted kerosene lamp was placed by the plaintiff at the back of his truck. The defendant argued, however, that any immobile object along the highway, like a parked truck, poses serious danger to a moving vehicle which has the right to be on the highway. The defendant posited that the burden of proving that care and diligence was observed is shifted to the plaintiff, for, as previously claimed, his Isuzu truck had a right to be on the road, while the immobile cargo truck had no business, so to speak, to be there. The absence of such proof of care, defendant concluded, would, under the doctrine of *Res ipsa loquitur*, evoke the presumption of negligence on the part of the driver of the parked cargo truck as well as his helper, who was fixing the flat tire of said truck. The Supreme Court ruled that the doctrine was inapplicable because there was sufficient proof that the plaintiff exercised due care by sufficiently placing an early warning device. But despite this warning, the Isuzu truck driven by Daniel Serrano, an employee of the defendant, still bumped the rear of the parked cargo truck.

In other words, the doctrine of *res ipsa loquitur* is not applicable if there is direct proof of absence or presence of negligence. As early as 1910, the Supreme Court already explained that the doctrine merely

creates a *prima facie* case, and applies only in the absence of proof of the circumstances under which the act complained of was performed. It is something invoked in favor of the plaintiff in the absence of proof. If there is sufficient proof showing the conditions and circumstances under which the injury occurred, the creative reason for the doctrine of *res ipsa loquitur* disappears. *(S.D. Martinez, et al. vs. William Van Buskirk, G.R. No. L-5691, December 27, 1910).*

The doctrine is also inapplicable if other causes, including the conduct of the plaintiff and third persons, are not sufficiently eliminated by the evidence. It is not applicable when an unexplained accident may be attributable to one of several causes, for some of which the defendant could not be responsible (*FGU Insurance Corporation v. G.P. Sarmiento Trucking Corporation and Lambert M. Eroles, G.R. No. 141910, August 6, 2002).*

Dra. Abdulia Rodriguez, et al. v. Court of Appeals, et al., (G.R. No. 121964, June 17, 1997, 273 SCRA 607) involved a quasi-delict case for damages filed by the owner and the lessees of apartment units that were destroyed by fire. It was alleged that the units were destroyed by reason of the gross negligence of the construction workers and employees of the defendants. Plaintiffs further alleged that because of such negligence, the bunkhouse or the worker's quarters in the construction site at the back of the apartment units caught fire and spread rapidly to the neighboring buildings. The plaintiffs tried to pin the blame on the defendants by claiming that the doctrine of *res ipsa loquitur* should have been applied because the fire started in the generator in the bunkhouse. The Supreme Court rejected the argument because the allegation that the fire started in the generator and the bunkhouse was not established. Thus, the Court concluded that it was not established that the fire was caused by an instrumentality within the exclusive control of the defendants.

In *Wildvalley Shipping Co. v. Court of Appeals (G.R. No. 119602, October 6, 2000, 342 SCRA 213, 228)*, a vessel of the petitioner ran aground in the center of a channel blocking ingress and egress of other vessels. The allegation that the negligence of the master of the vessel is presumed because of the doctrine of *res ipsa loquitur* was rejected because it was not established that the vessel was in his control at that time. It was established that there was temporary shift from the master to a pilot on a compulsory pilotage. Hence, the second requisite — that the instrumentality that caused the damage was within the exclusive control of the defendant — was not established.

d. Culpa Contractual.

The Supreme Court explained in *FGU Insurance Corporation v.*

G.P. Sarmiento Trucking Corporation (supra.) that the doctrine of *res ipsa loquitur* generally finds relevance whether or not a contractual relationship exists between the plaintiff and the defendant, for the inference of negligence arises from the circumstances and nature of the occurrence and not from the nature of the relation of the parties. Nevertheless, the requirement that responsible causes other than those due to defendant's conduct must first be eliminated, for the doctrine to apply, should be understood as being confined only to cases of pure (non-contractual) tort since obviously the presumption of negligence in culpa contractual, as previously so pointed out, immediately attaches by a failure of the covenant or its tenor.

CASES:

ESPIRITU vs. PHILIPPINE POWER AND DEV. CO.
C.A.-G.R. No. L-3240-R, September 20, 1949

The facts of that case are stated in the decision as follows:

"In the afternoon of May 5, 1946, while the plaintiff-appellee and other companions were loading grass between the municipalities of Bay and Calauan, in the province of Laguna, with clear weather and without any wind blowing, an electric transmission wire, installed and maintained by the defendant Philippine Power and Development Co., Inc. alongside the road, suddenly parted, and one of the broken ends hit the head of the plaintiff as he was about to board the truck. As a result, plaintiff received the full shock of 4,400 volts carried by the wire and was knocked unconscious to the ground. The electric charge coursed through his body and caused extensive and serious multiple burns from skull to legs, leaving the bone exposed in some parts and causing intense pain and wounds that were not completely healed when the case was tried on June 18, 1947, over one year after the mishap."

[*The defendant therein disclaimed liability on the ground that the plaintiff had failed to show any specific act of negligence but the appellate court overruled the defense under the doctrine of res ipsa loquitur. The court said:*]

"The first point is directed against the sufficiency of plaintiff's evidence to place appellant on its defense. While it is the rule, as contended by the appellant, that in case of noncontractual negligence, or *culpa aquiliana*, the burden of proof is on the plaintiff to establish that the proximate cause of his injury was the negligence of the defendant, it is also a recognized principle that 'Where the thing which caused injury, without fault of the injured person, is under the exclusive control of the defendant and the injury is such as in the ordinary course of things does not occur if those having such control use proper care, it affords reasonable evidence, in the absence of the explanation

that the injury arose from defendant's want of care.'

"And the burden of evidence is shifted to him to establish that he has observed due care and diligence. *(San Juan Light & Transit Co. vs. Requena, 224 U.S. 89, 56 L. ed. 68).* This rule is known by the name of *res ipsa loquitur* (the transaction speaks for itself), and is peculiarly applicable to the case at bar, where it is unquestioned that the plaintiff had every right to be on the highway, and the electric wire was under the sole control of defendant company. In the ordinary course of events, electric wires do not part suddenly in fair weather and injure people, unless they are subjected to unusual strain and stress or there are defects in their installation, maintenance and supervision; just as barrels do not ordinarily roll out of the warehouse windows to injure passersby unless someone was negligent. *(Byrne vs. Boadle, 2 H & Co. 22; 159 Eng. Reprint 299, the leading case that established that rule).* Consequently, in the absence of contributory negligence (which is admittedly not present) the fact that the wire snapped suffices to raise a reasonable presumption of negligence in the installation, care and maintenance. Thereafter, as observed by Chief Baron Pollock, if there are any facts inconsistent with negligence, it is for the defendant to prove."

RADIO COMMUNICATIONS OF THE PHILS., INC. (RCPI)
vs. COURT OF APPEALS, et al.
G.R. No. L-44748, August 29, 1986

PARAS, *J.*:

Before Us, is a Petition for Review by *certiorari* of the decision of the Court of Appeals, modifying the decision of the trial court in a civil case for recovery of damages against petitioner corporation by reducing the award to private respondent Loreto Dionela of moral damages from P40,000 to P15,000, and attorney's fees from P3,000 to P2,000.

The basis of the complaint against the defendant corporation is a telegram sent through its Manila Office to the offended party, Loreto Dionela, reading as follows:

"176 AS JR 1215 PM 9 PAID

MANDALUYONG JUL 22-66

LORETO DIONELA

CABANGAN LEGASPI CITY.

WIRE ARRIVAL OF CHECK

FER.

LORETO DIONELA — CABANGAN — WIRE ARRIVAL OF CHECK-PER. 115 PM.

SA IYO WALANG PAKINABANG DUMATING — KA DIYAN — WALA KANG PADALA DITO — KAHIT BULBULMO" (p. 19, Annex "A")

Plaintiff-respondent Loreto Dionela alleges that the defamatory words on the telegram sent to him not only wounded his feelings but also caused him undue embarrassment and affected adversely his business as well because other people have come to know of said defamatory words. Defendant-corporation as a defense, alleges that the additional words in Tagalog was a private joke between the sending and receiving operators and that they were not addressed to or intended for plaintiff and therefore did not form part of the telegram and that the Tagalog words are not defamatory. The telegram sent through its facilities was received in its station at Legaspi City. Nobody other than the operator manned the teletype machine which automatically receives telegrams being transmitted. The said telegram was detached from the machine and placed inside a sealed envelope and delivered to plaintiff, obviously as is. The additional words in Tagalog were never noticed and were included in the telegram when delivered.

x x x

Petitioner's contentions do not merit our consideration. The action for damages was filed in the lower court directly against respondent corporation not as an employer subsidiarily liable under the provisions of Article 1161 of the New Civil Code in relation to Art. 103 of the Revised Penal Code. The cause of action of the private respondent is based on Arts. 19 and 20 of the New Civil Code. (supra). As well as on respondent's breach of contract thru the negligence of its own employees.

Petitioner is a domestic corporation engaged in the business of receiving and transmitting messages. Everytime a person transmits a message through the facilities of the petitioner, a contract is entered into. Upon receipt of the rate or fee fixed, the petitioner undertakes to transmit the message accurately. There is no question that in the case at bar, libelous matters were included in the message transmitted, without the consent or knowledge of the sender. There is a clear case of breach of contract by the petitioner in adding extraneous and libelous matters in the message sent to the private respondent. As a corporation, the petitioner can act only through its employees. Hence, the acts of its employees in receiving and transmitting messages are the acts of the petitioner. To hold that the petitioner is not liable directly for the acts of its employees in the pursuit of petitioner's business is to deprive the general public availing of the services of the petitioner of an effective and adequate remedy. In most cases, negligence must be proved in order that plaintiff may recover. However, since negligence may be hard to substantiate in some cases, we may apply the doctrine of RES IPSA LOQUITUR (the thing speaks for itself), by considering the presence of facts or circumstances surrounding the injury."

NEGLIGENCE

NEGLIGENCE

CHAPTER 3

AFFIRMATIVE DUTIES AND MISCELLANEOUS ACTIVITIES

This chapter is an extension of the preceding chapter on negligence. It deals with the nature of the activity, the expertise of the actor and the effects thereof on the determination of negligence. Thus, the present chapter includes a discussion of certain specialized activities or profession like banking, common carriage, doctors and lawyers.

We will also turn our attention to various affirmative duties imposed by law on certain actors. These include affirmative duties that are imposed because of the public interest involved or the special relationship between certain individuals, particularly employer-employee relationship. These also include affirmative duties that become legal duties because they refer to principles of social conduct so universally recognized as to be demanded that they be observed as a legal duty. *(L.S. Ayers & Co. vs. Hicks, 220 Ind. 86, 40 N.E. 2d 334 [Indiana] 1942).*

There are also affirmative duties that are imposed by law or jurisprudence that are considered in some jurisdiction as purely moral obligation. Generally, the law does not impose or require performance of moral obligations. No duty to perform such obligation is imposed nor is there an affirmative duty to perform an act for the benefit of another. However, it has been observed by Justice Cardozo that more and more, moral obligations are "annexed to the domain of justice, and is incorporated into the jural norm." *(Benjamin Nathan Cardozo, Paradoxes of Legal Science).* Justice Cardozo further observed:

> "Whenever a relation between human beings becomes organized into one that is specifically jural, the duties attached to it by law are assimilated more and more to those attached to it by morals. The law will not command the rich to give alms to the indigent. On occasion, nonetheless, it will impose restraints upon power taking advantage of necessity. The law will not enforce a duty of kindness to a neighbor. It will enforce a duty of kindness

> to wife or child or pupil. Observe, however, that relations, once so vague and unorganized and definite with the result that thereafter rights and duties will belong to them. A new relation may be established, or at times an existing one extended. For many years, there was stress upon a relation known as privity. In default of that connecting bond, there were times when the law would not recognize duties that were recognized in morals. Decisions of recent date have made the bond of diminishing importance, and have broadened the relations to one's fellows from which duties are engendered. The scope of legal duty has expanded in obedience to the urge of morals. We see the same urge in decisions that charge less. We see it in the inroad made by recent cases upon the concept of an infant's disability where injustice would be wrought if the concept were maintained in all its rigorous simplicity. We see it in a tendency, still almost in embryo, and yet perceptible, to enlarge the duties owing to licensees and even trespassers by a gradual extension of the class of invitees. We see it in the striking growth of the concept of duress, a concept broad enough today to supply a remedy against unfairness and oppression in forms long ranked as guiltless. At times, indeed, the movement has been helped by legislation. x x x" *(ibid.)*

1. DUTY TO RESCUE

A. DUTY TO THE RESCUER.

Rousseau believes that we have "an innate repugnance at seeing a fellow creature suffer." He said that "it is this compassion that hurries us without reflection to the relief of those who are in distress." *(Rousseau, Discourse on the Origin of Inequality, pp. 73 and 76).* Cicero, the great Roman lawyer-statesman-philosopher, observed: *Hominis enim ad deos nulla re propius accedut quam salutem hominibus dando* — In nothing are men more like gods than in coming to the rescue of their fellow men.

In consideration of such nature of man, courts make defendants liable for the injuries to persons who rescue people in distress because of the acts or omission of the said defendants. Courts reject the arguments of defendants that they are not liable because the rescuers are not foreseeable.

In *Wagner vs. International Ry. Co.* (232 N.Y. 176 [1921]), Justice Cardozo rejected the argument of the defendant that rescue is at the peril of the rescuer, unless spontaneous and immediate. Justice Cardozo explained that there is liability to the rescuer and the law does not discriminate between the rescuer oblivious of the peril and the one who counts the costs. It is enough that the act, whether impulsive

or deliberate, is the child of the occasion. He further explained:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperiled victim; it is wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid . . . The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path. . . . The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had . . ."

In this jurisdiction, the liability to a rescuer was recognized in *Santiago vs. De Leon* (CA-G.R. No. 16180-R, March 21, 1960, 7 Velayo's Digest 569) where it was held that one who was hurt while trying to rescue another who was injured through negligence may recover damages. The case involved the negligence of an electric company in not repairing or reconnecting a live wire that was cut and was hanging. It appears that the owner of the house went to the office of the electric company to request for reconnection. The delay of the company in coping with the emergency reported to them was considered conclusive evidence of negligence. In the meantime, a boy was electrocuted by the live wire. On the other hand, the plaintiff realizing that the boy had been electrocuted, took off his wooden shoes and with it stuck the wire away in his desire to save the boy. Unfortunately, when the wire was released from underneath the boy's body, the wire coiled around the plaintiff's leg. The Court of Appeals awarded damages in favor of the plaintiff and rejected that argument of the defendant that the plaintiff tried to effect the rescue. The Court observed that to act immediately was the pressing need of the moment and to be unduly cautious would have been fatal to the boy. The Court applied the following observation in *Corpus Juris Secundum* (65 CJS 736-737):

> "x x x conduct which might otherwise be considered contributory negligence may not be so considered where a person is injured in attempting to save others from imminent danger of personal injury or death x x x. Persons are held justified in assuming greater risks in the protection of human life where

they would not be under other circumstances. One is not guilty of contributory negligence in exposing himself to the danger of injury or death, if, under the same or similar circumstances, an ordinarily prudent person might so expose himself, or, as often expressed, if the act of intervention is not performed under such circumstances as would make it rash or reckless in the judgment of ordinarily prudent persons. This is true even though the persons attempting the rescue knows that it involves great hazard to himself without certainty of accomplishing the attempting rescue and even though in attempting such rescue he thereby imperils his own life.

In determining whether one making or attempting such rescue exercised ordinary care, all the surrounding circumstances are to be considered including the existing emergency, the alarm, excitement and confusion usually present, the uncertainty as to the means to be employed, the necessity for immediate action, and the liability to err in the choice of the best course of action to pursue."

B. DUTY TO RESCUE.

The other side of this issue is the question of liability on the part of persons who should have acted in a manner that is consistent with man's natural compassion. The question is: Is a person who did not rescue another who is in distress liable to the latter? Is there a general duty to rescue? No such duty to rescue is recognized in common law. Thus, Justice Carpenter observed in *Buch vs. Amory Manufacturing Co.* (44 A. 809 N.H. 1897):

"There is a wide difference — a broad gulf — both in reason and in law, between causing and preventing injury; between doing by negligence or otherwise wrong to one's neighbor, and preventing him from injuring himself; between protecting him against injury by another and guarding him from injury that may accrue to him from the condition of the premises which he has unlawfully invaded. The duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking and exepting certain intimate relations in the nature of trust, moral obligation only, not recognized or enforced by law. Is a spectator liable if he sees an intelligent man or an unintelligent infant running into danger and does not warn or forcibly restrain him? What difference does it make whether the danger is on another's land, or upon his own, in case the man or infant is not there by his express or implied invitation? If A sees an eight-year-old boy beginning to climb into his garden over a wall stuck with spikes and does not warn him or drive him off, is he liable in damages if the boy meets with injury from the spikes? I see my neighbor's

> two-year-old-babe in dangerous proximity to the machinery of his windmill in his yard, and easily might, but do not, rescue him. I am not liable in damages to the child for his injuries, nor, if the child is killed, punishable for manslaughter by common law, or under the statute (P.S., c. 278, s. 8), because the child and I are strangers, and I am under no legal duty to protect him. x x x"

A legal writer argued that "once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own costs for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty." *(Epstein, A Theory of Strict Liability, 2 J. Legal Stud., 151, 198-199).*

In the Philippines, there is also no general duty to rescue. A person is not liable for quasi-delict even if he did not help a person in distress. However, a limited duty to rescue is imposed and abandonment of helpless persons is considered, under certain circumstances, as a crime against security under Article 275 of the Revised Penal Code. The Revised Penal Code provides:

> "Art. 275. Abandonment of persons in danger and abandonment of one's own victim. — The penalty of *arresto mayor* shall be imposed upon:
>
> 1. Anyone who shall fail to render assistance to any person whom he shall find in an uninhabited place wounded or in danger of dying, when he can render such assistance without detriment to himself, unless such omission shall constitute a more serious offense;
>
> 2. Anyone who shall fail to help or render assistance to another whom he has accidentally wounded or injured;
>
> 3. Anyone who, having found an abandoned child under seven years of age, shall fail to deliver said child to the authorities or to his family, or shall fail to take him to a safe place.

In all the cases contemplated by the above-quoted provision, there is an affirmative duty to act in favor of another person. In the second paragraph, the person who injured another did not commit a crime because the injury was caused accidentally. Thus, if there was intent to injure the person who was abandoned, the actor is guilty of the appropriate crime like serious physical injury or homicide as the case may be.

The Land Transportation and Traffic Code (Republic Act No. 4136) contains a similar provision. It requires a person who injured another in a vehicular accident to help the victim unless he is excused

from doing so. Thus, Section 55 provides:

> "Sec. 55. *Duty of driver in case of accident.* — x x x
>
> No driver of a motor vehicle concerned in a vehicular accident shall leave the scene of the accident without aiding the victim, except under the following circumstances:
>
> 1. If he is in imminent danger of being seriously harmed by any person or persons by reason of the accident;
>
> 2. If he reports the accident to the nearest officer of the law; or
>
> 3. If he has to summon a physician or nurse to aid the victim."

Of course, there are individuals who are required by law to take care another person. Hence, they are legally compelled to rescue the other person under their care or custody. These include parents with respect to their children or guardians with respect to their wards.

2. OWNERS, PROPRIETORS and POSSESSORS

Article 428 of the New Civil Code provides that the owner has the right to enjoy, dispose of and recover his property. Generally, the owner is not liable to any person who might be damaged if he is merely exercising his right as such. *(Custodio vs. Court of Appeals, 253 SCRA 483).* Damage to any person resulting from the exercise of any of the rights of ownership is damage without injury — *damnum absque injuria*. It can even be argued that no negligence is committed by the owner even if he carelessly caused damage by the exercise of his right because no duty of care is owed to anybody.

A. TRESPASSERS.

Consistently, the owner has no duty to take reasonable care towards a trespasser for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. *(Taylor v. Manila Railroad Company, 16 Phil. 8; Robert Addie & Sons. [Collieries], Ltd. vs. Dumbreck [1929] A.C. 358).* The owner has no duty to maintain his property in such a danger-free state just to prevent trespasser from being injured.

a. Tolerated Possession.

However, the owner is still liable if the plaintiff is inside his property by tolerance or by implied permission. In *Rodrigueza vs.*

Manila Railroad Co., the plaintiffs' houses were burned because a great quantity of sparks were negligently emitted from the smokestack of one of the defendant's locomotive and fire was communicated to the said houses. The ground relied upon by the defendant in trying to evade liability to one of the plaintiffs, Remegio Rodri-gueza, was that the house of the said plaintiff stood partly within the limits of the land owned by the defendant company. It further appeared that, after the railroad track was laid, the company notified Rodrigueza to get his house off the land of the defendant and to remove it from its exposed position. Rodrigueza did not comply with this suggestion, though he promised to put an iron roof on his house, which he never did. Instead, he changed the materials of the main roof to nipa, leaving the kitchen and *media aguas* covered with cogon. It was contended by the defendant that it was not liable because Rodrigueza was a trespasser and therefore guilty of contributory negligence. The Supreme Court rejected the argument ruling that:

> "With respect to the case of Remigio Rodrigueza it is to be inferred that his house stood upon this ground before the Railroad Company laid its line over this course; and at any rate there is no proof that this plaintiff had unlawfully intruded upon the railroad company's property in the act of building his house. What really occurred undoubtedly is that the company, upon making this extension, had acquired the land only, leaving the owner of the house free to remove it. Hence, he cannot be considered to have been a trespasser in the beginning. Rather, he was there at the sufferance of the defendant company, and so long as his house remained in this exposed position, he undoubtedly assumed the risk of any loss that might have resulted from fires occasioned by defendant's locomotives if operated and managed with ordinary care. But he cannot be held to have assumed the risk of any damage that might result from the unlawful negligent acts of the defendant. Nobody is bound to anticipate and defend himself against the possible negligence of another. Rather he has a right to assume that the other will use the ordinary care of the ordinarily prudent man. *(Philadelphia & Reading Railroad Co. vs. Hendrickson, 80 Pa. St., 182; 21 Am. Rep., 97).*
>
> In the situation now under consideration, the proximate and only cause of the damage that occurred was the negligent act of the defendant in causing the fire. The circumstance that Remigio Rodrigueza's house was partly on the property of the defendant company and therefore in dangerous proximity to passing locomotives was an antecedent condition that may in fact have made the disaster possible, but that circumstance cannot be imputed to him as contributory negligence destructive of his right of action, because, first, that condition was not created by himself; secondly, because his house remained on this ground

> by the toleration, and therefore with the consent of the Railroad Company; and thirdly, because even supposing the house to be improperly there, this fact would not justify the defendant in negligently destroying it. *(Grand Trunk Railway of Canada vs. Richardson, 91 U.S., 454; 23 L.ed., 356; Norfolk etc. Ry. Co. vs. Perro, 101 Vs. 345, 350).*

b. Visitors.

Under the same line of reasoning, owners of buildings or premises owe a duty of care to visitors. *(Cabigao vs. University of the East, CA G.R. No. 33554-R, August 24, 1973, 18 CAR 2s 827).* The plaintiff in the *Cabigao* case sat on a concrete bench inside the Dental Building of defendant University while visiting a student therein. When the plaintiff moved over from the bench, one of its concrete legs fell upon the left foot of the plaintiff causing fracture thereto. The Court awarded damages in favor of the plaintiff. The Court rejected the argument that the plaintiff was a trespasser because the defendant's Answer contains an admission that she was a visitor.

(1) Common Carriers.

The duty owed by owners or possessors to visitors are also imposed on common carriers. Common carriers may be held liable for negligence to persons who stay in their premises even if they are not passengers.

It should be recalled by way of a background that the law requires common carriers to carry passengers safely using the utmost diligence of very cautious persons with due regard for all circumstances *(Article 1755, Civil Code; see also Section 5 of this Chapter).* Such duty of a common carrier to provide safety to its passengers so obligates it not only during the course of the trip but for so long as the passengers are within its premises and where they ought to be in pursuance to the contract of carriage *(Dangwa Transportation Co., Inc. v. Court of Appeals, 202 SCRA 575).* Thus, the petitioner was held liable for breach of contract in *Light Rail Transit Authority (LRTA) et al. v. Marjorie Navidad, et al. (G.R. No. 145804, February 6, 2003)* when a certain Nicanor Navidad died after he fell on the LRT tracks and was struck by a moving train which was coming in at the exact moment that Mr. Nividad fell from the platform. Mr. Navidad was treated as a passenger because he entered the LRT station after having purchased a "token" and he fell while he was on the platform waiting for a train. Thus, he was where he was supposed to be with the intention of boarding a train.

It is important that the person who purchases the ticket (or a

"token" in the above referred case) from the carrier presents himself at the proper place and in a proper manner to be transported. Such person must have a bona fide intention to use the facilities of the carrier, possess sufficient fare with which to pay for his passage, and present himself to the carrier for transportation in the place and manner provided. If he does not do so, he will not be considered a passenger. *(Jesusa Vda. de Nueca, et al. v. The Manila Rairoad Company, CA-G.R. No. 31731, January 30, 1968, 13 CAR2s 49).*

Nevertheless, the carrier may still be liable to non-passengers. The liability of operators of common carriers, like railroad companies, to persons other than passengers who come upon the premises of such companies may in general be said to be determined according to the general rules of negligence relating to the duties of the owners or occupiers of property generally to trespassers, licensees or invitees. A licensee is one who enters another's premises either without invitation or purposes not connected with business conducted on the premises but with permission or tolerance. An invitee is one who is at a place upon invitation. In so far as railroad cases are concerned, the element of greatest significance in determining the liability of a railroad company to a licensee or invitee injured upon its premises seems to be whether the presence of the injured person was to have been anticipated. As to persons who are considered licensees or invitees, the carrier may be liable if said licensees or invitees are injured through the negligence of the carrier's employees *(ibid.)*. The liability is based on Article 2176 of the Civil Code and not based on contract.

The duty to exercise the diligence of a reasonable man even extends to persons who are in the premises of the carrier under an implied invitation. The Court of Appeals explained in *Nueca et al. v. Manila Railroad Company, et al. (ibid.)* that the company is bound to anticipate the presence of persons on the track or right of way at any place where the public in any considerable number has openly, notoriously, constantly and habitually crossed over or traveled along a portion of the tracks or right of way other than in a highway crossing with the acquiescence of the railroad company. Acquiescence or consent may be presumed where the company has permitted the public to use its tracks or station for a long period of time. Such a use may be of such long standing that there may arise what amount to an implied invitation to use the premises with the attendant responsibility upon the company *(ibid., at pp. 57-58).*

In above-cited *Nueca, et al. v. Manila Railroad Company (ibid.)*, the Court of Appeals imposed liability based on quasi-delict on the railroad company after applying the doctrine of *res ipsa loquitur* based

on the following established facts: (1) the deceased was walking or standing beside the baggage car of a train when it suddenly fell on its side, pinning him to death; (2) the train was under the complete control of the railroad company at the time of the accident; (3) that if the said train had been properly operated, the baggage car would not have been derailed; and (4) that there was no explanation as to why or how said baggage car was derailed. The liability was not based on contract because the deceased was not a passenger. Even if the deceased intended to accompany the cargoes that he loaded, he was not authorized to accompany the shipment in the baggage car nor was he given any special arrangement to ride in the freight wagon. If he intended to be an ordinary passenger, he must have presented himself at the proper place and in the proper manner. He should have stayed at the station, ticket office, waiting room, or even inside the passenger coach; but not beside the baggage car, or even inside it, the latter place not being used to convey passengers (*ibid., at p. 56).*

c. Children and Attractive Nuisance Rule.

Another qualification to the rule that owners do not have a duty of care towards uninvited persons is what is known as the **"attractive nuisance rule."** This also serves as a limitation to the rule on contributory negligence. Under the rule, an owner is liable if he maintains in his premises dangerous instrumentalities or appliances of a character likely to lure children in play and he fails to exercise ordinary care to prevent children of tender age from playing therewith or resorting thereto. *(Hidalgo Enterprises vs. Balandan, 91 Phil. 488; see also Del Rosario vs. Manila Electric, 57 Phil. 487; Taylor vs. Manila Electric, 16 Phil. 8).* Liability exists even if the child is a trespasser so long as he is not of sufficient age or discretion. *(Taylor vs. Manila Electric, ibid.).* These include railway turntables, explosives, electrical conduits, smoldering fires and rickety structures. Case law in the United States, however, has not extended the rule to cover rivers, creeks, ponds, wagons, axes, plows, woodpiles, haystacks and the like. *(Epstein, p. 583, citing Franich vs. Great Northern Ry. Co., 260 F. 2d 599 [1958]).* It was also ruled by the Supreme Court in *Hidalgo Enterprises vs. Balandan (supra)* that a swimming pool or pond or reservoir of water is not considered attractive nuisance. The Supreme Court explained that "nature has created streams, lakes and pools which attract children. Lurking in their waters is always the danger of drowning. Against this danger children are to know the danger;" and the owner of private property is not liable if he merely duplicated the work of nature by creating an artificial pool on his own property without adding new danger.

Contrary to the impression that the term "attractive nuisance" creates, the same is a concept which is separate from the nuisance defined under the Civil Code. A nuisance is, by its very nature, harmful to the community or to certain persons. An attractive nuisance is considered a nuisance only because it attracts certain kind of persons, children.

Section 339 of the *Restatement (Second) of Torts* states that "a possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon land if: (a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass; (b) the condition is one of which the possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children; (c) the children because of their youth do not discover the condition or realize the risk involved intermeddling with it or in coming within the area made dangerously by it; (d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved; and (e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children. With the exception of the fourth requisite (d), the requisites provided for are consistent with prevailing jurisprudence in this jurisdiction *(See Taylor vs. Manila Electric, supra)*. The fourth requisite is typical of American law which imposes a risk-benefit analysis in the calculation of risk.

The rule regarding the duty of care on the part of landowners with respect to children who trespass to their lot was explained by the Supreme Court in *Taylor vs. Manila Electric Railroad and Light Co.* cited earlier. The Supreme Court adopted in the said case the ruling in what are known as "Turntable cases." The "Turntable cases" refer to "a class of cases where the owner of the property is held liable to children who are trespassing thereon and injured, upon the ground that the owner is bound to know that children may be attracted and may be injured thereby, although the owner is guilty of no negligence except in maintaining the property in such condition that children may trespass thereon to their harm." They are called "Turntable cases" because many such cases have arisen in connection with railroad turntables. *(Bouvier's Law Dictionary, Vol. II, 3rd Ed., p. 2325)*.

The rule regarding children was also applied by the Court of Appeals in *Cirila Moreno vs. Manila Railroad Company* (CA-G.R. No. 25304-R, January 12, 1964). An eleven year old child died when she was bumped by and pinned under one of the wagons of the defend-

ant company at its station in Paco, Manila. It was established that the area occupied by the station was a very busy and very populous place. One defense raised by the company was that it allegedly owed no duty to the child because he was a trespasser. The Court of Appeals rejected the argument holding that:

> "The conclusion is based on reason, justice and necessity. For children are children, and wherever they go, they must be expected to act upon childish instincts and impulses. Drawn by curiosity and impelled by the restless spirit that dominates the youth, they will usually be found in places where the public is permitted to congregate. The movement of machines, and for that matter anything that arouses attention of the young and inquisitive mind, will draw them to the scene as inevitably as does the magnet draws the iron which comes within the range of its magnetic influence x x x "

CASE:

HIDALGO ENTERPRISES, INC. vs. BALANDAN
91 Phil. 488 [1952]

BENGZON, *J*.:

This is an appeal by *certiorari*, from a decision of the Court of Appeals requiring Hidalgo Enterprises, Inc. to pay Guillermo Balandan and his wife, damages in the sum of P2,000 for the death of their son Mario.

It appears that the petitioner Hidalgo Enterprises, Inc. "was the owner of an ice-plant factory in the City of San Pablo, Laguna, in whose premises were installed two tanks full of water, nine feet deep, for cooling purposes of its engine. While the factory compound was surrounded with fence, the tanks themselves were not provided with any kind of fence or top covers. The edges of the tank were barely a foot high from the surface of the ground. Through the wide gate entrance, which was continually open, motor vehicles hauling ice and persons buying said commodity passed, and any one could easily enter the said factory, as he pleased. There was no guard assigned on the gate. At about noon of April 16, 1948, plaintiffs' son, Mario Balandan, a boy barely 8 years old, while playing with and in company of other boys of his age, entered the factory premises through the gate, to take a bath in one of said tanks; and while thus bathing, Mario sank to the bottom of the tank, only to be fished out later, already a cadaver, having died of 'asphyxia secondary to drowning.'"

The Court of Appeals, and the Court of First Instance of Laguna, took the view that the petitioner maintained an attractive nuisance (the tanks), and neglected to adopt the necessary precautions to avoid accident to per-

sons entering its premises. It applied the doctrine of attractive nuisance, of American origin, recognized in this jurisdiction in *Taylor vs. Manila Electric* (16 Phil. 8).

The doctrine may be stated, in short, as follows: One who maintains on his premises dangerous instrumentalities or appliances of a character likely to attract children in play, and who fails to exercise ordinary care to prevent children from playing therewith or resorting thereto, is liable to a child of tender years who is injured thereby, even if the child is technically a trespasser in the premises. *(See 65 C.J.S., p. 455).*

The principal reason for the doctrine is that the condition or appliance in question although its danger is apparent to those of age, is so enticing or alluring to children of tender years as to induce them to approach, get on or use it, and this attractiveness is an implied invitation to such children. *(65 C.J.S., p. 458).*

Now, is a swimming pool or water tank an instrumentality or appliance likely to attract little children in play? In other words is the body of water an attractive nuisance? The great majority of American decisions say no.

"The attractive nuisance doctrine generally is not applicable to bodies of water, artificial as well as natural, in the absence of some unusual condition or artificial feature other than the mere water and its location."

"There are numerous cases in which the attractive nuisance doctrine has been held not to be applicable to ponds or reservoirs, pools of water, streams, canals, dams, ditches, culverts, drains, cesspools or sewer pools, ..." (65 C.J.S., p. 476 *et seq.,* citing decisions of California, Georgia, Idaho, Illinois, Kansas, Iowa, Louisiana, Miss., Missouri, Montana, Oklahoma, Pennsylvania, Tennessee, Texas, Nebraska, Wisconsin).

In fairness to the Court of Appeals it should be stated that the above volume of Corpus Juris Secundum was published in 1950, whereas its decision was promulgated on September 30, 1949.

The reason why a swimming pool or pond or reservoir of water is not considered an attractive nuisance was lucidly explained by the Indiana Appellate Court as follows:

"Nature has created streams, lakes and pools which attract children. Lurking in their waters is always the danger of drowning. Against this danger children are early instructed so that they are sufficiently presumed to know the danger; and if the owner of private property creates an artificial pool on his own property, merely duplicating the work of nature without adding any new danger, . . . (he) is not liable because of having created an 'attractive nuisance.' *(Anderson vs. Reith-Riley Const. Co., N. E., 2nd, 184, 185; 184, 185; 112 Ind. App., 170).*

Therefore, as petitioner's tanks are not classified as attractive nuisance, the question whether the petitioner had taken reasonable precautions be-

comes immaterial. And the other issue submitted by petitioner — that the parents of the boy were guilty of contributory negligence precluding recovery, because they left for Manila on that unlucky day leaving their son under the care of no responsible individual — needs no further discussion.

d. State of Necessity.

Owners and possessors of real estate also owe a duty to allow trespassers, who are in a state of necessity, to enter their properties. Article 432 of the Civil Code states that the "owner of the thing has no right to prohibit the interference of another with the same, if the interference is necessary to avert an imminent danger and threatened damage, compared to damages arising to the owner from the interference, is much greater." It is also a recognized justifying circumstance under the Revised Penal Code. *(Art. 11).* In both the Civil Code and the Revised Penal Code, the owner may demand from the person benefited, indemnity for damages. *(Art. 432, Civil Code and Art. 101, Revised Penal Code).*

Justice Mariano Albert, an eminent commentator on the Revised Penal Code, explained that the state of necessity may be defined as a situation of present danger to legally protected interests, in which there is no other remedy than the injuring of another's also legally protected interest. *(Albert, Justifying and Exempting Circumstances under Our Penal Code, reprinted in Legal Essays and Jurisprudence, 1948, p. 433).* The act executed in the state of necessity differs from self-defense and from taking the law into one's hands, in that the latter seek to defend or establish a right against injustice, while the former aims at safeguarding a right at the expense of another right. (*ibid*., p. 434).

Justice Albert explained that the state of necessity always presupposes the collision of legitimate interests. In general, the state of necessity may refer either to the collision of unequal rights or of equal rights. He explained:

> "x x x Examples of conflict between *unequal rights*: a destitute starving man snatches up a loaf of bread. Fire breaks out in a cluster of nipa houses, and in order to prevent its spread to adjacent houses of strong materials, the surrounding nipa houses are pulled down. In a storm at sea the captain orders the jettison of all or part of the cargo to lighten the vessel.
>
> Classical examples of *equal rights* in conflict: anthropophagy among survivors of a shipwreck on the high seas, and the traditional case of two shipwrecked persons fighting over a *tabula unius capax*. It is said that the sophists of the Graeco-

> Latin age were the first to mention this last case, which used to be thus presented: 'What would the just man do in a shipwreck before a weaker passenger who seized a floating spar? Would he not wrench it away from the unfortunate, to ride to safety on it, especially on the high seas in the absence of all witnesses? If he is sensible, he will not hesitate: to hesitate is to be lost! If he prefers to perish rather than lay hands upon a fellowman, he indeed shows himself a manifestly just man, but also a fool, who showed for another's life such care as he did not have for his own.'" *(ibid.)*

The state of necessity contemplated under Article 432 of the Civil Code and Article 11 of the Revised Penal Code involves a collision of unequal rights. The act is performed to avoid a greater evil. Justice Albert cautioned, however, that "it is not always easy to make this (comparison between the seriousness of both evils) estimate calmly and impartially, for it is human to imagine the danger to ourselves greater than the risk to another's rights, especially in moments of agitation and peril. If the person concerned honestly believed that the harm he did was less than the risk he ran, that must suffice; for in time of danger it is not to be expected that a person will arrive at a nicely balanced judgment of the comparative seriousness of two alternative evils." (*ibid*., p. 437).

B. USE OF PROPERTY THAT INJURES OTHERS.

The qualifications to the rule that no duty is owed to trespassers demonstrate the fact that ownership is not absolute. It is subject to limitations imposed by the very fact of the owner's membership in the community. Article 431 of the New Civil Code provides that an owner cannot use his property in such a manner as to injure the rights of others — *sic utero tuo ut alienum non laedas*. This statutory provision is not even necessary because it is a fundamental restriction that is deemed to exist even without an express provision to that effect. *(Report of the Code Commission, p. 95)*. Thus, an exercise of the right of the owner may give rise to an action based on quasi-delict if the owner negligently exercises such right to the prejudice of another. For example, the Supreme Court ruled in *Andamo vs. Intermediate Appellate Court* (191 SCRA 195 [1990]) that an action for quasi-delict may be maintained if the owner negligently constructs a pond on its property and allows it to overflow to the neighboring lots. Although, the owner had the right to construct a pond, the exercise of the right should not cause damage to his neighbor.

In *Romman Enterprises, Inc. vs. Court of Appeals* (G.R. No. 125018, April 6, 2000), the Supreme Court explained that the claim for damages may be sustained although a landowner is entitled to

the benefit of the easement of natural drainage of water under Article 637 of the Civil Code. Under the same provision, "lower estates are obliged to receive the waters which naturally and without intervention of man descend from the higher estates." Liability was imposed on the owner of a piggery farm because the land of his neighbor was flooded with waste water containing pig manure. Trees and vegetables of the neighbor were destroyed because such polluted water continuously flowed ankle-deep for several months.

C. LIABILITY OF PROPRIETORS OF BUILDINGS.

The New Civil Code includes the following provisions that apply to proprietors of a building or structure which involve affirmative duty of due care in maintaining the same.

> "Art. 2190. The proprietor of a building or structure is responsible for the damages resulting from its total or partial collapse, if it should be due to the lack of necessary repairs.
>
> Art. 2191. Proprietors shall also be responsible for damages caused:
>
> (1) By the explosion of machinery which has not been taken care of with due diligence, and the inflammation of explosive substances which have not been kept in a safe and adequate place;
>
> (2) By excessive smoke, which may be harmful to persons or property;
>
> (3) By the falling of trees situated at or near highways or lanes, if not caused by *force majeure*;
>
> (4) By emanations from tubes, canals, sewers or deposits of infectious matter, constructed without precautions suitable to the place.

The provisions were carried over from the Old Civil Code. The New Civil Code likewise adopted the rule in the Old Civil Code to the effect that third persons who suffered damages may proceed only against the engineer or architect or contractor if the damage referred to in Articles 2190 and 2191 should be the result of any defect in construction. *(Articles 2192 and 1723, New Civil Code)*. Nevertheless, even in the absence of the above-quoted provisions, actions for damages in the situations specified thereunder can still be maintained under Article 2176 because any damage may be considered as damage resulting from the proprietor's failure to exercise due care in the maintenance of his building and that he used his property in such a

way that he injured the property of another.

With respect to the second paragraph of Article 2191, the Supreme Court considered the excessive smoke a nuisance that might bring about depreciation in the value of adjoining properties. However, the Court ruled that there is no certain pecuniary standard by which such damage can be measured, and in that sense the threatened injury is irreparable and may appropriately be restrained by injunction *(Ollendorf v. Abrahamson, 38 Phil. 585).*

3. EMPLOYERS AND EMPLOYEES

A. EMPLOYERS.

It was already explained in Chapter 1 that actions for quasi-delict can still be maintained even if employee's compensation is provided for under the Labor Code. It should be noted that in connection with quasi-delictual actions, the employee may use the provisions of the Labor Code which imposes upon the employer certain duties with respect to the proper maintenance of the work place or the provision of adequate facilities to ensure the safety of the employees. Failure on the part of the employer to comply with such mandatory provisions may be considered negligence *per se*.

Traditionally, employers, by engaging the services of another as employee, impliedly agree to use reasonable care to provide reasonably safe premises and places in and about which the servant is required to work, to furnish reasonably safe and suitable machinery, and a sufficient supply of proper materials, tools, and appliances for the work to be done, and at all times during the continuance of work to repair and to keep in the same safe suitable condition the places, machinery, and appliances; to provide competent workmen; and so far as the servant could not be assumed to know the perils of the work itself, or of the particular portion of it in which he was engaged, to instruct him and to warn him of any secret danger which the master was aware. As to these matters, the employer is bound to exercise that measure of care which reasonably prudent men take under similar circumstances. *(Cerezo vs. Atlantic Gulf and Pacific Co., supra., page 26)*.

It should be noted, however, that the rules regarding the degree of care owed by employers to their employees has been modified by Articles 1711 and 1712 of the New Civil Code. The same provisions already impose liability without fault on the part of the employers. (*See Julita Vda. De Severo vs. Feliciano*, 157 SCRA 446 [1988]).

B. EMPLOYEES.

Employees are also bound to exercise due care in the performance of their functions for the employers. Absent such due care, the employee may be held liable. The liability may be based on negligence committed while in the performance of the duties of the employee. The existence of the contract constitutes no bar to the commission of torts by one against the other and the consequent recovery of damages. Thus, in *Araneta vs. De Joya* (57 SCRA 59 [1974]), a company Vice President who signed checks and disbursed funds of the corporation for an unauthorized trip abroad of another employee may be held liable under Article 2176. He is guilty of neglecting to perform his duties properly to the damage of the company.

CASE:

MA-AO SUGAR CENTRAL CO., INC., et al. vs.
HON. COURT OF APPEALS, et al.
G.R. No. 83491, August 27, 1990

CRUZ, *J.*:

To say the least, the Court views with regret the adamant refusal of petitioner Ma-ao Sugar Central to recompense the private respondent for the death of Julio Famoso, their main source of support, who was killed in line of duty while in its employ. It is not only a matter of law but also of compassion on which we are called upon to rule today. We shall state at the outset that on both counts the petition must fail.

On March 22, 1980, Famoso was riding with a co-employee in the caboose or "carbonera" of Plymouth No. 12, a cargo train of the petitioner, when the locomotive was suddenly derailed. He and his companion jumped off to escape injury, but the train fell on its side, caught his legs by its wheels and pinned him down. He was declared dead on the spot.

The claims for death and other benefits having been denied by the petitioner, the herein private respondent filed suit in the Regional Trial Court of Bago City. Judge Marietta Hobilla-Alinio ruled in her favor but deducted from the total damages awarded 25% thereof for the decedent's contributory negligence and the total pension of P41,367.60 private respondent and her children would be receiving from the SSS for the next five years. The dispositive portion of the decision read:

> "WHEREFORE, in view of the foregoing facts and circumstances present in this case, the Court orders as it does hereby order the defendant Ma-ao Sugar Central thru its Manager Mr. Guillermo Y. Araneta to pay plaintiff the following amount:

x x x"

The widow appealed, claiming that the deductions were illegal. So did the petitioner, but on the ground that it was not negligent and therefore not liable at all.

In its own decision, the Court of Appeals sustained the rulings of the trial court except as to the contributory negligence of the deceased and disallowed the deductions protested by the private respondent.

x x x

In this petition, the respondent court is faulted for finding the petitioner guilty of negligence notwithstanding its defense of due diligence under Article 2176 of the Civil Code and for disallowing the deductions made by the trial court.

Investigation of the accident revealed that the derailment of the locomotive was caused by protruding rails which had come loose because they were not connected and fixed in place by fish plates. Fish plates are described as strips of iron 8" to 12" long and 3 1/2" thick which are attached to the rails by 4 bolts, two on each side, to keep the rails aligned. Although they could be removed only with special equipment, the fish plates that should have kept the rails aligned could not be found at the scene of the accident.

There is no question that the maintenance of the rails, for the purpose *inter alia* of preventing derailments, was the responsibility of the petitioner, and that this responsibility was not discharged. According to Jose Treyes, its own witness, who was in charge of the control and supervision of its train operations, cases of derailment in the milling district were frequent and there were even times when such derailments were reported every hour. The petitioner should therefore have taken more prudent steps to prevent such accidents instead of waiting until a life was finally lost because of its negligence.

The argument that no one had been hurt before because of such derailments is of course not acceptable. And neither are we impressed by the claim that the brakemen and the conductors were required to report any defect in the condition of the railways and to fill out prescribed forms for the purpose. For what is important is that the petitioner should act on these reports and not merely receive and file them. The fact that it is not easy to detect if the fish plates are missing is no excuse either. Indeed, it should stress all the more the need for the responsible employees of the petitioner to make periodic checks and actually go down to the railroad tracks and see if the fish plates were in place.

It is argued that the locomotive that was derailed was on its way back and that it had passed the same rails earlier without accident. The suggestion is that the rails were properly aligned then, but that does not necessarily mean they were still aligned afterwards. It is possible that the fish plates were loosened and detached during its first trip and the rails were as a result already misaligned during the return trip. But the Court feels that even this

was unlikely, for, as earlier noted, the fish plates were supposed to have been bolted to the rails and could be removed only with special tools. The fact that the fish plates were not found later at the scene of the mishap may show they were never there at all to begin with or had been removed long before.

At any rate, the absence of the fish plates — whatever the cause or reason — is by itself alone proof of the negligence of the petitioner. *Res ipsa loquitur*. The doctrine was described recently in *Layugan vs. Intermediate Appellate Court*, thus:

Where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from want of care.

4. BANKS

The business of banks is one affected with public interest. Because of the nature of its functions, a bank is under obligation to treat the accounts of its depositors with meticulous care, always having in mind the fiduciary nature of their relationship. *(Philippine Bank of Commerce vs. Court of Appeals, 269 SCRA 695 [1997])*. In every case, the depositor expects the bank to treat his account with utmost fidelity, whether such account consists only of a few hundred pesos or of millions. The bank must record every single transaction accurately, down to the last centavo, and as promptly as possible. This has to be done if the account is to reflect at any given time the amount of money the depositor can dispose as he sees fit, confident that the bank will deliver it as and to whomever he directs. A blunder on the part of the bank, such as failure to duly credit him his deposits as soon as they are made, can cause the depositor not a little embarrassment if not financial loss and perhaps even civil and criminal litigation. *(ibid., citing Simex International [Manila], Inc. vs. Court of Appeals, 183 SCRA 360, 367 [1990]; Bank of Phil. Islands vs. IAC, 206 SCRA 408 [1992]; Bank of Phil. Islands vs. Court of Appeals, 102 Phil. 181 [1957]; City Trust Banking Corp. v. IAC, 232 SCRA 559 [1994]; Metropolitan Bank and Trust Company vs. CA, 237 SCRA 761 [1994])*.

Consequently, depositor may file an action for damages under Article 2176 of the New Civil Code if through the fault of the bank's employee, the secretary of the depositor was able to fraudulently divert his funds from his account to the account of the secretary's husband. *(Phil. Bank of Commerce vs. Court of Appeals, 269 SCRA 695 [1997])*. The Supreme Court found in the last cited case that there was contributory negligence on the part of the depositor but considered the negligence of the bank and its employees as the proximate

cause of the loss.

The bank is also liable if it wrongfully dishonors the check issued by the depositor even if there are sufficient funds in the account and even if there is no other valid justification to do so. The payee itself may not have a cause of action against the drawee bank for lack of privity but the depositor can maintain an action either based on contract or quasi-delict. Thus, if the bank dishonored the check issued by the drawer because the employees of the bank negligently failed to credit a previous deposit to the account of the drawer, the bank may be held liable for damages including damage to the business reputation of the client and moral damages for the embarrassment and humiliation that it caused. *(Metropolitan Bank and Trust Company vs. Court of Appeals, 237 SCRA 761 [1994]; Pilipinas Bank vs. Court of Appeals, 234 SCRA 435 [1994]; Bank of Philippine Islands vs. Intermediate Appellate Court, 206 SCRA 408 [1992]).*

Negligence may also justify liability if there is forgery in the checks drawn against a bank. The general rule under Section 23 of the Negotiable Instrument's Law is that a forged signature is wholly inoperative and payment made through or under such signature is ineffectual or does not discharge the instrument. The exception to this rule is when the party relying on the forgery is precluded from setting up forgery or want of authority. In this jurisdiction, the Supreme Court recognizes negligence of the party invoking forgery as an exception to the general rule. Thus, if an endorsement was forged, the rights and liabilities of the drawee bank and the collective bank are determined by looking at the relative negligence of the parties thereto. *(Bank of Philippine Islands vs. Court of Appeals, 216 SCRA 51 [1992]; Banco de Oro Savings and Mortgage vs. Equitable Bank Corporation, 157 SCRA 188 [1988]; Philippine National Bank vs. Quimpo, 158 SCRA 582 [1988]; Philippine National Bank vs. Court of Appeals, 25 SCRA 693 [1968]; Republic vs. Equitable Banking Corporation, 10 SCRA 8 [1964]; National Bank vs. National City Bank of New York, 63 Phil. 711 [1936]; San Carlos Milling Co. vs. Bank of Phil. Islands, 59 Phil. 59 [1933]).*

CASE:

PHILIPPINE BANK OF COMMERCE vs. COURT OF APPEALS 269 SCRA 695 [1997]

"Irene Yabut's (secretary) *modus operandi* is far from complicated. She would accomplish two (2) copies of the deposit slip, an original and a duplicate. The original showed the name of her husband as depositor and

his current account number. On the duplicate copy was written the account number of her husband but the name of the account holder was left blank. PBC's teller, Azucena Mabayad, would, however, validate and stamp both the original and the duplicate of these deposit slips retaining only the original copy despite the lack of information on the duplicate slip. The second copy was kept by Irene Yabut allegedly for record purposes. After validation, Yabut would then fill up the name of RMC in the space left blank in the duplicate copy and change the account number written thereon, which is that of her husband's and make it appear to be RMC's account number x x x. With the daily remittance records also prepared by Ms. Yabut and submitted to private respondent RMC together with the validated duplicate slips with the latter's name and account number, she made her company believe that all the while the amounts she deposited were being credited to its account when, in truth and in fact, they were being deposited by her and credited by the petitioner bank in the account of Cotas. This went on in a span of more than one (1) year without the private respondent's knowledge.

x x x

Applying the above test, it appears that the bank's teller, Ms. Azucena Mabayad, was negligent in validating, officially stamping and signing all the deposit slips prepared and presented by Ms. Yabut, despite the glaring fact that the duplicate copy was not completely accomplished contrary to the self-imposed procedure of the bank with respect to the proper validation of deposit slips, original or duplicate x x x.

Clearly, Ms. Mabayad failed to observe this very important procedure. The fact that the duplicate slip was not compulsorily required by the bank in accepting deposit should not relieve the petitioner bank of responsibility. The odd circumstance alone that such duplicate copy lacked one vital information – that of the name of the account holder – should have already put Ms. Mabayad on guard. Rather than steadily validating the incomplete copy, she should have proceeded more cautiously by being more proving as to the true reason why the name of the account holder in the duplicate slip was left blank while that in the original was filled up. She should not have been so naive in accepting hook, line and sinker the too shallow excuse of Ms. Irene Yabut to the effect that since the duplicate copy was only for her personal record, she would simply fill up the blank space later on. A 'reasonable man of ordinary prudence' would not have given credence to such explanation and would have insisted that the space left blank filled up as a condition for validation. Unfortunately, this was not how bank teller Mabayad proceeded thus, resulting in huge losses to the private respondent.

Negligence here lies not only on the part of Ms. Mabayad but also on the part of the bank itself in its lackadaisal selection and supervision of Ms. Mabayad. This was exemplified in the testimony of Mr. Romeo Bonifacio, then Manager of the Pasig Branch of the petitioner bank and now its Vice-President, to the effect that, while he ordered the investigation of the incident, he never came to know that blank deposit slips were validated in total disregard of the bank's validation procedures x x x."

5. COMMON CARRIERS

Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of passengers transported by them according to all circumstances of each case. *(Articles 1733 and 1755, Civil Code; Sarkies Tours Philippines, Inc. vs. Court of Appeals, 280 SCRA 58; Tabacalera Insurance Co. vs. North Front Shipping Services, Inc., 272 SCRA 572 [1997]).* The law provides that the common carriers shall be responsible for all the loss, destruction or deterioration of the goods unless the same is due to any of the following causes only: (1) Flood, storm, earthquake, lightning, or other natural disaster or calamity; (2) Act of the public enemy in war, whether international or civil; (3) Act or omission of the shipper or owner of the goods; (4) The character of the goods or defects in the packing or in the containers; and (5) Order or act of competent public authority. (Article 1735, Civil Code).

However, in those cases where there is no liability, the presumption is that the common carriers have been at fault or have acted negligently. *(Art. 1735, Civil Code; Philippine American General Insurance Co. vs. Court of Appeals, 273 SCRA 262 [1997]; Philippine Airlines, Inc. vs. Court of Appeals, 255 SCRA 48 [1996]).* The same presumption of negligence is present in case of death or injuries to passengers. *(Art. 1756, Civil Code; Baliwag Transit, Inc. vs. Court. of Appeals, 256 SCRA 746 [1996]; Fabre, Jr. vs. Court of Appeals, 259 SCRA 426 [1996]).*

It should be emphasized, however, that the duty to exercise extraordinary diligence of common carriers is usually owed to persons with whom he has contractual relation, that is, the passenger and the shipper of the goods. Hence, the case against the common carrier is for the enforcement of an obligation arising from breach of contract. *(Del Prado vs. Manila Electric Co., 52 Phil. 900; MRR Co. vs. Cia Transatlantica, 38 Phil. 875).* As such, the case cannot be defeated by proof of the exercise of due diligence in the selection and supervision of the employee. *(Manzanal vs. Ausejo, 164 SCRA 36, 46 [1988]).*However, there is also a view that extraordinary diligence is owed by common carriers even to third persons *(Kapalaran Bus Line v. Coronado, 176 SCRA 792 [1989]).*

Nevertheless, the same act which breached the contract gives rise to an action based on quasi-delict. *(Air France vs. Carrascoso, supra., p. 34).* Quasi-delictual liability may be due to the passenger

himself or a third person who may be injured thereby. The presumption of negligence does not apply if the action is one based on quasi-delict. However, the nature of the business still requires the exercise of the highest degree of care demanded by the circumstances.

6. DOCTORS

Doctors or physicians are experts, who, because of their training and the very nature of their work, are required to exercise utmost diligence in the performance of their tasks. The Supreme Court explained in *Dr. Victoria L. Batiquin and Allan Batiquin vs. Court of Appeals, et al.* (258 SCRA 334 [1996]) that:

> "Throughout history, patients have consigned their fates and lives to the skill of their doctors. For a breach of this trust, men have been quick to demand retribution. Some 4,000 years ago, the Code of Hammurabi then already provided: 'If a physician make a deep incision upon a man with his bronze lancet and cause a man's death or operate on the eye socket of a man with his bronze lancet and destroy the man's eyes, they shall cut off his hand. Subsequently, Hippocrates wrote what was to become part of the healer's oath: 'I will follow that method of treatment which according to my ability and judgment, I consider for the benefit of my patients and abstain from whatever is deleterious and mischievous . . . . While I continue to keep this oath unviolated may it be granted to me to enjoy life and practice the art, respected by all men at all times but should I trespass and violate this oath, may the reverse be my lot.' At present, the primary objective of the medical profession is the preservation of life and maintenance of the health of the people.
>
> Needless to say then, when a physician strays from his sacred duty and endangers instead the life of his patient, he must be made to answer therefor. Although society today cannot and will not tolerate the punishment meted out by the ancients, neither will it and this Court, as this case would show, let the act go uncondemned.
>
> x x x
>
> As a final word, this Court reiterates its recognition of the vital role the medical profession plays in the lives of the people and State's compelling interest to enact measures to protect the public from 'potentially deadly effects of incompetence and ignorance in those who would undertake to treat our bodies and minds for disease or trauma'. Indeed, a physician is bound to serve the interest of this patients 'with the greatest solicitude, giving them always his best talent and skill'. Through her tortious conduct, the petitioner endangered the life of Flotilde Villegas, in viola-

> tion of her profession's rigid ethical code and in contravention of the legal standards set forth for professionals, in general, and members of the medical profession, in particular."

The duty of the physician to bring skill and care to the amelioration of the condition of his patient has its foundation in public consideration which is inseparable from the nature and exercise of his calling upon which the public reposes respect and confidence; any slip or breach in the performance of that duty, no matter how small, is corrosive of that public faith. *(Bernal, et al. vs. Natalia Alonzo, et al., 12 CAR 2s 792 [1967]).*

A. STANDARD OF CARE.

The action against the doctor is commonly referred to as medical malpractice. This is a particular form of negligence which consists in the failure of a physician or surgeon to apply to his practice of medicine that degree of care and skill which is ordinarily employed by the profession generally under similar conditions, and in like surrounding circumstances *(Reyes v. Sisters of Mercy Hospital, 341 SCRA 760, 769 [2000]).*

Whether or not a physician committed an inexcusable lack of precaution in the treatment of his patient is to be determined according to the standard of care observed by other members of the profession in good standing under similar circumstances bearing in mind the advanced state of the profession at the time of treatment or the present state of medical science *(Dr. Ninevetch Cruz v. Court of Appeals, 282 SCRA 188 [1997]).* The doctor must use at least the same level of care that any reasonably competent doctor would use to treat a condition under the same circumstances. Indeed, the standard contemplated is not what is actually the average merit among all known practitioners from the best to the worst and from the most to the least experienced, but the reasonable average merit among the ordinarily good physicians *(Reyes v. Sisters of Mercy Hospital, supra. at p. 777).*

a. General Practitioners v. Specialists.

According to the leading authority on Medical Jurisprudence, the "standard of care demanded from a general practitioner is ordinary care and diligence in the application of his knowledge and skill in his practice of the profession. He ought to apply to his patient what other general practitioners will apply when confronted with similar situation." *(Pedro P. Solis, Medical Jurisprudence, 1988 Ed., p. 225).* On the other hand, "a specialist's legal duty to the patient is

generally considered to be that of an average specialist, not that of an average physician. A physician who holds himself out as having special knowledge and skill in the treatment of a particular organ or disease or injury is required to bring to the discharge of his duty to a patient employing him as such as a specialist, not merely that of an average degree of skill possessed by general practitioners but that special degree of skill and care which physicians, similarly situated who devote special study and attention to the treatment of such organ, disease or injury ordinarily possess, regard being in the state of scientific knowledge at the time." *(ibid., citing Bolk vs. Sshizer, 149 S.E. 2d 565 [1966])*

Stated differently, the proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. One holding out as a specialist should also be held to the standard of care and skill of the average member of the profession practising the specialty, taking into account the advances in the profession. In both cases, it is permissible to consider the resources available to the general practitioner and the specialist as one of the circumstances in determining the degree of skill and care required. *(Brune vs. Belinkoff, 235 N.E. 2d 793 [1968]).*

B. CAPTAIN OF THE SHIP DOCTRINE.

The doctor cannot blame the assisting nurse for his own omission. Thus, if a piece of gauze was left in the abdominal cavity of the patient after an operation, the surgeon cannot excuse himself from liability just because a nurse was present. The only effect is that the nurse may be held jointly and solidarily liable with him if said nurse was also negligent. The surgeon is liable because he has the duty to ascertain for himself whether there was left any foreign body in the abdominal cavity of his patient before he surtured it. *(Bernal, et al. vs. Alonzo, et al., supra).*

This is especially true if the doctor is the head of the surgical team, the so-called captain of the ship, because as such he has the responsibility to see to it that those under him perform the task in the proper manner. Under the "captain of the ship" doctrine, the surgeon is likened to a ship captain who must not only be responsible for the safety of the crew but also of the passengers of the vessel. The head surgeon is made responsible for everything that goes wrong within the four corners of the operating room. It enunciates the liability of the surgeon not only for the wrongful acts of those who are under his

physical control but also those wherein he has extension of control. *(Rogelio Ramos, et al. vs. Court of Appeals, et al., G.R. No. 124354, December 29, 1999, see note 73).*

In the above-cited *Ramos v. Court of Appeals* case, the doctor who was made liable under the "captain of the ship" doctrine sought reconsideration of the ruling arguing that the trend in American jurisprudence has been to reject the doctrine in the light of medical practice. The doctor cited *Thomas v. Raleigh General Hospital* where the court rejected the application of the doctrine citing the fact that the field of medicine has become specialized such that surgeons can no longer be deemed as having control over the other personnel in the operating room. It held that an assignment of liability based on actual control more realistically reflects the actual relationship which exists in a modern operating room. Nevertheless, the Supreme Court rejected the argument of the doctor ruling that the fact that there is such a trend in the United States does not mean that it will *ipso facto* follow said trend. The Supreme Court ruled that due regard for the peculiar factual circumstances obtaining in the case justifies the application of the Captain-of-the-Ship doctrine. The Court pointed out that from the facts on record, it can be logically inferred that the doctor in question exercised a certain degree of, at the very least, supervision over the procedure then being performed on the patient. *(Ramos v. Court of Appeals, No. 124354, April 11, 2002, Resolution on Motion for Reconsideration).*

C. NOT WARRANTORS.

Physicians are not warrantors of cures or insurers against personal injuries or death of the patient. *(Cruz v. Court of Appeals, supra.; Chan Lugay vs. St. Luke's Medical Hospital, 10 CAR 2s 415, 431 [1960]).* Difficulties and uncertainties in the practice of profession are such that no practitioner can guarantee results. Error of judgment will not necessarily make the physician liable. Thus, the Court of Appeals explained in *Liberata Morales vs. Mary Johnston Hospital, Inc., et al.* (15 CAR 2s 98 [1970]):

> "x x x It is noteworthy that an eye specialist is required to use only reasonable skill and care in determining through diagnosis the condition of the patient and the nature of his ailment, and is liable for failure, due to a want of the requisite skill or care, to diagnose correctly the nature of the ailment. But he does not guarantee or insure the correctness of his diagnosis, and he is not responsible for a mistake in diagnosis if he uses the proper degree of skill and care." *(70 C.J.S., pp. 960-961, Sec. 48d; 41 Am.*

Jur. P. 201 Sec. 82 n 17; Anno: 68 ALR 2d 428, et al.).

Lord Denning explained in *Roe vs. Minister of Health* (2 Q.B. 66, Court of Appeals [1954]) that "medical science has conferred great benefits on mankind, but these benefits are attended by considerable risks. Every surgical operation is attended by risks. Doctors like the rest of us, have to learn by experience; and experience often teaches the hard way. Something goes wrong and shows up a weakness, and then it is put right."

The Supreme Court explained the rules regarding medical malpractice or negligence in *Garcia-Rueda vs. Pascasio* (278 SCRA 769 [1997]). In the said case, the husband of the petitioner underwent surgical operation at the UST hospital for the removal of a stone blocking his ureter. Six hours after surgery, petitioner's husband died of complications of "unknown cause" according to the officials of the hospital. An autopsy was conducted by a doctor of the National Bureau of Investigation (NBI) who concluded that death was due to lack of care by the attending physician in administering anaesthesia. The NBI recommended that a criminal case be filed against the surgeon and the anaesthesiologist. The criminal cases were later dismissed by the City Prosecutor. Aggrieved, the petitioner filed a case before the Office of the Ombudsman against the prosecutors which in turn dismissed the complaint. The petitioner questioned the dismissal of the case by the Ombudsman before the Supreme Court but the Supreme Court dismissed the complaint finding that no grave abuse of discretion was committed by the Office of the Ombudsman. However, the Supreme Court suggested that the proper remedy is to appeal the decision of the prosecutors before the Secretary of Justice. In making such ruling, the Supreme Court explained the nature of medical malpractice in this wise:

> A word on medical malpractice or negligence cases.
>
> "In its simplest terms, the type of lawsuit which has been called medical malpractice or, more appropriately, medical negligence, is that type of claim which a victim has available to him or her to redress a wrong committed by a medical professional which has caused bodily harm.
>
> In order to successfully pursue such a claim, a patient must prove that a health care provider, in most cases a physician, either failed to do something which a reasonably prudent health care provider would have done, or that he or she did something that a reasonably prudent provider would not have done; and that failure or action caused injury to the patient."

Hence, there are four elements involved in medical negligence cases: duty, breach, injury and proximate causation.

Evidently, when the victim employed the services of Dr. Antonio and Dr. Reyes, a physician-patient relationship was created. In accepting the case, Dr. Antonio and Dr. Reyes in effect represented that, having the needed training and skill possessed by physicians and surgeons practicing in the same field, they will employ such training, care and skill in the treatment of their patients. They have a duty to use at least the same level of care that any other reasonably competent doctor would use to treat a condition under the same circumstances. The breach of these professional duties of skill and care, or their improper performance, by a physician surgeon whereby the patient is injured in body or in health, constitutes actionable malpractice. Consequently, in the event that any injury results to the patient from want of due care or skill during the operation, the surgeons may be held answerable in damages for negligence.

Moreover, in malpractice or negligence cases involving the administration of anaesthesia, the necessity of expert testimony and the availability of the charge of *res ipsa loquitur* to the plaintiff, have been applied in actions against anaesthesiologists to hold the defendant liable for the death or injury of a patient under excessive or improper anaesthesia. Essentially, it requires two-pronged evidence: evidence as to the recognized standards of the medical community in the particular kind of case, and a showing that the physician in question negligently departed from this standard in his treatment.

Another element in medical negligence cases is causation which is divided into two inquiries: whether the doctor's actions in fact caused the harm to the patient and whether these were the proximate cause of the patient's injury. Indeed here, a causal connection is discernible from the occurrence of the victim's death after the negligent act of the anaesthesiologist in administering the anesthesia, a fact which, if confirmed, should warrant the filing of the appropriate criminal case. To be sure, the allegation of negligence is not entirely baseless. Moreover, the NBI deduced that the attending surgeons did not conduct the necessary interview of the patient prior to the operation. It appears that the cause of the death of the victim could have been averted had the proper drug been applied to cope with the symptoms of malignant hyperthermia. Also, we cannot ignore the fact that an antidote was readily available to counteract whatever deleterious effect the anaesthesia might produce. Why these precautionary measures were disregarded must be sufficiently explained."

D. PROOF.

Whether a physician or surgeon has exercised the requisite degree of skill and care in the treatment of his patient is, in the generality of cases, a matter of expert opinion. The deference of courts to the expert opinion of qualified physicians stems from its realization that the latter possess unusual technical skills which laymen in most instances are incapable of intelligently evaluating. Expert testimony should be offered to prove that the circumstances cited by the courts below are constitutive of conduct falling below the standard of care employed by other physicians in good standing when performing the same operation. It must be remembered that when the qualifications of a physician are admitted, there is an inevitable presumption that in proper cases he takes the necessary precaution and employs the best of his knowledge and skill in attending to his clients, unless the contrary is sufficiently established. This presumption is rebuttable by expert opinion. *(Dr. Ninevetch Cruz vs. Court of Appeals, 282 SCRA 188 [1997]).*

Medical malpractice can also be established by relying on the doctrine of *res ipsa loquitur*. However, this is limited to cases where the court from its fund of common knowledge can determine the standard of care. These are cases where an ordinary layman can conclude that there was negligence on the part of the doctor. It is restricted to situations where a layman is able to say, as a matter of common knowledge and observation, that the consequences of professional care were not as such as would ordinarily have followed if due care had been exercised *(Reyes v. Sisters of Mercy Hospital, supra. at p. 772 citing Ramos v. Court of Appeals).* If a layman cannot or is not in a position to say if due care has been exercised, the testimony of an expert would then be indispensable.

The Supreme Court explained in *Rogelio Ramos, et al. vs. Court of Appeals, et al.* (G.R. No. 124354, December 29, 1999):

> "Medical malpractice cases do not escape the application of this doctrine. Thus, *res ipsa loquitur* has been applied when the circumstances attendant upon the harm are themselves of such a character as to justify an inference of negligence as the cause of that harm. The application of *res ipsa loquitur* in medical negligence cases presents a question of law since it is a judicial function to determine whether a certain set of circumstances does, as a matter of law, permit a given inference.
>
> Although generally, expert medical testimony is relied upon in malpractice suits to prove that a physician has done a negligent

act or that he has deviated from the standard medical procedure, when the doctrine of *res ipsa loquitur* is availed by the plaintiff, the need for expert medical testimony is dispensed with because the injury itself provides the proof of negligence. The reason is that the general rule on the necessity of expert testimony applies only to such matters clearly within the domain of medical science, and not to matters that are within the common knowledge of mankind which may be testified to by anyone familiar with the facts. Ordinarily, only physicians and surgeons of skill and experience are competent to testify as to whether a patient has been treated or operated upon with a reasonable degree of skill and care. However, testimony as to the statements and acts of physicians and surgeons, external appearances, and manifest conditions which are observable by any one may be given by non-expert witnesses. Hence, in cases where the *res ipsa loquitur* is applicable, the court is permitted to find a physician negligent upon proper proof of injury to the patient, without the aid of expert testimony, where the court from its fund of common knowledge can determine the proper standard of care. Where common knowledge and experience teach that a resulting injury would not have occurred to the patient if due care had been exercised, an inference of negligence may be drawn giving rise to an application of the doctrine of *res ipsa loquitur* without medical evidence, which is ordinarily required to show not only what occurred but how and why it occurred. When the doctrine is appropriate, all that the patient must do is prove a nexus between the particular act or omission complained of and the injury sustained while under the custody and management of the defendant without need to produce expert medical testimony to establish the standard of care. Resort to *res ipsa loquitur* is allowed because there is no other way, under usual and ordinary conditions, by which the patient can obtain redress for injury suffered by him.

Thus, courts of other jurisdictions have applied the doctrine in the following situations: leaving of a foreign object in the body of the patient after an operation, injuries sustained on a healthy part of the body which was not under, or in the area, of treatment, removal of the wrong part of the body when another part was intended, knocking out a tooth while a patient's jaw was under anesthetic for the removal of his tonsils, and loss of an eye while the patient plaintiff was under the influence of anesthetic, during or following an operation for appendicitis, among others.

Nevertheless, despite the fact that the scope of *res ipsa loquitur* has been measurably enlarged, it does not automatically apply to all cases of medical negligence as to mechanically shift the burden of proof to the defendant to show that he is not guilty of the ascribed negligence. *Res ipsa loquitur* is not a rigid or ordinary doctrine to be perfunctorily used but a rule to be cau-

tiously applied, depending upon the circumstances of each case. It is generally restricted to situations in malpractice cases where a layman is able to say, as a matter of common knowledge and observation, that the consequences of professional care were not as such as would ordinarily have followed if due care had been exercised. A distinction must be made between the failure to secure results, and the occurrence of something more unusual and not ordinarily found if the service or treatment rendered followed the usual procedure of those skilled in that particular practice. It must be conceded that the doctrine of *res ipsa loquitur* can have no application in a suit against a physician or surgeon which involves the merits of a diagnosis or of a scientific treatment. The physician or surgeon is not required at his peril to explain why any particular diagnosis was not correct, or why any particular scientific treatment did not produce the desired result. Thus, *res ipsa loquitur* is not available in a malpractice suit if the only showing is that the desired result of an operation or treatment was not accomplished. The real question, therefore, is whether or not in the process of the operation any extraordinary incident or unusual event outside of the routine performance occurred which is beyond the regular scope of customary professional activity in such operations, which, if unexplained would themselves reasonably speak to the average man as the negligent cause or causes of the untoward consequence. If there was such extraneous interventions, the doctrine of *res ipsa loquitur* may be utilized and the defendant is called upon to explain the matter, by evidence of exculpation, if he could.

We find the doctrine of *res ipsa loquitur* appropriate in the case at bar. As will hereinafter be explained, the damage sustained by Erlinda in her brain prior to a scheduled gall bladder operation presents a case for the application of *res ipsa loquitur*.

A case strikingly similar to the one before us is *Voss vs. Bridwell*, where the Kansas Supreme Court in applying the *res ipsa loquitur* stated:

The plaintiff herein submitted himself for a mastoid operation and delivered his person over to the care, custody and control of his physician who had complete and exclusive control over him, but the operation was never performed. At the time of submission he was neurologically sound and physically fit in mind and body, but he suffered irreparable damage and injury rendering him decerebrate and totally incapacitated. The injury was one which does not ordinarily occur in the process of a mastoid operation or in the absence of negligence in the administration of an anesthetic, and in the use and employment of an endoctracheal tube. Ordinarily a person being put under anesthesia is not rendered decerebrate as a consequence of administering such anesthesia

in the absence of negligence. Upon these facts and under these circumstances a layman would be able to say, as a matter of common knowledge and observation, that the consequences of professional treatment were not as such as would ordinarily have followed if due care had been exercised.

Here, the plaintiff could not have been guilty of contributory negligence because he was under the influence of anesthetics and unconscious, and the circumstances are such that the true explanation of event is more accessible to the defendants than to the plaintiff for they had the exclusive control of the instrumentalities of anesthesia.

Upon all the facts, conditions and circumstances alleged in Count II it is held that a cause of action is stated under the doctrine of *res ipsa loquitur*.

Indeed, the principles enunciated in the aforequoted case apply with equal force here. In the present case, Erlinda submitted herself for cholecystectomy and expected a routine general surgery to be performed on her gall bladder. On that fateful day she delivered her person over to the care, custody and control of private respondents who exercised complete and exclusive control over her. At the time of submission, Erlinda was neurologically sound and, except for a few minor discomforts, was likewise physically fit in mind and body. However, during the administration of anesthesia and prior to the performance of cholecystectomy she suffered irreparable damage to her brain. Thus, without undergoing surgery, she went out of the operating room already decerebrate and totally incapacitated. Obviously, brain damage, which Erlinda sustained, is an injury which does not normally occur in the process of a gall bladder operation. In fact, this kind of situation does not happen in the absence of negligence of someone in the administration of anesthesia and in the use of endotracheal tube. Normally, a person being put under anesthesia is not rendered decerebrate as a consequence of administering such anesthesia if the proper procedure was followed. Furthermore, the instruments used in the administration of anesthesia, including the endotracheal tube, were all under the exclusive control of private respondents, who are the physicians-in-charge. Likewise, petitioner Erlinda could not have been guilty of contributory negligence because she was under the influence of anesthetics which rendered her unconscious.

Considering that a sound and unaffected member of the body (the brain) is injured or destroyed while the patient is unconscious and under the immediate and exclusive control of the physicians, we hold that a practical administration of justice dictates the application of *res ipsa loquitur*. Upon these facts and under these circumstances the Court would be able to say, as a matter of common knowledge and observation, if negligence at-

> tended the management and care of the patient. Moreover, the liability of the physicians and the hospital in this case is not predicated upon an alleged failure to secure the desired results of an operation nor on an alleged lack of skill in the diagnosis or treatment as in fact no operation or treatment was ever performed on Erlinda. Thus, upon all these initial determination a case is made out for the application of the doctrine of *res ipsa loquitur*.
>
> Nonetheless, in holding that *res ipsa loquitur* is available to the present case we are not saying that the doctrine is applicable in any and all cases where injury occurs to a patient while under anesthesia, or to any and all anesthesia cases. Each case must be viewed in its own light and scrutinized in order to be within the *res ipsa loquitur* coverage."

Thus, in *Reyes v. Sisters of Mercy Hospital (supra.)* the petitioners, heirs of the deceased, argued that respondent Dr. Rico hastily and erroneously relied upon the Widal test, diagnosed the deceased's illness as typhoid fever and immediately prescribed the administration of the antibiotic chloromycetin and respondent Dr. Blanes erred in ordering the administration of the second dose of 500 milligrams of chloromycetin barely three hours after the first was given. However, the petitioners failed to present an expert witness to establish that the same specific acts constitute malpractice. They only presented a doctor who had extensive experience on autopsies but was not a specialist on typhoid fever. For their part, the private respondents presented two doctors who were experts on the subject. One is a diplomate whose specialization is infectious diseases and microbiology while the other, an associate professor in a medical school who has already treated a thousand cases of typhoid fever. Through these expert witnesses, it was established that although the Widal test is not conclusive, it remains a standard diagnostic test for typhoid fever. The expert witnesses confirmed that the actions of the respondent doctors were in accordance with the reasonable average merit among ordinarily good physicians.

E. LIABILITY OF HOSPITALS AND CONSULTANTS.

The "captain of the ship" described above may be a mere "consultant" in the hospital. The term "consultant" is loosely used by hospitals to distinguish their attending and visiting physicians from the residents, who are also physicians. In most hospitals abroad, the term visiting or attending physician, not consultant, is used. (*ibid*., note 74).

The hospital itself is not liable under Article 2180 in the ab-

sence of employer-employee relationship. Thus, the Supreme Court explained in its Resolution on the Motion for Reconsideration in *Rogelio Ramos et al. v. Court of Appeals, et al. (No. 124354, April 11, 2002)*:

> DLSMC maintains that first, a hospital does not hire or engage the services of a consultant, but rather, accredits the latter and grants him or her the privilege of maintaining a clinic and/or admitting patients in the hospital upon a showing by the consultant that he or she possesses the necessary qualifications, such as accreditation by the appropriate board (diplomate), evidence of fellowship and references. Second, it is not the hospital but the patient who pays the consultant's fee for services rendered by the latter. Third, a hospital does not dismiss a consultant; instead, the latter may lose his or her accreditation or privileges granted by the hospital. Lastly, DLSMC argues that when a doctor refers a patient for admission in a hospital, it is the doctor who prescribes the treatment to be given to said patient. The hospital's obligation is limited to providing the patient with the preferred room accommodation, the nutritional diet and medications prescribed by the doctor, the equipment and facilities necessary for the treatment of the patient, as well as the services of the hospital staff who perform the ministerial tasks of ensuring that the doctor's orders are carried out strictly.
>
> After a careful consideration of the arguments raised by DLSMC, the Court finds that respondent hospital's position on this issue is meritorious. There is no employer-employee relationship between DLSMC and Drs. Gutierrez and Hosaka which would hold DLSMC solidarily liable for the injury suffered by petitioner Erlinda under Article 2180 of the Civil Code.
>
> As explained by respondent hospital, that the admission of a physician to membership in DLSMC's medical staff as active or visiting consultant is first decided upon by the Credentials Committee thereof, which is composed of the heads of the various specialty departments such as the Department of Obstetrics and Gynecology, Pediatrics, Surgery with the department head of the particular specialty applied for as chairman. The Credentials Committee then recommends to DLSMC's Medical Director or Hospital Administrator the acceptance or rejection of the applicant physician, and said director or administrator validates the committee's recommendation. Similarly, in cases where a disciplinary action is lodged against a consultant, the same is initiated by the department to whom the consultant concerned belongs and filed with the Ethics Committee consisting of the department specialty heads. The medical director/hospital administrator merely acts as ex-officio member of said committee.
>
> Neither is there any showing that it is DLSMC which pays

> any of its consultants for medical services rendered by the latter to their respective patients. Moreover, the contract between the consultant in respondent hospital and his patient is separate and distinct from the contract between respondent hospital and said patient. The first has for its object the rendition of medical services by the consultant to the patient, while the second concerns the provision by the hospital of facilities and services by its staff such as nurses and laboratory personnel necessary for the proper treatment of the patient.
>
> Further, no evidence was adduced to show that the injury suffered by petitioner Erlinda was due to a failure on the part of respondent DLSMC to provide for hospital facilities and staff necessary for her treatment.
>
> For these reasons, we reverse the finding of liability on the part of DLSMC for the injury suffered by petitioner Erlinda.

The Supreme Court modified its previous ruling in the same case. Earlier, it made the hospital liable on the ground that the hospital exercised significant control in the hiring and firing of consultants and in the conduct of their work within the hospital premises. Although its Decision dated December 29, 1999 on this point is not controlling, it is interesting to quote the explanation of the Supreme Court which can be considered the contrary (though not controlling) view on the liability of hospitals:

> We now discuss the responsibility of the hospital in this particular incident. The unique practice (among private hospitals) of filling up specialist staff with attending and visiting "consultants," who are allegedly not hospital employees, presents problems in apportioning responsibility for negligence in medical malpractice cases. However, the difficulty is only more apparent than real.
>
> In the first place, hospitals exercise significant control in the hiring and firing of consultants and in the conduct of their work within the hospital premises. Doctors who apply for "consultant" slots, visiting or attending, are required to submit proof of completion of residency, their educational qualifications; generally, evidence of accreditation by the appropriate board (diplomate), evidence of fellowship in most cases, and references. These requirements are carefully scrutinized by members of the hospital administration or by a review committee set up by the hospital who either accept or reject the application. This is particularly true with respondent hospital.
>
> After a physician is accepted, either as a visiting or attending consultant, he is normally required to attend clinico-pathological conferences, conduct bedside rounds for clerks, interns

and residents, moderate grand rounds and patient audits and perform other tasks and responsibilities, for the privilege of being able to maintain a clinic in the hospital, and/or for the privilege of admitting patients into the hospital. In addition to these, the physician's performance as a specialist is generally evaluated by a peer review committee on the basis of mortality and morbidity statistics, and feedback from patients, nurses, interns and residents. A consultant remiss in his duties, or a consultant who regularly falls short of the minimum standards acceptable to the hospital or its peer review committee, is normally politely terminated.

In other words, private hospitals, hire, fire and exercise real control over their attending and visiting "consultant" staff. While "consultants" are not, technically employees, a point which respondent hospital asserts in denying all responsibility for the patient's condition, the control exercised, the hiring, and the right to terminate consultants all fulfill the important hallmarks of an employer-employee relationship, with the exception of the payment of wages. In assessing whether such a relationship in fact exists, the control test is determining. Accordingly, on the basis of the foregoing, we rule that for the purpose of allocating responsibility in medical negligence cases, an employer-employee relationship in effect exists between hospitals and their attending and visiting physicians. This being the case, the question now arises as to whether or not respondent hospital is solidarily liable with respondent doctors for petitioner's condition.

The basis for holding an employer solidarily responsible for the negligence of its employee is found in Article 2180 of the Civil Code which considers a person accountable not only for his own acts but also for those of others based on the former's responsibility under a relationship of *patria potestas*. Such responsibility ceases when the persons or entity concerned prove that they have observed the diligence of a good father of the family to prevent damage. In other words, while the burden of proving negligence rests on the plaintiffs, once negligence is shown, the burden shifts to the respondents (parent, guardian, teacher or employer) who should prove that they observed the diligence of a good father of a family to prevent damage.

In the instant case, respondent hospital, apart from a general denial of its responsibility over respondent physicians, failed to adduce evidence showing that it exercised the diligence of a good father of a family in the hiring and supervision of the latter. It failed to adduce evidence with regard to the degree of supervision which it exercised over its physicians. In neglecting to offer such proof, or proof of a similar nature, respondent hospital thereby failed to discharge its burden under the last paragraph of Article 2180. Having failed to do this, respondent hospital is

consequently solidarily responsible with its physicians for Erlinda's condition.

CASE:

DR. NINEVETCH CRUZ vs. COURT OF APPEALS
282 SCRA 188 [1997]

FRANCISCO, *J.*:

"Doctors are protected by a special rule of law. They are not guarantors of care. They do not even warrant a good result. They are not insurers against mishaps or unusual consequences. Furthermore, they are not liable for honest mistakes of judgment. . . ."

The present case against petitioner is in the nature of a medical malpractice suit, which in simplest terms is the type of claim which a victim has available to him or her to redress a wrong committed by a medical professional which has caused bodily harm. In this jurisdiction, however, such claims are most often brought as a civil action for damages under Article 2176 of the Civil Code, and in some instances, as a criminal case under Article 365 of the Revised Penal Code with which the civil action for damages is impliedly instituted. It is via the latter type of action that the heirs of the deceased sought redress for the petitioner's alleged imprudence and negligence in treating the deceased thereby causing her death. The petitioner and one Dr. Lina Ercillo who was the attending anaesthesiologist during the operation of the deceased were charged with "reckless imprudence and negligence resulting to (sic) homicide" in an information which reads:

> "That on or about March 23, 1991, in the City of San Pablo, Republic of the Philippines and within the jurisdiction of this Honorable Court, the accused above-named, being then the attending anaesthesiologist and surgeon, respectively, did then and there, in a negligence (sic), careless, imprudent, and incompetent manner, and failing to supply or store sufficient provisions and facilities necessary to meet any and all exigencies apt to arise before, during and/or after a surgical operation causing by such negligence, carelessness, imprudence, and incompetence, and causing by such failure, including the lack of preparation and foresight needed to avert a tragedy, the untimely death of said Lydia Umali on the day following said surgical operation."

x x x

[The accused was convicted by the Municipal Circuit Trial Court and the same was affirmed by the Regional Trial Court and the Court of Appeals]

First, the antecedent facts.

On March 22, 1991, prosecution witness, Rowena Umali De Ocampo,

accompanied her mother to the Perpetual Help Clinic and General Hospital situated in Balagtas Street, San Pablo City, Laguna. They arrived at the said hospital at around 4:30 in the afternoon of the same day. Prior to March 22, 1991, Lydia was examined by the petitioner who found a "myoma" in her uterus, and scheduled her for a hysterectomy operation on March 23, 1991. Rowena and her mother slept in the clinic on the evening of March 22, 1991 as the latter was to be operated on the next day at 1:00 o'clock in the afternoon. According to Rowena, she noticed that the clinic was untidy and the window and the floor were very dusty prompting her to ask the attendant for a rag to wipe the window and the floor with. Because of the untidy state of the clinic, Rowena tried to persuade her mother not to proceed with the operation. The following day, before her mother was wheeled into the operating room, Rowena asked the petitioner if the operation could be postponed. The petitioner called Lydia into her office and the two had a conversation. Lydia then informed Rowena that the petitioner told her that she must be operated on as scheduled.

Rowena and her other relatives, namely her husband, her sister and two aunts waited outside the operating room while Lydia underwent operation. While they were waiting, Dr. Ercillo went out of the operating room and instructed them to buy tagamet ampules which Rowena's sister immediately bought. About one hour had passed when Dr. Ercillo came out again this time to ask them to buy blood for Lydia. They bought type "A" blood from the St. Gerald Blood Bank and the same was brought by the attendant into the operating room. After the lapse of a few hours, the petitioner informed them that the operation was finished. The operating staff then went inside the petitioner's clinic to take their snacks. Some thirty minutes after, Lydia was brought out of the operating room in a stretcher and the petitioner asked Rowena and the other relatives to buy additional blood for Lydia. Unfortunately, they were not able to comply with petitioner's order as there was no more type "A" blood available in the blood bank. Thereafter, a person arrived to donate blood which was later transfused to Lydia. Rowena then noticed her mother, who was attached to an oxygen tank, gasping for breath. Apparently, the oxygen supply had run out and Rowena's husband together with the driver of the accused had to go to the San Pablo District Hospital to get oxygen. Lydia was given the fresh supply of oxygen as soon as it arrived. But at around 10:00 o'clock P.M., she went into shock and her blood pressure dropped to 60/50. Lydia's unstable condition necessitated her transfer to the San Pablo District Hospital so she could be connected to a respirator and further examined. The transfer to the San Pablo District Hospital was without the prior consent of Rowena nor of the other relatives present who found out about the intended transfer only when an ambulance arrived to take Lydia to the San Pablo District Hospital. Rowena and her other relatives then boarded a tricycle and followed the ambulance.

Upon Lydia's arrival at the San Pablo District Hospital, she was wheeled into the operating room and the petitioner and Dr. Ercillo re-operated on her because there was blood oozing from the abdominal incision. The at-

tending physicians summoned Dr. Bartolome Angeles, head of the Obstetrics and Gynecology Department of the San Pablo District Hospital. However, when Dr. Angeles arrived, Lydia was already in shock and possibly dead as her blood pressure was already 0/0. Dr. Angeles then informed petitioner and Dr. Ercillo that there was nothing he could do to help save the patient. While the petitioner was closing the abdominal wall, the patient died. Thus, on March 24, 1991, at 3:00 o'clock in the morning, Lydia Umali was pronounced dead. Her death certificate states "shock" as the immediate cause of death and "Disseminated Intravascular Coagulation (DIC)" as the antecedent cause.

In convicting the petitioner, the MTCC found the following circumstances as sufficient basis to conclude that she was indeed negligent in the performance of the operation:

> ". . . , the clinic was untidy, there was lack of provision like blood and oxygen to prepare for any contingency that might happen during the operation. The manner and the fact that the patient was brought to the San Pablo District Hospital for reoperation indicates that there was something wrong in the manner in which Dra. Cruz conducted the operation. There was no showing that before the operation, accused Dra. Cruz had conducted a cardio pulmonary clearance or any typing of the blood of the patient. It was (sic) said in medical parlance that the "the abdomen of the person is a temple of surprises" because you do not know the whole thing the moment it was open (sic) and surgeon must be prepared for any eventuality thereof. The patient (sic) chart which is a public document was not presented because it is only there that we could determine the condition of the patient before the surgery. The court also noticed in Exh. "F-1" that the sister of the deceased wished to postpone the operation but the patient was prevailed upon by Dra. Cruz to proceed with the surgery. The court finds that Lydia Umali died because of the negligence and carelessness of the surgeon Dra. Ninevetch Cruz because of loss of blood during the operation of the deceased for evident unpreparedness and for lack of skill, the reason why the patient was brought for operation at the San Pablo City District Hospital. As such, the surgeon should answer for such negligence. With respect to Dra. Lina Ercillo, the anaesthesiologist, there is no evidence to indicate that she should be held jointly liable with Dra. Cruz who actually did the operation."

The RTC reiterated the abovementioned findings of the MTCC and upheld the latter's declaration of "incompetency, negligence and lack of foresight and skill of appellant (herein petitioner) in handling the subject patient before and after the operation." And likewise affirming the petitioner's conviction, the Court of Appeals echoed similar observations, thus:

> ". . . While we may grant that the untidiness and filthiness of the clinic may not by itself indicate negligence, it nevertheless shows the absence of due care and supervision over her subordinate employees. Did this unsanitary condition permeate the operating room? Were the

surgical instruments properly sterilized? Could the conditions in the OR have contributed to the infection of the patient? Only the petitioner could answer these, but she opted not to testify. This could only give rise to the presumption that she has nothing good to testify on her defense. Anyway, the alleged "unverified statement of the prosecution witness" remains unchallenged and unrebutted.

Likewise undisputed is the prosecution's version indicating the following facts: that the accused asked the patient's relatives to buy Tagamet capsules while the operation was already in progress; that after an hour, they were also asked to buy type "A" blood for the patient; that after the surgery, they were again asked to procure more type "A" blood, but such was not anymore available from the source; that the oxygen given to the patient was empty; and that the son-in-law of the patient, together with a driver of the petitioner, had to rush to the San Pablo City District Hospital to get the much-needed oxygen. All these conclusively show that the petitioner had not prepared for any unforeseen circumstances before going into the first surgery, which was not emergency in nature, but was elective or prescheduled; she had no ready antibiotics, no prepared blood, properly typed and cross-matched, and no sufficient oxygen supply.

Moreover, there are a lot of questions that keep nagging Us. Was the patient given any cardio-pulmonary clearance, or at least a clearance by an internist, which are standard requirements before a patient is subjected to surgery. Did the petitioner determine as part of the pre-operative evaluation, the bleeding parameters of the patient, such as bleeding time and clotting time? There is no showing that these were done. The petitioner just appears to have been in a hurry to perform the operation, even as the family wanted a postponement to April 6, 1991. Obviously, she did not prepare the patient; neither did she get the family's consent to the operation. Moreover, she did not prepare a medical chart with instructions for the patient's care. If she did all these, proof thereof should have been offered. But there is none. Indeed, these are overwhelming evidence of "recklessness and imprudence."

This Court, however, holds differently and finds the foregoing circumstances insufficient to sustain a judgment of conviction against the petitioner for the crime of reckless imprudence resulting in homicide. The elements of reckless imprudence are: (1) that the offender does or fails to do an act; (2) that the doing or the failure to do that act is voluntary; (3) that it be without malice; (4) that material damage results from the reckless imprudence; and (5) that there is inexcusable lack of precaution on the part of the offender, taking into consideration his employment or occupation, degree of intelligence, physical condition, and other circumstances regarding persons, time and place.

Whether or not a physician has committed an "inexcusable lack of precaution" in the treatment of his patient is to be determined according to the standard of care observed by other members of the profession in good standing under similar circumstances bearing in mind the advanced state

of the profession at the time of treatment or the present state of medical science. In the recent case of *Leonila Garcia-Rueda vs. Wilfred L. Pascasio, et al.*, this Court stated that in accepting a case, a doctor in effect represents that, having the needed training and skill possessed by physicians and surgeons practicing in the same field, he will employ such training, care and skill in the treatment of his patients. He therefore has a duty to use at least the same level of care that any other reasonably competent doctor would use to treat a condition under the same circumstances. It is in this aspect of medical malpractice that expert testimony is essential to establish not only the standard of care of the profession but also that the physician's conduct in the treatment and care falls below such standard. Further, inasmuch as the causes of the injuries involved in malpractice actions are determinable only in the light of scientific knowledge, it has been recognized that expert testimony is usually necessary to support the conclusion as to causation.

Immediately apparent from a review of the records of this case is the absence of any expert testimony on the matter of the standard of care employed by other physicians of good standing in the conduct of similar operations. The prosecution's expert witnesses in the persons of Dr. Floresto Arizala and Dr. Nieto Salvador, Jr. of the National Bureau of Investigation (NBI) only testified as to the possible cause of death but did not venture to illuminate the court on the matter of the standard of care that petitioner should have exercised.

All three courts below bewail the inadequacy of the facilities of the clinic and its untidiness; the lack of provisions such as blood, oxygen, and certain medicines; the failure to subject the patient to a cardio-pulmonary test prior to the operation; the omission of any form of blood typing before transfusion; and even the subsequent transfer of Lydia to the San Pablo Hospital and the reoperation performed on her by the petitioner. But while it may be true that the circumstances pointed out by the courts below seemed beyond cavil to constitute reckless imprudence on the part of the surgeon, this conclusion is still best arrived at not through the educated surmises nor conjectures of laymen, including judges, but by the unquestionable knowledge of expert witnesses. For whether a physician or surgeon has exercised the requisite degree of skill and care in the treatment of his patient is, in the generality of cases, a matter of expert opinion. The deference of courts to the expert opinion of qualified physicians stems from its realization that the latter possess unusual technical skills which laymen in most instances are incapable of intelligently evaluating. Expert testimony should have been offered to prove that the circumstances cited by the courts below are constitutive of conduct falling below the standard of care employed by other physicians in good standing when performing the same operation. It must be remembered that when the qualifications of a physician are admitted, as in the instant case, there is an inevitable presumption that in proper cases he takes the necessary precaution and employs the best of his knowledge and skill in attending to his clients, unless the contrary is sufficiently established. This presumption is rebuttable by expert opinion which is so sadly lacking in the case at bench.

Even granting *arguendo* that the inadequacy of the facilities and untidiness of the clinic; the lack of provisions; the failure to conduct pre-operation tests on the patient; and the subsequent transfer of Lydia to the San Pablo Hospital and the reoperation performed on her by the petitioner do indicate, even without expert testimony, that petitioner was recklessly imprudent in the exercise of her duties as a surgeon, no cogent proof exists that any of these circumstances caused petitioner's death. Thus, the absence of the fourth element of reckless imprudence: that the injury to the person or property was a consequence of the reckless imprudence.

In litigations involving medical negligence, the plaintiff has the burden of establishing appellant's negligence and for a reasonable conclusion of negligence, there must be proof of breach of duty on the part of the surgeon as well as a causal connection of such breach and the resulting death of his patient. In *Chan Lugay vs. St. Luke's Hospital, Inc.*, where the attending physician was absolved of liability for the death of the complainant's wife and newborn baby, this Court held that:

"In order that there may be a recovery for an injury, however, it must be shown that the 'injury for which recovery is sought must be the legitimate consequence of the wrong done; the connection between the negligence and the injury must be a direct and natural sequence of events, unbroken by intervening efficient causes.' In other words, the negligence must be the proximate cause of the injury. For, 'negligence, no matter in what it consists cannot create a right of action unless it is the proximate cause of the injury complained of.' And 'the proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.'" (Emphasis supplied.)

x x x

This Court has no recourse but to rely on the expert testimonies rendered by both prosecution and defense witnesses that substantiate rather than contradict petitioner's allegation that the cause of Lydia's death was DIC which, as attested to by an expert witness, cannot be attributed to the petitioner's fault or negligence. The probability that Lydia's death was caused by DIC was unrebutted during trial and has engendered in the mind of this Court a reasonable doubt as to the petitioner's guilt. Thus, her acquittal of the crime of reckless imprudence resulting in homicide. While we condole with the family of Lydia Umali, our hands are bound by the dictates of justice and fair dealing which hold inviolable the right of an accused to be presumed innocent until proven guilty beyond reasonable doubt. Nevertheless, this Court finds the petitioner civilly liable for the death of Lydia Umali, for while a conviction of a crime requires proof beyond reasonable doubt, only a preponderance of evidence is required to establish civil liability.

The petitioner is a doctor in whose hands a patient puts his life and limb. For insufficiency of evidence this Court was not able to render a sentence of conviction but it is not blind to the reckless and imprudent manner

in which the petitioner carried out her duties. A precious life has been lost and the circumstances leading thereto exacerbated the grief of those left behind. The heirs of the deceased continue to feel the loss of their mother up to the present time and this Court is aware that no amount of compassion and commiseration nor words of bereavement can suffice to assuage the sorrow felt for the loss of a loved one. Certainly, the award of moral and exemplary damages in favor of the heirs of Lydia Umali are proper in the instant case.

7. LAWYERS

The conduct of lawyers is governed by the Code of Professional Responsibility. Cannon 18 provides that "a lawyer shall serve his client with competence and diligence." It is his responsibility not to undertake a legal service he knows or should know that he is not qualified to render. (Cannon 18.01). He is also enjoined not to handle any legal matter without adequate preparation. (Cannon 18.02).

Cannon 18.03 provides that a lawyer shall not neglect a legal matter entrusted to him and his negligence in connection therewith shall render him liable. However, it was explained by the Supreme Court that "an attorney is not bound to exercise extraordinary diligence, but only a reasonable degree of care and skill, having reference to the character of the business he undertakes to do. Prone to err like any other human being, he is not answerable to every error or mistake, and will be protected as long as he acts honestly and in good faith to the best of his skill and knowledge." *(Adarne vs. Aldaba, 83 SCRA 734, 739 [1978]).*

Necessarily, the lawyer's liability may not be based solely on that fact that his client lost the case. The Supreme Court explained in *Atienza vs. Evangelista* (80 SCRA 338, 341-342 [1977]):

> "It would be to place an intolerable burden on a member of the bar if just because a client failed to obtain what is sought by her after due exertion of the required effort on his part, he would be held accountable. Success in a litigation is certainly not the test of whether or not a lawyer had lived up to his duties to a client. It is enough that with the thorough preparation of the case handled by him, he had taken all the steps to prosecute his suit. If thereafter the result would be the frustration of his client's hopes, that is, a cause for his disappointment, no doubt for him no less than for his client, but not for displeasing action. He is more to be sympathized with than condemned — on the assumption of course that he did what was expected of him."

In *Dominga Roque, et al. vs. Magtanggol C. Gunigundo* (89 SCRA 178 [1979]), the plaintiffs filed an action to recover a parcel of land.

Their lawyer, the respondent, received a copy of the order dismissing the case on the ground of laches and prior judgment. Within the fifteen (15) day period to appeal or to file a Motion for Reconsideration, the lawyer filed a motion for extension to file a motion for reconsideration — a prohibited motion. Later, the lawyer was admonished by the Supreme Court but the Court refused to impose liability for damages because no damage was established. The High Court explained:

"However, the fact that the complainants and their co-plaintiffs lost the right to appeal would not necessarily mean that they were damaged. The lower court's order of dismissal has in its favor the presumption of validity or correctness. Indeed, an examination of that order discloses that the trial court painstakingly studied the motion to dismiss and carefully rationalized its order. It found that the action was filed more than forty years after the disputed land was registered in the name of the defendants' predecessor-in-interest.

Where a judgment became final through the fault of the lawyer who did not appeal therefrom, that fact alone is not a sufficient ground for the losing party to recover damages from his lawyer since the action for damages rests on the unsubstantiated and arbitrary supposition of the injustice of the decision which became final through the fault and negligence of the lawyer. *(Heredia vs. Salinas, 10 Phil. 157, 162, See Ventanilla vs. Centeno, 110 Phil. 811, where the lawyer who failed to perfect an appeal was ordered to pay his client two hundred pesos as nominal damages).*"

CHAPTER 4

DEFENSES IN NEGLIGENCE CASES

This chapter deals with the defenses which may be raised by the defendants in negligence cases. Defenses discussed here may either be partial or complete defenses, that is, defenses that may either mitigate liability or completely bar recovery. Partial defenses include contributory negligence. On the other hand, assumption of risk and fortuitous event may be invoked as complete defenses.

1. PLAINTIFF'S CONDUCT AND CONTRIBUTORY NEGLIGENCE

The victim of negligence is likewise required to exercise due care in avoiding injury to himself. He ought to conform to the standard of a reasonable man for his own protection. Article 2179 of the Civil Code provides that:

> Art. 2179. When the plaintiff's own negligence was the immediate and proximate cause of his injury, he cannot recover damages. But if his negligence was only contributory, the immediate and proximate cause of the injury being the defendants lack of due care, the plaintiff may recover damages, but the courts shall mitigate the damages to be awarded.

A. PLAINTIFF'S OWN NEGLIGENCE AS THE PROXIMATE CAUSE.

The rule stated in the first sentence of Article 2179 corresponds to the rule under the old Civil Code which was based on Roman Law, the Partidas and the decisions of the Supreme Court of Spain. The Supreme Court explained in *Taylor vs. Manila Electric Railroad and Light Co.* (*supra*, pp. 26 to 30) that:

> "The *Partidas* contain the following provisions:
>
> 'The just thing is that a man should suffer the damage which comes to him through his own fault, and that he can not

> demand reparation therefor from another.' (Law 25, tit. 5, *Partida* 3).
>
> 'And they even said that when a man received an injury through his own negligence he should blame himself for it.' (Rule 22, tit. 34, *Partida* 7).
>
> 'According to ancient sages, when a man received an injury through his own acts the grievance should be against himself and not against another.' (Law 2, tit. 7, *Partida* 2).
>
> And while there does not appear to be anything in the Civil Code (old Civil Code) which expressly lays down the law touching contributory negligence in this jurisdiction, nevertheless, the interpretation placed upon its provisions by the Supreme Court of Spain, and by this court in the case of *Rakes vs. Atlantic Gulf and Pacific Co.,* (7 Phil. Rep., 359), clearly deny to the plaintiff in the case at bar the right to recover damages from the defendant, in whole or in part, for the injuries sustained by him."

In one case, the accused operator of a locomotive was acquitted because it was established that the victim's negligence was the proximate cause of his death. The deceased was walking along the railroad track together with some companions. The deceased suddenly and carelessly turned to the left, trying to cross the very tracks on which a locomotive was running and at the time that it was barely three meters away. The Court observed that no matter what speed the locomotive was running, the accident would have occurred just the same because of the negligence of the deceased. *(People vs. San Gabriel, CA-G.R. No. 3598-R, June 19, 1950).*

The same conclusion was reached in *Raynera v. Hiceta (No. 120027, April 21, 1999)* where it was held that the direct cause of the accident was the negligence of the victim. The vehicle of the petitioner's husband in this case crashed (his motorcycle) into the left rear portion of the truck-trailer causing injuries to his head and his eventual death. The Court ruled that the victim had the responsibility of avoiding bumping the vehicle in front of him. He was in control of the situation and his motorcycle was equipped with headlights to enable him to see what was in front of him. The circumstances indicate that an accident could have been easily avoided unless the victim had been driving too fast and did not exercise due care and prudence demanded of him under the circumstances.

CASES:

PHILIPPINE LONG DISTANCE TELEPHONE CO., INC. vs. COURT OF APPEALS and SPOUSES ANTONIO ESTEBAN and GLORIA ESTEBAN
G.R. No. 57079, September 29, 1989

This case had its inception in an action for damages instituted in the former Court of First Instance of Negros Occidental by private respondent spouses against petitioner Philippine Long Distance Telephone Company (PLDT, for brevity) for the injuries they sustained in the evening of July 30, 1968 when their jeep ran over a mound of earth and fell into an open trench, an excavation allegedly undertaken by PLDT for the installation of its underground conduit system. The complaint alleged that respondent Antonio Esteban failed to notice the open trench which was left uncovered because of the creeping darkness and the lack of any warning light or signs. As a result of the accident, respondent Gloria Esteban allegedly sustained injuries on her arms, legs and face, leaving a permanent scar on her cheek, while the respondent husband suffered cut lips. In addition, the windshield of the jeep was shattered.

PLDT, in its answer, denies liability on the contention that the injuries sustained by respondent spouses were the result of their own negligence and that the entity which should be held responsible, if at all, is L.R. Barte and Company (Barte, for short), an independent contractor which undertook the construction of the manhole and the conduit system. Accordingly, PLDT filed a third-party complaint against Barte alleging that, under the terms of their agreement, PLDT should in no manner be answerable for any accident or injuries arising from the negligence or carelessness of Barte or any of its employees. In answer thereto, Barte claimed that it was not aware nor was it notified of the accident involving respondent spouses and that it had complied with the terms of its contract with PLDT by installing the necessary and appropriate standard signs in the vicinity of the work site, with barricades at both ends of the excavation and with red lights at night along the excavated area to warn the traveling public of the presence of excavations.

x x x

[The trial court rendered a decision in favor of private respondents. On appeal, the Court of Appeals rendered a decision in said appealed case reversing the decision of the lower court and dismissing the complaint of respondent spouses. It held that respondent Esteban spouses were negligent and consequently absolved petitioner PLDT from the claim for damages. On a second motion for reconsideration, the Court of Appeals set aside its previous decision and affirmed in toto the decision of the lower court. PLDT moved to set aside the latter resolution but the same was denied. Hence, PLDT elevated the case to the Supreme Court. The High Court reinstated the original decision of the

Court of Appeals on procedural and substantive grounds.]

Prescinding from the aforesaid procedural lapses into the substantive merits of the case, we find no error in the findings of the respondent court in its original decision that the accident which befell private respondents was due to the lack of diligence of respondent Antonio Esteban and was not imputable to negligent omission on the part of petitioner PLDT. Such findings were reached after an exhaustive assessment and evaluation of the evidence on record, as evidenced by the respondent court's resolution of January 24, 1980 which we quote with approval:

"First. Plaintiff's jeep was running along the inside lane of Lacson Street. If it had remained on that inside lane, it would not have hit the ACCIDENT MOUND.

"Exhibit B shows, through the tiremarks, that the ACCIDENT MOUND was hit by the jeep swerving from the left that is, swerving from the inside lane. What caused the swerving is not disclosed; but, as the cause of the accident, defendant cannot be made liable for the damages suffered by plaintiffs. The accident was not due to the absence of warning signs, but to the unexplained abrupt swerving of the jeep from the inside lane. That may explain plaintiff-husband's insistence that he did not see the ACCIDENT MOUND for which reason he ran into it."

"Second. That plaintiff's Jeep was on the inside lane before it swerved to hit the ACCIDENT MOUND could have been corroborated by a picture showing Lacson Street to the south of the ACCIDENT MOUND."

"It has been stated that the ditches along Lacson Street had already been covered except the 3 or 4 meters where the ACCIDENT MOUND was located. Exhibit B-1 shows that the ditches on Lacson Street north of the ACCIDENT MOUND had already been covered, but not in such a way as to allow the outer lane to be freely and conveniently passable to vehicles. The situation could have been worse to the south of the ACCIDENT MOUND for which reason no picture of the ACCIDENT MOUND facing south was taken."

"Third. Plaintiff's jeep was not running at 25 kilometers an hour as plaintiff-husband claimed. At that speed, he could have braked the vehicle the moment it struck the ACCIDENT MOUND. The jeep would not have climbed the ACCIDENT MOUND several feet as indicated by the tiremarks in Exhibit B. The jeep must have been running quite fast. If the jeep had been braked at 25 kilometers an hour, plaintiffs would not have been thrown against the windshield and they would not have suffered their injuries."

"Fourth. If the accident did not happen because the jeep was running quite fast on the inside lane and for some reason or other it had to swerve suddenly to the right and had to climb over the ACCIDENT MOUND, then plaintiff-husband had not exercised the diligence of a good father of a family to avoid the accident. With the drizzle, he should not have run on dim lights, but should have put on his regular lights which should have made him see the ACCIDENT MOUND in time. If he was running on the outside lane at

25 kilometers an hour, even on dim lights, his failure to see the ACCIDENT MOUND in time to brake the car was negligence on his part. The ACCIDENT MOUND was relatively big and visible, being 2 to 3 feet high and 1-1/2 feet wide. If he did not see the ACCIDENT MOUND in time, he would not have seen any warning sign either. He knew of the existence and location of the ACCIDENT MOUND, having seen it many previous times. With ordinary precaution, he should have driven his jeep on the night of the accident so as to avoid hitting the ACCIDENT MOUND."

The above findings clearly show that the negligence of respondent Antonio Esteban was not only contributory to his injuries and those of his wife but goes to the very cause of the occurrence of the accident, as one of its determining factors, and thereby precludes their right to recover damages. The perils of the road were known to, hence, appreciated and assumed by, private respondents. By exercising reasonable care and prudence, respondent Antonio Esteban could have avoided the injurious consequences of his act, even assuming arguendo that there was some alleged negligence on the part of petitioner.

The presence of warning signs could not have completely prevented the accident; the only purpose of said signs was to inform and warn the public of the presence of excavations on the site. The private respondents already knew of the presence of said excavations. It was not the lack of knowledge of these excavations which caused the jeep of respondents to fall into the excavation but the unexplained sudden swerving of the jeep from the inside lane towards the accident mound. As opined in some quarters, the omission to perform a duty, such as the placing of warning signs on the site of the excavation, constitutes the proximate cause only when the doing of the said omitted act would have prevented the injury. It is basic that private respondents cannot charge PLDT for their injuries where their own failure to exercise due and reasonable care was the cause thereof. It is both a societal norm and necessity that one should exercise a reasonable degree of caution for his own protection. Furthermore, respondent Antonio Esteban had the last clear chance or opportunity to avoid the accident, notwithstanding the negligence he imputes to petitioner PLDT. As a resident of Lacson Street, he passed on that street almost everyday and had knowledge of the presence and location of the excavations there. It was his negligence that exposed him and his wife to danger, hence, he is solely responsible for the consequences of his imprudence.

Moreover, we also sustain the findings of respondent Court of Appeals in its original decision that there was insufficient evidence to prove any negligence on the part of PLDT. We have for consideration only the self-serving testimony of respondent Antonio Esteban and the unverified photograph of merely a portion of the scene of the accident. The absence of a police report of the incident and the non-submission of a medical report from the hospital where private respondents were allegedly treated have not even been satisfactorily explained.

As aptly observed by respondent court in its aforecited extended resolution of January 24, 1980 —

"(a) There was no third party eyewitness of the accident. As to how the accident occurred, the Court can only rely on the testimonial evidence of plaintiffs themselves, and such evidence should be very carefully evaluated, with defendant, as the party being charged, being given the benefit of any doubt. Definitely without ascribing the same motivation to plaintiffs, another person could have deliberately engineered a similar accident in the hope and expectation that the Court can grant him substantial moral and exemplary damages from the big corporation that defendant is. The statement is made only to stress the disadvantageous position of defendant which would have extreme difficulty in contesting such person's claim. If there were no witness or record available from the police department of Bacolod, defendant would not be able to determine for itself which of the conflicting testimonies of plaintiffs is correct as to the report or non-report of the accident to the police department."

A person claiming damages for the negligence of another has the burden of proving the existence of such fault or negligence causative thereof. The facts constitutive of negligence must be affirmatively established by competent evidence. Whosoever relies on negligence for his cause of action has the burden in the first instance of proving the existence of the same if contested, otherwise his action must fail.

KIM vs. PHILIPPINE AERIAL TAXI CO.
58 Phil. 838 (1933)

VILLAREAL, *J*.:

This is an appeal taken by the plaintiff Teh Le Kim from the judgment rendered by the Court of First Instance of Manila, absolving the defendant Philippine Aerial Taxi Co., Inc., from the complaint, which was dismissed, without special pronouncement as to costs.

In support of his appeal, the appellant assigns five alleged errors as committed by the trial court, which we shall discuss in the course of this decision.

The following facts have been proven by a preponderance of evidence presented during the trial, to wit:

On the morning of September 4, 1931, the plaintiff herein bought, in Manila, a passenger ticket for a flight to Iloilo in one of the defendant company's hydroplanes starting from Madrigal Field in Pasay. Inasmuch as the engine of the plane Mabuhay, in which he was to make the flight, was not working satisfactorily, the said plaintiff had to wait for some time. While the engine was being tested, the plaintiff saw how it was started by turning the propeller repeatedly and how the man who did it ran away from it each time in order not to be caught by the said propeller. Before the plane Mabuhay was put in condition for the flight, the plane Taal arrived and it was decided to have the plaintiff make the flight therein. The plaintiff and his companion were carefully carried from the beach to the plane, entering the same by the

rear or tail end, and were placed in their seats to which they were strapped. Later, they were shown how the straps could be tightened or loosened in case of accident and were instructed further not to touch anything in the plane. After an uneventful flight, the plane landed on the waters of Guimaras Strait, in front of Iloilo and taxied toward the beach until its pontoons struck bottom, when the plane stopped. The pilot shut off the gasoline feed pipe, permitting the engine, however, to continue to function until all the gasoline was drained from the feed pipe and carburetor. This operation was necessary in accordance with the established practice of aviation in order to avoid danger of fire which would exist if the pipes and carburetor remained full of gasoline, and to prevent the sudden cooling of the engine which might cause serious damage, especially to the valves.

When the pilot observed that a banca was approaching rapidly on the right hand side of the plane, he arose, signalled and shouted to the boatman to keep his banca at a distance from the plane, inasmuch as there were waves and quite a strong current, and he feared that the banca, which had a high prow, might collide with the plane and damage either the wing or the pontoon thereof. While he was doing this, he heard the propeller strike something. He immediately turned off the switch and, looking on the other side, he saw Bohn picking up the plaintiff out of the water.

What really happened was that at the moment the pontoons touched bottom and while the pilot was signalling to the banca, the plaintiff unfastened the straps around him and, not even waiting to put on his hat, climbed over the door to the lower wing, went down the ladder to the pontoon and walked along the pontoon toward the revolving propeller. The propeller first grazed his forehead and, as he threw up his arm, it was caught by the revolving blades thereof and so injured that it had to be amputated.

Bohn and Garrett of Warner, Barnes & Co., consignees of the defendant in Iloilo, were on the beach to meet the plane and to make arrangements for the disembarking of the passengers. Upon seeing the plaintiff walking toward the propeller, they shouted frantically and motioned to him to keep away from it, but the said plaintiff took no heed of them.

The usual procedure in discharging passengers from a hydroplane is to wait until the propeller stops, then turn the plane around by hand so as to have the rear or tail thereof towards the beach, and then take the passengers to shore in a banca. The pilot in charge of the plane has had fourteen years experience, having first learned to fly during the World War. He is duly licensed by the Department of Commerce of the United States and by the Department of Commerce and Communications of the Government of the Philippine Islands.

The only question to decide in this appeal, which is raised in the first assignment of error, is whether or not the defendant entity has complied with its contractual obligation to carry the plaintiff-appellant Teh Le Kim safe and sound to his destination.

The contract entered into by the plaintiff Teh Le Kim and the defendant entity Philippine Aerial Taxi Co., Inc., was that upon payment of the

price of the passage, which the carrier had received, the latter would carry the former by air in one of its hydroplanes and put him, safe and sound, on the beach at Iloilo. After an uneventful flight, the hydroplane, which carried the plaintiff and his companion, arrived at the Iloilo beach, as usual, with nothing more left to do but to take the plaintiff and his companion, safe and sound, ashore. In order to do this, it was necessary to wait for the propeller to stop, turn the rear or tail end of the plane towards the shore, take the passengers out by the aforesaid rear or tail end thereof, place them in a banca and take them ashore. By sheer common sense, the plaintiff ought to know that a propeller, be it that of a ship or of an aeroplane, is dangerous while in motion and that to approach it is to run the risk of being caught and injured thereby. He ought to know furthermore that inasmuch as the plane was on the water, he had to wait for a banca to take him ashore. Notwithstanding the shouts and warning signals given him from the shore by the representatives of the consignee firm, the plaintiff herein, not being a man of ordinary prudence, hastily left the cabin of the plane, walked along one of the pontoons and directly into the revolving propeller, while the banca which was to take him ashore was still some distance away and the pilot was instructing the boatman to keep it at a safe distance from the plane. Under such circumstances, it is not difficult to understand that the plaintiff-appellant acted with reckless negligence in approaching the propeller while it was still in motion, and when the banca was not yet in a position to take him. That the plaintiff-appellant's negligence alone was the direct cause of the accident, is so clear that it is not necessary to cite authoritative opinions to support the conclusion that the injury to his right arm and the subsequent amputation thereof were due entirely and exclusively to his own imprudence and not the slightest negligence attributable to the defendant entity or to its agents. Therefore, he alone should suffer the consequences of his act.

B. CONTRIBUTORY NEGLIGENCE.

Article 2179 of the New Civil Code is also clear that if the plaintiff's negligence is merely contributory, the plaintiff is not barred from recovering from the defendant. This statutory rule is reiterated in Article 2214 which states that "in quasi-delicts, the contributory negligence of the plaintiff shall reduce the damages that he may recover."

What is applicable then in this jurisdiction is what is known in common law as the rule of comparative negligence. In the broadest sense, comparative negligence rules include any rule under which the relative degree of negligence of the parties is considered in determining whether, and to what degree, either should be responsible for his negligence. *(57 Am. Jur. 2d 847)*. The rules involve apportionment of damages. Under the "pure" type of comparative negligence, the plaintiff's contributory negligence does not operate to bar his recovery

altogether but does serve to reduce his damage in proportion to his fault. *(Prosser and Keeton, p. 472).*

At the time the Civil Code was enacted, the prevailing rule in the United States was the doctrine of contributory negligence. *(Rakes vs. Atlantic Gulf and Pacific Co., supra).* However, as of 1991, the prevailing rule was already the doctrine of comparative negligence. *(Epstein, Torts, 1995 Ed.).*

Under the common law doctrine of contributory negligence, the negligence of the defendant which contributes to his injury completely bars recovery. On the other hand, the doctrine of comparative negligence does not completely bar recovery but merely mitigates the same.

In this jurisdiction, contributory negligence of the plaintiff merely results in mitigation of liability. Under this rule, contributory negligence is defined as conduct on the part of the injured party, 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. *(Valenzuela vs. Court of Appeals, supra at 113).* It was explained in *Rakes vs. Atlantic Gulf and Pacific Co.* that:

> "Difficulty seems to be apprehended in deciding which acts of the injured party shall be considered immediate causes of the accident. The test is simple. Distinction must be made between the accident and the injury, between the event itself, without which there could have been no accident, and those acts of the victim not entering into it, independent of it, but contributing to his own proper hurt. For instance, the cause of the accident under review was the displacement of the crosspiece or the failure to replace it. This produced the event giving occasion for damages — that is, sinking of the track and the sliding of the iron rails. To this event, the act of the plaintiff in walking by the side of the car did not contribute, although it was an element of the damage which came to himself. Had the crosspiece been out of place wholly or partly through this act or omission of duty, that would have been one of the determining causes of the event or accident, for which he would have been responsible. Where he contributes to the principal occurrence, as one of its determining factors, he can not recover. Where, in conjunction with the occurrence, he contributes only to his own injury, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence."

The court is free to determine the extent of the mitigation of the defendant's liability depending on the circumstances. Jurisprudence

shows that the Supreme Court had sustained various percentages of mitigation. Thus, the Supreme Court sustained a mitigation of fifty percent (50%) in *Rakes vs. AG&P*, twenty percent (20%) in *Phoenix Construction, Inc. vs. Intermediate Appellate Court* (148 SCRA 353 [1987]) and *LBC Air Cargo, Inc. vs. Court of Appeals* (241 SCRA 619 [1995]) and forty percent (40%) in *Bank of Philippine Islands vs. Court of Appeals* (216 SCRA 51 [1992]) and *Phil. Bank of Commerce vs. Court of Appeals* (269 SCRA 695 [1997]).

CASES:

M. H. RAKES vs. THE ATLANTIC GULF AND PACIFIC COMPANY
G.R. No. L-1719. January 23, 1907

This is an action for damages. The plaintiff, one of a gang of eight negro laborers in the employment of the defendant, was at work transporting iron rails from a barge in the harbor to the company's yard near the malecon in Manila. Plaintiff claims that but one hand car was used in this work. The defendant has proved that there were two immediately following one another, upon which were piled lengthwise seven rails, each weighing 560 pounds, so that the ends of the rails lay upon two crosspieces or sills secured to the cars, but without side pieces or guards to prevent them from slipping off. According to the testimony of the plaintiff, the men were either in the rear of the car or at its sides. According to that defendant, some of them were also in front, hauling by a rope. At a certain spot at or near the water's edge the track sagged, the tie broke, the car either canted or upset, the rails slid off and caught the plaintiff, breaking his leg, which was afterwards amputated at about the knee.

This first point for the plaintiff to establish was that the accident happened through the negligence of the defendant. The detailed description by the defendant's witnesses of the construction and quality of the track proves that it was up to the general stranded of tramways of that character, the foundation consisting on land of blocks or crosspieces of wood, by 8 inches thick and from 8 to 10 feet long laid, on the surface of the ground, upon which at a right angle rested stringers of the same thickness, but from 24 to 30 feet in length. On the across the stringers the parallel with the blocks were the ties to which the tracks were fastened. After the road reached the water's edge, the blocks or crosspieces were replaced with pilling, capped by timbers extending from one side to the other. The tracks were each about 2 feet wide and the two inside rails of the parallel tracks about 18 inches apart. It was admitted that there were no side pieces or guards on the car; that where no ends of the rails of the track met each other and also where the stringers joined, there were no fish plates. The defendant has not effectually overcome the plaintiff's proof that the joints between the rails were immediately above

the joints between the underlying stringers.

The cause of the sagging of the tracks and the breaking of the tie, which was the immediate occasion of the accident, is not clear in the evidence, but is found by the trial court and is admitted in the briefs and in the argument to have been the dislodging of the crosspiece or piling under the stringer by the water of the bay raised by a recent typhoon. The superintendent of the company attributed it to the giving way of the block laid in the sand. No effort was made to repair the injury at the time of the occurrence. According to plaintiff's witnesses, a depression of the track, varying from one half inch to one inch and a half, was thereafter apparent to the eye, and a fellow workman of the plaintiff swears that the day before the accident he called the attention of McKenna, the foreman, to it and asked by simply straightening out the crosspiece, resetting the block under the stringer and renewing the tie, but otherwise leaving the very same timbers as before. It has not proven that the company inspected the track after the typhoon or had any proper system of inspection.

In order to charge the defendant with negligence, it was necessary to show a breach of duty on its part in failing either to properly secure the load on iron to vehicles transporting it, or to skillfully build the tramway or to maintain it in proper condition, or to vigilantly inspect and repair the roadway as soon as the depression in it became visible. It is upon the failure of the defendant to repair the weakened track, after notice of its condition, that the judge below based his judgment.

This case presents many important matters for our decision, and first among them is the standard of duty which we shall establish in our jurisprudence on the part of employees toward employees.

The lack or the harshness of legal rules on this subject has led many countries to enact designed to put these relations on a fair basis in the form of compensation or liability laws or the institution of insurance. In the absence of special legislation we find no difficulty in so applying the general principles of our law as to work out a just result.

Article 1092 of the Civil Code provides:

"Civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code."

And Article 568 of the latter code provides:

"He who shall execute through reckless negligence an act that if done with malice would constitute a grave crime, shall be punished."

And Article 590 provides that the following shall be punished:

"4. Those who by simple imprudence or negligence, without committing any infraction of regulations, shall cause an injury which, had malice intervened, would have constituted a crime or misdemeanor."

And finally by Articles 19 and 20, the liability of owners and employers

for the faults of their servants and representatives is declared to be civil and subsidiary in its character.

It is contended by the defendant, as its first defense to the action, that the necessary conclusion from these collated laws is that the remedy for injuries through negligence lies only in a criminal action in which the official criminally responsible must be made primarily liable and his employer held only subsidiarily to him. According to this theory the plaintiff should have procured the arrest of the representative of the company accountable for not repairing the tract, and on his prosecution a suitable fine should have been imposed, payable primarily by him and secondarily by his employer.

This reasoning misconceived the plan of the Spanish codes upon this subject. Article 1093 of the Civil Code makes obligations arising from faults or negligence not punished by the law, subject to the provisions of Chapter 11 of Title XVI. Section 1902 of that chapter reads:

"A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"SEC. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

"The father, and on his death or incapacity, the mother, is liable for the damages caused by the minors who live with them.

x x x x x x x x x

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or in the performance of their duties.

x x x x x x x x x

"The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damages."

As an answer to the argument urged in this particular action it may be sufficient to point out that nowhere in our general statutes is the employer penalized for failure to provide or maintain safe appliances for his workmen. His obligation therefore is one "not punished by the law" and falls under civil rather than criminal jurisprudence. But the answer may be a broader one. We should be reluctant, under any conditions, to adopt a forced construction of these scientific codes, such as is proposed by the defendant, that would rob some of these articles of effect, would shut out litigants their will from the civil courts, would make the assertion of their rights dependent upon the selection for prosecution of the proper criminal offender, and render recovery doubtful by reason of the strict rules of proof prevailing in criminal actions. Even if these articles had always stood alone, such a construction would be unnecessary, but clear light is thrown upon their meaning by the provisions

of the Law of Criminal Procedure of Spain *(Ley de Enjuiciamiento Criminal)*, which, though never in actual force in these Islands, was formerly given a suppletory or explanatory effect. Under Article 111 of this law, both classes of action, civil and criminal, might be prosecuted jointly or separately, but while the penal action was pending the civil was suspended. According to Article 112, the penal action once started, the civil remedy should be sought therewith, unless it had been waived by the party injured or been expressly reserved by him for civil proceedings for the future. If the civil action alone was prosecuted, arising out of a crime that could be enforced only on private complaint, the penal action thereunder should be extinguished. These provisions are in harmony with those of Articles 23 and 133 of our Penal Code on the same subject.

An examination of this topic might be carried much further, but the citations of these articles suffices to show that the civil liability was not intended to be merged in the criminal nor even to be suspended thereby, except as expressly provided by law. Where an individual is civilly liable for a negligent act or omission, it is not required that the injured party should seek out a third person criminally liable whose prosecution must be a condition precedent to the enforcement of the civil right.

Under Article 20 of the Penal Code the responsibility of an employer may be regarded as subsidiary in respect of criminal actions against his employees only while they are in process of prosecution, or in so far as they determinate the existence of the criminal act from which liability arises, and his obligation under the civil law and its enforcement in the civil courts is not barred thereby unless by election of the injured person. Inasmuch as no criminal in question, the provisions of the Penal Code can not affect this action. This construction renders it unnecessary to finally determine here whether this subsidiary civil liability in penal actions survived the laws that fully regulated it or has been abrogated by the American civil and criminal procedure now in force in the Philippines.

The difficulty in construing the articles of the code above-cited in this case appears from the briefs before us to have arisen from the interpretation of the words of Article 1093, "fault or negligence not punished by law," as applied to the comprehensive definition of offenses in Articles 568 and 590 of the Penal Code. It has been shown that the liability of an employer arising out of his relation to his employee who is the offender is not to be regarded as derived from negligence punished by the law, within the meaning of Articles 1092 and 1093. More than this, however, it can not be said to fall within the class of acts unpunished by the law, the consequences of which are regulated by Articles 1902 and 1903 of the Civil Code. The acts to which these articles are applicable are understood to be those and growing out of preexisting duties of the parties to one another. But were relations already formed give rise to duties, whether springing from contract or quasi-contract, then breaches of those duties are subject to Articles 1101, 1103, and 1104, of the same code. A typical application of the distinction may be found in the consequences of a railway accident due to defective machinery supplied by the employer.

His liability to his employee would arise out of the contract of employment, that to the passengers out of the contract for passage. While to that injured bystander would originate in the negligent act itself. This distinction is thus clearly set forth by Manresa in his commentary on Article 1093.

"We are with reference to such obligations, that culpa, or negligence, may be understood in two different senses; either as culpa, substantive and independent, which on account of its origin arises in an obligation between two persons not formerly bound by any other obligation; or as an incident in the performance of an obligation; or as already existed, which can not be presumed to exist without the other, and which increases the liability arising from the already existing obligation.

"Of these two species of culpa the first one mentioned, existing by itself, may be also considered as a real source of an independent obligation, and, as chapter 2, title 16 of this book of the code is devoted to it, it is logical to presume that the reference contained in Article 1093 is limited thereto and that it does not extend to those provisions relating to the other species of culpa (negligence), the nature of which we will discuss later. (Vol. 8, p. 29).

And in his commentary on Articles 1102 and 1104 he says that these two species of negligence may be somewhat inexactly described as contractual and extra-contractual, the latter being the *culpa aquiliana* of the Roman law and not entailing so strict an obligation as the former. This terminology is unreservedly accepted by Sanchez-Roman (*Derecho Civil, fourth section*, Chapter XI, Article II, No. 12), and the principle stated is supported be decisions of the supreme court of Spain, among them those of November 20, 1896 (80 Jurisprudencia Civil, No. 151), and June 27, 1894 (75 Jurisprudencia Civil, No. 182). The contract is one for hire and not one of mandate. (March 10, 1897, 81 Jurisprudencia Civil, No. 107).

Spanish Jurisprudencia prior to the adoption of the Working Men's Accident Law of January 30, 1900, throws uncertain light on the relation between master and workman. Moved by the quick industrial development of their people, the courts of France early applied to the subject the principles common to the law of both countries, which are lucidly discussed by the leading French commentators.

The original French theory, resting the responsibility of owners of industrial enterprises upon Articles 1382, 1383, and 1384 of the Code Napoleon, corresponding in scope to Articles 1902 and 1903 of the Spanish Code, soon yielded to the principle that the true basis is the contractual obligation of the employer and employee. *(See 18 Dalloz, 196, Title Travail, 331).*

Later the hardships resulting from special exemptions inserted in contracts for employment led to the discovery of a third basis for liability in an article of the French Code making the possessor of any object answerable for damage done by it while in his charge. Our law having no counterpart of this article, applicable to every kind of object, we need consider neither the theory growing out of it nor that of "professional risk" more recently imposed

by express legislation, but rather adopting the interpretation of our Civil Code above given, find a rule for this case in the contractual obligation. This contractual obligation, implied from the relation and perhaps so inherent in its nature to be invariable by the parties, binds the employer to provide safe appliances for the use of the employee, thus closely corresponding to English and American Law. On these principles it was the duty of the defendant to build and to maintain its track in reasonably sound condition, so as to protect its workingmen from unnecessary danger. It is plain that in one respect or the other it failed in its duty, otherwise the accident could not have occurred; consequently the negligence of the defendant is established.

Another contention of the defense is that the injury resulted to the plaintiff as a risk incident to his employment and, as such, one assumed by him. It is evident that this can not be the case if the occurrence was due to the failure to repair the track or to duly inspect, it for the employee is not presumed to have stipulated that the employer might neglect his legal duty. Nor may it be excused upon the ground that the negligence leading to the accident was that of a fellow-servant of the injured man. It is not apparent to us that the intervention of a third person can relieve the defendant from the performance of its duty nor impose upon the plaintiff the consequences of an act or omission not his own. *Sua cuique culpa nocet.* This doctrine, known as "the fellow-servant rule," we are not disposed to introduce into our jurisprudence. Adopted in England by Lord Abinger in the case of *Prescott vs. Fowler* (3 Meeson & Welsby, 1) in 1837, it has since been effectually abrogated by "the Employers' Liability Acts" and the "Compensation Law." The American States which applied it appear to be gradually getting rid of it; for instance, the New York State legislature of 1906 did away with it in respect to railroad companies, and had in hand a scheme for its total abolition. It has never found place in the civil law of continental Europe. *(Dalloz, vol. 39, 1858, Title Responsibilite, 630, and vol. 15, 1895, same title, 804. Also more recent instances in Fuzier-Herman, Title Responsibilite Civile, 710).*

The *French Cour de Cassation* clearly laid down the contrary principle in its judgment of June 28, 1841, in the case of *Reygasse*, and has since adhered to it.

The most controverted question in the case is that of the negligence of the plaintiff, contributing to the accident, to what extent it existed in fact and what legal effect is to be given it. In two particulars is he charged with carelessness:

First. That having noticed the depression in the track he continued his work; and

Second. That he walked on the ends of the ties at the side of the car instead of along the boards, either before or behind it.

As to the first point, the depression in the track might indicate either a serious or a rival difficulty. There is nothing in the evidence to show that the plaintiff did or could see the displaced timber underneath the sleeper. The claim that he must have done so is a conclusion drawn from what is assumed to have been a probable condition of things not before us, rather than a fair

inference from the testimony. While the method of construction may have been known to the men who had helped build the road, it was otherwise with the plaintiff who had worked at this job less than two days. A man may easily walk along a railway without perceiving a displacement of the underlying timbers. The foreman testified that he knew the state of the track on the day of the accident and that it was then in good condition, and one Danridge, a witness for the defendant, working on the same job, swore that he never noticed the depression in the track and never saw any bad place in it. The sagging of the track this plaintiff did perceive, but that was reported in his hearing to the foreman who neither promised nor refused to repair it. His lack of caution in continuing at his work after noticing the slight depression of the rail was not of so gross a nature as to constitute negligence, barring his recovery under the severe American rule. On this point we accept the conclusion of the trial judge who found as facts that "the plaintiff did not know the cause of the one rail being lower than the other" and "it does not appear in this case that the plaintiff knew before the accident occurred that the stringers and rails joined in the same place."

Were we not disposed to agree with these findings they would, nevertheless, be binding upon us, because not "plainly and manifestly against the weight of evidence," as those words of section 497, paragraph 3 of the Code of Civil Procedure were interpreted by the Supreme Court of the United States in the *De la Rama* case (201 U.S. 303).

In respect of the second charge of negligence against the plaintiff, the judgment below is not so specific. While the judge remarks that the evidence does not justify the finding that the car was pulled by means of a rope attached to the front end or to the rails upon it, and further that the circumstances in evidence make it clear that the persons necessary to operate the car could not walk upon the plank between the rails and that, therefore, it was necessary for the employees moving it to get hold upon it as best they could, there is no specific finding upon the instruction given by the defendant to its employees to walk only upon the planks, nor upon the necessity of the plaintiff putting himself upon the ties at the side in order to get hold upon the car. Therefore, the findings of the judge below leave the conduct of the plaintiff in walking along the side of the loaded car, upon the open ties, over the depressed track, free to our inquiry.

While the plaintiff and his witnesses swear that not only were they not forbidden to proceed in this way, but were expressly directed by the foreman to do so, both the officers of the company and three of the workmen testify that there was a general prohibition frequently made known to all the gang against walking by the side of the car, and the foreman swears that he repeated the prohibition before the starting of this particular load. On this contradiction of proof we think that the preponderance is in favor of the defendant's contention to the extent of the general order being made known to the workmen. If so, the disobedience of the plaintiff in placing himself in danger contributed in some degree to the injury as a proximate, although not

as its primary cause. This conclusion presents sharply the question, What effect is to be given such an act of contributory negligence? Does it defeat a recovery, according to the American rule, or is it to be taken only in reduction of damages?

While a few of the American States have adopted to a greater or less extent the doctrine of comparative negligence, allowing a recovery by a plaintiff whose own act contributed to his injury, provided his negligence was slight as compared with that of the defendant, and some others have accepted the theory of proportional damages, reducing the award to a plaintiff in proportion to his responsibility for the accident, yet the overwhelming weight of adjudication establishes the principle in American jurisprudence that any negligence, however slight, on the part of the person injured which is one of the causes proximately contributing to his injury, bars his recovery. *(English and American Encyclopedia of law, Titles "Comparative Negligence" and "Contributory Negligence").*

In *Grant Trunk Railway Company vs. Ives* (144 U.S., 408, at page 429) the Supreme Court of the United States thus authoritatively states the present rule of law:

"Although the defendant's' negligence may have been the primary cause of the injury complained of, yet an action for such injury can not be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies vs. Mann,* 10 M. & W., 546) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

There are may cases in the Supreme Court of Spain in which the defendant was exonerated, but when analyzed they prove to have been decided either upon the point that he was not negligent or that the negligence of the plaintiff was the immediate cause of the casualty or that the accident was due to *casus fortuitus*. Of the first class in the decision of January 26, 1887 (38 Jurisprudencia Criminal, No. 70), in which a railway employee, standing on a car, was thrown therefrom and killed by the shock following the backing up of the engine. It was held that the management of the train and engine being in conformity with proper rules of the company, showed no fault on its part.

Of the second class are the decision of the 15th of January, the 19th of February, and the 7th of March, 1902, stated in Alcubilla's Index of that year; and of the third class the decision of the 4th of June, 1888 (64 Jurisprudencia Civil, No. 1), in which the breaking down of plaintiff's dam by the logs of the defendant impelled against it by the Tajo River, was held due to a freshet as a fortuitous cause.

The decision of the 7th of March, 1902, on which stress has been laid,

rested on two bases, one, that the defendant was not negligent, because expressly relieved by royal order from the common obligation imposed by the police law of maintaining a guard at the road crossing; the other, because the act of the deceased in driving over level ground with unobstructed view in front of a train running at speed, with the engine whistle blowing was the determining cause of the accident. It is plain that the train was doing nothing but what it had a right to do and that the only fault lay with the injured man. His negligence was not contributory, it was sole, and was of such an efficient nature that without it no catastrophe could have happened.

On the other hand, there are many cases reported in which it seems plain that the plaintiff sustaining damages was not free from contributory negligence; for instance, the decision of the 14th of December, 1894 (76 Jurisprudencia Civil, No. 134), in which the owner of a building was held liable for not furnishing protection to workmen engaged in hanging out flags, when the latter must have perceived beforehand the danger attending the work.

None of those cases define the effect to be given the negligence of a plaintiff which contributed to his injury as one of its causes, though not the principal one, and we are left to seek the theory of the civil law in the practice of other countries.

In France in the case of *Marquant*, August 20, 1879, the *cour de cassation* held that the carelessness of the victim did not civilly relieve the person without whose fault the accident could not have happened, but that the contributory negligence of the injured man had the effect only of reducing the damages. The same principle was applied in the case of Recullet, November 10, 1888, and that of Laugier of the 11th of November, 1896. *(Fuzier-Herman, Title Responsibilite Cirile, 411, 412.)* Of like tenor are citations in Dalloz. (vol. 18, 1806, Title Trail, 363, 364, and vol. 15, 1895, Title Responsibilite, 193, 198).

In the Canadian Province of Quebec, which has retained for the most part the French Civil Law, now embodied in a code following the Code Napoleon, a practice in accord with that of France is laid down in many cases collected in the annotations to Article 1053 of the code edited by Beauchamps, 1904. One of these is *Luttrell vs. Trottier*, reported in *La Revue de Jurisprudence*, volume 6, page 90, in which the court of Kings bench, otherwise known as the court of appeals, the highest authority in the Dominion of Canada on points of French law, held that contributory negligence did not exonerate the defendants whose fault had been the immediate cause of the accident, but entitled him to a reduction of damages. Other similar cases in the provincial courts have been overruled by appellate tribunals made up of common law judges drawn from other provinces, who have preferred to impose uniformally throughout the Dominion the English theory of contributory negligence. Such decisions throw no light upon the doctrines of the civil law. Elsewhere we find this practice embodied in legislation; for instance, section 2 of Article 2398 of the Code of Portugal reads as follows:

"If in the case of damage there was fault or negligence on the part of

the person injured or in the part of someone else, the indemnification shall be reduced in the first case, and in the second case it shall be appropriated in proportion to such fault or negligence as provided in paragraphs 1 and 2 of Section 2372."

And in Article 1304 of the Austrian Code provides that the victim who is partly changeable with the accident shall stand his damages in proportion to his fault, but when that proportion is incapable of ascertainment, he shall share the liability equally with the person principally responsible. The principle of proportional damages appears to be also adopted in Article 51 of the Swiss Code. Even in the United States in admirality jurisdictions, whose principles are derived from the civil law, common fault in cases of collision have been disposed of not on the ground of contributory negligence, but on that of equal loss, the fault of the one part being offset against that of the other. *(Ralli vs. Troop, 157 U. S. 386; 97).*

The damage of both being added together and the sum equally divided, a decree is entered in favor of the vessel sustaining the greater loss against the other for the excess of her damages over one-half of the aggregate sum. *(The Manitoba, 122 U. S., 97).*

Exceptional practice appears to prevail in maritime law in other jurisdictions. The Spanish Code of Commerce, Article 827, makes each vessel for its own damage when both are the fault; this provision restricted to a single class of the maritime accidents, falls for short of a recognition of the principle of contributory negligence as understood in American Law, with which, indeed, it has little in common. This is a plain from other articles of the same code; for instance, Article 829, referring to Articles 826, 827, and 828, which provides: "In the cases above mentioned the civil action of the owner against the person liable for the damage is reserved, as well as the criminal liability which may appear."

The rule of the common law, a hard and fast one, not adjustable with respects of the faults of the parties, appears to have grown out the original method of trial by jury, which rendered difficult a nice balancing of responsibilities and which demanded an inflexible standard as a safeguard against too ready sympathy for the injured. It was assumed that an exact measure of several concurring faults was unattainable.

"The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is, not the wrong of the one is set off against the wrong of the other; it that the law can not measure how much of the damage suffered is attributable to the plaintiff's own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct." *(Heil vs. Glanding, 42 Penn. St. Rep., 493, 499).*

"The parties being mutually in fault, there can be no appointment of damages. The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief." *(Railroad*

vs. Norton, 24 Penn. St. 565, 469).

Experience with jury trials in negligence cases has brought American courts to review to relax the vigor of the rule by freely exercising the power of setting aside verdicts deemed excessive, through the device of granting new trials, unless reduced damages are stipulated for, amounting to a partial revision of damages by the courts. It appears to us that the control by the court of the subject matter may be secured on a moral logical basis and its judgment adjusted with greater nicety to the merits of the litigants through the practice of offsetting their respective responsibilities. In the civil law system the desirable end is not deemed beyond the capacity of its tribunals.

Whatever may prove to be the doctrine finally adopted in Spain or in other countries under the stress and counter stress of novel schemers of legislation, we find the theory of damages laid down in the judgment the most consistent with the history and the principles of our law in these Islands and with its logical development.

Difficulty seems to be apprehended in deciding which acts of the injured party shall be considered immediate causes of the accident. The test is simple. Distinction must be between the accident and the injury, between the event itself, without which there could have been no accident, and those acts of the victim not entering into it, independent of it, but contributing under review was the displacement of the crosspiece or the failure to replace it. This produced the event giving occasion for damages — that is, the sinking of the track and the sliding of the iron rails. To this event, the act of the plaintiff in walking by the side of the car did not contribute, although it was an element of the damage which came to himself. Had the crosspiece been out of place wholly or partly thorough his act of omission of duty, the last would have been one of the determining causes of the event or accident, for which he would have been responsible. Where he contributes to the principal occurrence, as one of its determining factors, he can not recover. Where, in conjunction with the occurrence, he contributes only to his own injury, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence.

Accepting, though with some hesitation, the judgment of the trial court, fixing the damage incurred by the plaintiff at 5,000 pesos, the equivalent of 2,500 dollars, United States money, we deduct therefrom 2,500 pesos, the amount fairly attributable to his negligence, and direct judgment to be entered in favor of the plaintiff for the resulting sum of 2,500 pesos, with cost of both instances, and ten days hereafter let the case be remanded to the court below for proper action. So ordered.

PHOENIX CONSTRUCTION, INC. and ARMANDO U. CARBONEL vs. THE INTERMEDIATE APPELLATE COURT and LEONARDO DIONISIO
G.R. No. L-65295, March 10, 1987

FELICIANO, *J.*:

In the early morning of 15 November 1975 — at about 1:30 a.m. — private respondent Leonardo Dionisio was on his way home — he lived in 1214-B Zamora Street, Bangkal, Makati — from a cocktails-and-dinner meeting with his boss, the general manager of a marketing corporation. During the cocktails phase of the evening, Dionisio had taken "a shot or two" of liquor. Dionisio was driving his Volkswagen car and had just crossed the intersection of General Lacuna and General Santos Streets at Bangkal, Makati, not far from his home, and was proceeding down General Lacuna Street, when his car headlights (in his allegation) suddenly failed. He switched his headlights on "bright" and thereupon he saw a Ford dump truck looming some 2-1/2 meters away from his car. The dump truck, owned by and registered in the name of petitioner Phoenix Construction Inc. ("Phoenix"), was parked on the right hand side of General Lacuna Street (*i.e.*, on the right hand side of a person facing in the same direction toward which Dionisio's car was proceeding), facing the oncoming traffic. The dump truck was parked askew (not parallel to the street curb) in such a manner as to stick out onto the street, partly blocking the way of oncoming traffic. There were no lights nor any so-called "early warning" reflector devices set anywhere near the dump truck, front or rear. The dump truck had earlier that evening been driven home by petitioner Armando U. Carbonel, its regular driver, with the permission of his employer Phoenix, in view of work scheduled to be carried out early the following morning. Dionisio claimed that he tried to avoid a collision by swerving his car to the left but it was too late and his car smashed into the dump truck. As a result of the collision, Dionisio suffered some physical injuries including some permanent facial scars, a "nervous breakdown" and loss of two gold bridge dentures.

Dionisio commenced an action for damages in the Court of First Instance of Pampanga basically claiming that the legal and proximate cause of his injuries was the negligent manner in which Carbonel had parked the dump truck entrusted to him by his employer Phoenix. Phoenix and Carbonel, on the other hand, countered that the proximate cause of Dionisio's injuries was his own recklessness in driving fast at the time of the accident, while under the influence of liquor, without his headlights on and without a curfew pass. Phoenix also sought to establish that it had exercised due care in the selection and supervision of the dump truck driver.

[The trial court rendered judgment in favor of Dionisio and against Phoenix and Carbonel and ordered the latter to pay damages. Phoenix and Carbonel appealed to the Intermediate Appellate Court and the latter affirmed the decision of the trial court but modified the award of damages.]

x x x

This decision of the Intermediate Appellate Court is now before us on a petition for review.

Both the trial court and the appellate court had made fairly explicit findings of fact relating to the manner in which the dump truck was parked along General Lacuna Street on the basis of which both courts drew the inference that there was negligence on the part of Carbonel, the dump truck driver, and that this negligence was the proximate cause of the accident and Dionisio's injuries. We note, however, that both courts failed to pass upon the defense raised by Carbonel and Phoenix that the true legal and proximate cause of the accident was not the way in which the dump truck had been parked but rather the reckless way in which Dionisio had driven his car that night when he smashed into the dump truck. The Intermediate Appellate Court in its questioned decision casually conceded that Dionisio was "in some way, negligent" but apparently failed to see the relevance of Dionisio's negligence and made no further mention of it. We have examined the record both before the trial court and the Intermediate Appellate Court and we find that both parties had placed into the record sufficient evidence on the basis of which the trial court and the appellate court could have and should have made findings of fact relating to the alleged reckless manner in which Dionisio drove his car that night. The petitioners Phoenix and Carbonel contend that if there was negligence in the manner in which the dump truck was parked, that negligence was merely a "passive and static condition" and that private respondent Dionisio's recklessness constituted an intervening, efficient cause determinative of the accident and the injuries he sustained. The need to administer substantial justice as between the parties in this case, without having to remand it back to the trial court after eleven years, compels us to address directly the contention put forward by the petitioners and to examine for ourselves the record pertaining to Dionisio's alleged negligence which must bear upon the liability, or extent of liability, of Phoenix and Carbonel.

[Initially, the Supreme Court found the following facts to have been established: (a) Private respondent Dionisio did not have a curfew pass valid and effective for that eventful night; (b) Dionisio was driving fast or speeding just before the collision with the dump truck; (c) Dionisio had purposely turned off his car's headlights before contact with the dump truck so that he will not be detected by the policemen who were manning a check-point; and (d) Dionisio was intoxicated at the time of the accident.]

The conclusion we draw from the factual circumstances outlined above is that private respondent Dionisio was negligent the night of the accident. He was hurrying home that night and driving faster than he should have been. Worse, he extinguished his headlights at or near the intersection of General Lacuna and General Santos Streets and thus, did not see the dump truck that was parked askew and sticking out onto the road lane.

Nonetheless, we agree with the Court of First Instance and the Intermediate Appellate Court that the legal and proximate cause of the accident and of Dionisio's injuries was the wrongful or negligent manner in which the dump truck was parked — in other words, the negligence of petitioner Carbonel. That there was a reasonable relationship between petitioner

Carbonel's negligence on the one hand and the accident and respondent's injuries on the other hand, is quite clear. Put in a slightly different manner, the collision of Dionisio's car with the dump truck was a natural and foreseeable consequence of the truck driver's negligence.

The petitioners, however, urge that the truck driver's negligence was merely a "passive and static condition" and that private respondent Dionisio's negligence was an "efficient intervening cause," and that consequently Dionisio's negligence must be regarded as the legal and proximate cause of the accident rather than the earlier negligence of Carbonel. We note that the petitioners' arguments are drawn from a reading of some of the older cases in various jurisdictions in the United States but we are unable to persuade ourselves that these arguments have any validity for our jurisdiction. We note, firstly, that even in the United States, the distinctions between "cause" and "condition" which the petitioners would have us adopt have already been "almost entirely discredited."

x x x

We believe, secondly, that the truck driver's negligence far from being a "passive and static condition" was rather an indispensable and efficient cause. The collision between the dump truck and the private respondent's car would in all probability not have occurred had the dump truck not been parked askew without any warning lights or reflector devices. The improper parking of the dump truck created an unreasonable risk of injury for anyone driving down General Lacuna Street and for having so created this risk, the truck driver must be held responsible. In our view, Dionisio's negligence, although later in point of time than the truck driver's negligence and therefore closer to the accident, was not an efficient intervening or independent cause. What the petitioners describe as an "intervening cause" was no more than a foreseeable consequence of the risk created by the negligent manner in which the truck driver had parked the dump truck. In other words, the petitioner truck driver owed a duty to private respondent Dionisio and others similarly situated not to impose upon them the very risk the truck driver had created. Dionisio's negligence was not of an independent and overpowering nature as to cut, as it were, the chain of causation in fact between the improper parking of the dump truck and the accident, nor to sever the *juris vinculum* of liability.

x x x

We hold that private respondent Dionisio's negligence was "only contributory," that the "immediate and proximate cause" of the injury remained the truck driver's "lack of due care" and that consequently respondent Dionisio may recover damages though such damages are subject to mitigation by the courts. (Article 2179, Civil Code of the Philippines).

Petitioners also ask us to apply what they refer to as the "last clear chance" doctrine. The theory here of petitioners is that while the petitioner truck driver was negligent, private respondent Dionisio had the "last clear chance" of avoiding the accident and hence, his injuries, and that Dionisio

having failed to take that "last clear chance" must bear his own injuries alone. The last clear chance doctrine of the common law was imported into our jurisdiction by *Picart vs. Smith* but it is a matter for debate whether, or to what extent, it has found its way into the Civil Code of the Philippines. The historical function of that doctrine in the common law was to mitigate the harshness of another common law doctrine or rule — that of contributory negligence. The common law rule of contributory negligence prevented any recovery at all by a plaintiff who was also negligent, even if the plaintiff's negligence was relatively minor as compared with the wrongful act or omission of the defendant. The common law notion of last clear chance permitted courts to grant recovery to a plaintiff who had also been negligent provided that the defendant had the last clear chance to avoid the casualty and failed to do so. Accordingly, it is difficult to see what role, if any, the common law last clear chance doctrine has to play in a jurisdiction where the common law concept of contributory negligence as an absolute bar to recovery by the plaintiff, has itself been rejected, as it has been in Article 2179 of the Civil Code of the Philippines.

Is there perhaps a general concept of "last clear chance" that may be extracted from its common law matrix and utilized as a general rule in negligence cases in a civil law jurisdiction like ours? We do not believe so. Under Article 2179, the task of a court, in technical terms, is to determine whose negligence — the plaintiff's or the defendant's — was the legal or proximate cause of the injury. That task is not simply or even primarily an exercise in chronology or physics, as the petitioners seem to imply by the use of terms like "last" or "intervening" or "immediate." The relative location in the continuum of time of the plaintiff's and the defendant's negligent acts or omissions, is only one of the relevant factors that may be taken into account. Of more fundamental importance are the nature of the negligent act or omission of each party and the character and gravity of the risks created by such act or omission for the rest of the community. The petitioners urge that the truck driver (and therefore his employer) should be absolved from responsibility for his own prior negligence because the unfortunate plaintiff failed to act with that increased diligence which had become necessary to avoid the peril precisely created by the truck driver's own wrongful act or omission. To accept this proposition is to come too close to wiping out the fundamental principle of law that a man must respond for the foreseeable consequences of his own negligent act or omission. Our law on quasi-delicts seeks to reduce the risks and burdens of living in society and to allocate them among the members of society. To accept the petitioners' proposition must tend to weaken the very bonds of society.

Petitioner Carbonel's proven negligence creates a presumption of negligence on the part of his employer Phoenix in supervising its employees properly and adequately. The respondent appellate court in effect found, correctly in our opinion, that Phoenix was not able to overcome this presumption of negligence. The circumstance that Phoenix had allowed its truck driver to bring the dump truck to his home whenever there was work to be done early the following morning, when coupled with the failure to show any effort on the

part of Phoenix to supervise the manner in which the dump truck is parked when away from company premises, is an affirmative showing of *culpa in vigilando* on the part of Phoenix.

Turning to the award of damages and taking into account the comparative negligence of private respondent Dionisio on one hand and petitioners Carbonel and Phoenix upon the other hand, we believe that the demands of substantial justice are satisfied by allocating most of the damages on a 20-80 ratio. Thus, 20% of the damages awarded by the respondent appellate court, except the award of P10,000.00 as exemplary damages and P4,500.00 as attorney's fees and costs, shall be borne by private respondent; only the balance of 80% needs to be paid by petitioners Carbonel and Phoenix who shall be solidarily liable therefor to the former. The award of exemplary damages and attorney's fees and costs shall be borne exclusively by the petitioners. Phoenix is of course entitled to reimbursement from Carbonel. We see no sufficient reason for disturbing the reduced award of damages made by the respondent appellate court.

2. IMPUTED CONTRIBUTORY NEGLIGENCE

Negligence is imputed if the actor is different from the person who is being made liable. As applied to contributory negligence, the defendant will be subject to mitigated liability even if the plaintiff was not himself personally negligent but because the negligence of another is imputed to the plaintiff. This rule is applicable where the negligence was on the part of the person for whom the plaintiff is responsible, and especially, by negligence of an associate in the transaction where he was injured. *(Reyes and Puno, Outline of Phil. Civil Law, Vol. 6, p. 169).* The Supreme Court explained in *Phil. Commercial Intl. Bank, et al. v. Court of Appeals (G.R. No. 121413, Jan. 29, 2001):*

> "On this point, jurisprudence regarding the imputed negligence of employer in a master-servant relationship is instructive. Since a master may be held for his servant's wrongful act, the law imputes to the master the act of the servant, and if that act is negligent or wrongful and proximately results in injury to a third person, the negligence or wrongful conduct is the negligence or wrongful conduct of the master, for which he is liable. The general rule is that if the master is injured by the negligence of a third person and by the concurring contributory negligence of his own servant or agent, the latter's negligence is imputed to his superior and will defeat the superior's action against the third person, assuming, of course that the contributory negligence was the proximate cause of the injury of which complaint is made."

The Supreme Court ruled in *Yamada vs. The Manila Railroad Co.* (33 Phil. 8 [1915]), that negligence of the driver of a taxicab can-

not be imputed to a passenger who hired the vehicle and who gave directions to his destination. In *Yamada,* the plaintiffs, together with three companions, hired an automobile from the defendant taxicab company for a trip to Cavite Viejo. The automobile was secured at a certain price per hour and was driven and controlled by a chauffeur supplied by the taxicab company. The journey to Cavite Viejo was made without incident but, on the return trip, while crossing the tracts of defendant railroad company in the barrio of San Juan, municipality of Cavite Viejo, the automobile was struck by a train and the plaintiffs were injured. The defendant railroad company argued that the plaintiffs cannot recover for the reason that the negligence of the driver of the automobile, if any, was imputable to them, they having permitted the driver to approach and pass over the railroad crossing without the use of ordinary care and diligence to determine the proximity of a train, and having made no effort to caution or instruct him or compel him to take reasonable care in making the crossing. The Supreme Court rejected such contention explaining that:

> "x x x We think the better rule, and one more consonant with the weight of authority, is that a person who hires a public automobile and gives the driver directions to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for acts of negligence of the latter or prevented from recovering for injuries suffered from a collision between the automobile and a train, caused by the negligence either of the locomotive engineer or the automobile driver. *(Little vs. Hackett, 116 U.S. 366).* The theory on which the negligence of the driver has in some instances been imputed to the occupant of the vehicle is that having trusted the driver by selecting the particular conveyance, the plaintiff so far identified himself with the owner and his servant that in case of injury resulting from their negligence, he was considered a party thereto. x x x"

3. FORTUITOUS EVENT

Under Article 1174 of the New Civil Code, a person is not liable if the cause of damage was fortuitous; an event which could not be foreseen, or which though foreseen, was inevitable. (Article 2181). Fortuitous event is therefore the same as what is known in the *Partidas* as *caso fortuito* — an event which takes place by accident and could not have been foreseen. "Escriche defines *caso fortuito* as an 'unexpected event or act of God which could neither be foreseen nor resisted, such as floods, torrents, shipwrecks, conflagrations,

lightning, compulsion, insurrections, destruction of buildings by unforeseen accidents and other occurrences of similar nature." *(Lasam vs. Smith, 45 Phil. 657 [1924])*. The Supreme Court likewise cites different formulations of the same concept of fortuitous event in *Pons y Compania vs. La Compania Maritima* (9 Phil. 125, 129 [1907]), cited in *Gotesco Investment Corporation vs. Chatto* (210 SCRA 18 [1992]) that:

> "An examination of the Spanish and American authorities concerning the meaning of *force majeure* shows that the jurisprudence of these two countries practically agree upon the meaning of this phrase.
>
> Blackstone, in his Commentaries on English law, defines it as —
>
> > 'Inevitable accident or casualty; an accident produced by any physical cause which is irresistible; such as lightning, tempest, perils of the sea, inundation, or earthquake; the sudden illness or death of a person.' (2 Blackstone's Commentaries, 122; Story in Bailments, sec. 25).
>
> Escriche, in his Diccionario de Legislacion y Jurisprudencia, defines *fuerza mayor* as follows:
>
> > 'The event which we could neither foresee nor resist; as, for example, the lightning stoke, hall, inundation, hurricane, public enemy, attack by robbers; *Vis major est*, says Cayo, *ea quae consilio humano neque provideri neque vitari potest*. Accident and mitigating circumstances.'
>
> Bouvier defines the same as —
>
> > 'Any accident due to natural causes, directly, exclusively without human intervention, such as could not have been prevented by any kind of oversight, pains, and care reasonably to have been expected.' (Law Reports, 1 Common Pleas Division, 423, Law Reports, 10 Exchequer, 255).
>
> Cockburn, Chief Justice, in a well-considered English case (1 Common Pleas Division, 34, 432), said that where a captain —
>
> > 'Uses all the known means to which prudent and experienced captains ordinarily have recourse, he does all that can be reasonably required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major*.'
>
> The term generally applies, broadly speaking, to natural accidents, such as those caused by lightning, earthquake, tempests, public enemy, etc."

The essential characteristics of fortuitous event enumerated in *Enciclopedia Juridica Espanola* are adopted in this jurisdiction: "(1) the cause of the unforeseen and unexpected occurrence, or of the failure of the debtor to comply with his obligation, must be independent of the human will; (2) it must be impossible to foresee the event which constitutes the *'caso fortuito,'* or if it can be foreseen, it must be impossible to avoid; (3) the occurrence must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (4) the obligor must be free from any participation in the aggravation of the injury resulting to the creditor." (cited in *Servando vs. Philippine Steam Navigation Company, 117 SCRA 832 [1982]; Gatchalian vs. Delim, 203 SCRA 126 [1991]; see also Nakpil & Sons vs. Court of Appeals, 144 SCRA 596 [1986]; Vasquez vs. Court of Appeals, 138 SCRA 553; Estrada vs. Consolacion, 71 SCRA 423; Austria vs. Court of Appeals, 39 SCRA 527; Republic of the Philippines vs. Luzon Stevedoring Corp., 21 SCRA 279; Lasam vs. Smith, 45 Phil. 657).*

The essential characteristics that resulted in the rule that the defendant will not be excused from liability if the fortuitous event is not the sole cause of the injury. In other words, the negligence of the defendant which concurred with the fortuitous event or which resulted in the aggravation of the injury of the plaintiff will make him liable even if there was a fortuitous event. When an act of God combines or concurs with the negligence of the defendant to produce an injury, the defendant is liable if the injury would not have resulted but for his own negligent conduct or omission. The whole occurrence is humanized and removed from the rules applicable to acts of God. *(National Power Corporation vs. The Court of Appeals, 222 SCRA 415 [1993]; National Power Corp. vs. Court of Appeals, 211 SCRA 162 [1992]; Ilocos Norte Electric Company vs. Court of Appeals, 179 SCRA 5 [1989]; National Power Corporation vs. Court of Appeals, 161 SCRA 334 [1988]; Juan F. Nakpil & Sons vs. Court of Appeals, supra, citing Fish & Elective Co. vs. Phil. Motors, 55 Phil. 129; Tucker vs. Milan, 49 O.G. 4379; Limpanco & Sons vs. Yanco Steamship Co., 34 Phil. 594, 604; Lasam v. Smith, 45 Phil. 657; Gotesco Investment Corp. vs. Chatto, supra; see also 38 Am. Jur., p. 649).*

Nevertheless, it is believed that even if the defendant is still liable, courts may equitably mitigate the damages if the loss, even in part, would have resulted in any event because of the fortuitous event. *(Article 2215[4], New Civil Code).* Otherwise stated, any aggravation of the injury due to fortuitous event should be taken into consideration in the assessment of liability of the defendant.

CASES:

NATIONAL POWER CORPORATION, et al. vs. THE COURT OF APPEALS, GAUDENCIO C. RAYO, et al. 222 SCRA 415 G.R. Nos. 103442-45, May 21, 1993

DAVIDE, JR., *J.*:

This present controversy traces its beginnings to four (4) separate complaints for damages filed against the NPC and Benjamin Chavez before the trial court. The plaintiffs therein, now private respondents, sought to recover actual and other damages for the loss of lives and the destruction to property caused by the inundation of the town of Norzagaray, Bulacan on 26-27 October 1978. The flooding was purportedly caused by the negligent release by the defendants of water through the spillways of the Angat Dam (Hydroelectric Plant). In said complaints, the plaintiffs alleged, *inter alia*, that: 1) defendant NPC operated and maintained a multi-purpose hydroelectric plant in the Angat River at Hilltop, Norzagaray, Bulacan; 2) defendant Benjamin Chavez was the plant supervisor at the time of the incident in question; 3) despite the defendants' knowledge, as early as 24 October 1978, of the impending entry of typhoon "Kading," they failed to exercise due diligence in monitoring the water level at the dam; 4) when the said water level went beyond the maximum allowable limit at the height of the typhoon, the defendants suddenly, negligently and recklessly opened three (3) of the dam's spillways, thereby releasing a large amount of water which inundated the banks of the Angat River; and 5) as a consequence, members of the household of the plaintiffs, together with their animals, drowned, and their properties were washed away in the evening of 26 October and the early hours of 27 October 1978.

In their Answers, the defendants, now petitioners, alleged that: 1) the NPC exercised due care, diligence and prudence in the operation and maintenance of the hydroelectric plant; 2) the NPC exercised the diligence of a good father in the selection of its employees; 3) written notices were sent to the different municipalities of Bulacan warning the residents therein about the impending release of a large volume of water with the onset of typhoon "Kading" and advising them to take the necessary precautions; 4) the water released during the typhoon was needed to prevent the collapse of the dam and avoid greater damage to people and property; 5) in spite of the precautions undertaken and the diligence exercised, they could still not contain or control the flood that resulted; and 6) the damages incurred by the private respondents were caused by a fortuitous event or force majeure and are in the nature and character of *damnum absque injuria*. By way of a special affirmative defense, the defendants averred that the NPC cannot be sued because it performs a purely governmental function.

Upon motion of the defendants, a preliminary hearing on the special

defense was conducted. As a result thereof, the trial court dismissed the complaints as against the NPC on the ground that the provision of its charter allowing it to sue and be sued does not contemplate actions based on tort. The parties do not, however, dispute the fact that this Court overruled the trial court and ordered the reinstatement of the complaints as against the NPC.

[The lower court rendered a decision dismissing the complaints for lack of sufficient and credible evidence. Consequently, the private respondents appealed therefrom to the respondent Court which reversed the appealed decision and awarded damages in favor of the private respondents.]

The foregoing judgment is based on the public respondent's conclusion that the petitioners were guilty of:

> ". . . a patent gross and evident lack of foresight, imprudence and negligence . . . in the management and operation of Angat Dam. The unholiness of the hour, the extent of the opening of the spillways, and the magnitude of the water released, are all but products of defendants-appellees' headlessness, slovenliness, and carelessness. The resulting flash flood and inundation of even areas (sic) one (1) kilometer away from the Angat River bank would have been avoided had defendants-appellees prepared the Angat Dam by maintaining in the first place, a water elevation which would allow room for the expected torrential rains."

This conclusion, in turn, is anchored on its findings of fact, to wit:

> "As early as October 21, 1978, defendants-appellees knew of the impending onslaught of and imminent danger posed by typhoon 'Kading.' For as alleged by defendants-appellees themselves, the coming of said super typhoon was bannered by Bulletin Today, a newspaper of national circulation, on October 25, 1978, as 'Super Howler to hit R.P.' The next day, October 26, 1978, said typhoon once again merited a headline in said newspaper as 'Kading's Big Blow expected this afternoon.' (Appellee's Brief, p. 6). Apart from the newspapers, defendants-appellees learned of typhoon 'Kading' through radio announcements. (Civil Case No. SM-950, TSN, Benjamin Chavez, December 4, 1984, pp. 7-9).

Defendants-appellees doubly knew that the Angat Dam can safely hold a normal maximum headwater elevation of 217 meters. (Appellees' Brief, p. 12; Civil Case No. SM-951, Exhibit "I-6"; Civil Case No. SM-953, Exhibit "J-6"; Civil Case No. SM-1247, Exhibit "G-6").

Yet, despite such knowledge, defendants-appellees maintained a reservoir water elevation even beyond its maximum and safe level, thereby giving no sufficient allowance for the reservoir to contain the rain water that will inevitably be brought by the coming typhoon.

On October 24, 1978, before typhoon 'Kading' entered the Philippines

area of responsibility, water elevation ranged from 217.61 to 217.53, with very little opening of the spillways, ranging from 1/2 to 1 meter. On October 25, 1978, when typhoon 'Kading' entered the Philippine area of responsibility, and public storm signal number one was hoisted over Bulacan at 10:45 a.m., later raised to number two at 4:45 p.m., and then to number three at 10:45 p.m., water elevation ranged from 217.47 to 217.57, with very little opening of the spillways, ranging from 1/2 to 1 meter. On October 26, 1978, when public storm signal number three remained hoisted over Bulacan, the water elevation still remained at its maximum level of 217.00 to 218.00 with very little opening of the spillways ranging from 1/2 to 2 meters, until at or about midnight, the spillways were suddenly opened at 5 meters, then increasing swiftly to 8, 10, 12, 12.5, 13, 13.5, 14, 14.5 in the early morning hours of October 27, 1978, releasing water at the rate of 4,500 cubic meters per second, more or less. On October 27, 1978, water elevation remained at a range of 218.30 to 217.05. (Civil Case No. SM-950, Exhibits "D" and series, "L", "M", "N", and "O" and Exhibits "3" and "4"; Civil Case No. SM-951, Exhibits "H" and "H-1"; Civil Case No. SM-953, Exhibits "I" and "I-1"; Civil Case No. SM-1247, Exhibits "F" and "F-1").

x x x x x x x x x

From the mass of evidence extant in the record, We are convinced, and so hold that the flash flood on October 27, 1978, was caused not by rain waters (sic), but by stored waters (sic) suddenly and simultaneously released from the Angat Dam by defendants-appellees, particularly from midnight of October 26, 1978 up to the morning hours of October 27, 1978."

The appellate court rejected the petitioners' defense that they had sent "early warning written notices" to the towns of Norzagaray, Angat, Bustos, Plaridel, Baliwag and Calumpit dated 24 October 1978 and which read:

"TO ALL CONCERN (sic):

'Please be informed that at the present our reservoir (dam) is full and that we have been releasing water intermittently for the past several days.

'With the coming of typhoon 'Rita' (Kading) we expect to release greater (sic) volume of water, if it pass (sic) over our place.

'In view of this kindly advise people residing along Angat River to keep alert and stay in safe places.

'BENJAMIN L. CHAVEZ
'Power Plant Superintendent"

because:

"Said notice was delivered to the 'towns of Bulacan' on October 26, 1978 by defendants-appellees' driver, Leonardo Nepomuceno. (Civil Case No. SM-950, TSN, Benjamin Chavez, December 4, 1984, pp. 7-11 and TSN,

Leonardo Nepomuceno, March 7, 1985, pp. 10-12).

Said notice is ineffectual, insufficient and inadequate for purposes of the opening of the spillway gates at midnight of October 26, 1978 and on October 27, 1978. It did not prepare or warn the persons so served, for the volume of water to be released, which turned out to be of such magnitude, that residents near or along the Angat River, even those one (1) kilometer away, should have been advised to evacuate. Said notice, addressed 'TO ALL CONCERN (sic),' was delivered to a policeman (Civil Case No. SM-950, TSN, Leonardo Nepomuceno, March 7, 1985, pp. 10-12 and Exhibit "2-A") for the municipality of Norzagaray. Said notice was not thus addressed and delivered to the proper and responsible municipal officials who could have disseminated the warning to the residents directly affected. As for the municipality of Sta. Maria, where plaintiffs-defendants in Civil Case No. SM-1246 reside, said notice does not appear to have been served."

Relying on *Juan F. Nakpil & Sons vs. Court of Appeals*, public respondent rejected the petitioners' plea that the incident in question was caused by *force majeure* and that they are, therefore, not liable to the private respondents for any kind of damage — such damage being in the nature of *damnum absque injuria*.

The motion for reconsideration filed by the petitioners, as well as the motion to modify judgment filed by the private respondents, were denied by the public respondent in its Resolution of 27 December 1991.

Petitioners thus, filed the instant petition on 21 February 1992.

x x x

These same errors were raised by herein petitioners in G.R. No. 96410, entitled *National Power Corporation, et al. vs. Court of Appeals, et al.*, which this Court decided on 3 July 1992. The said case involved the very same incident subject of the instant petition. In no uncertain terms, We declared therein that the proximate cause of the loss and damage sustained by the plaintiffs therein — who were similarly situated as the private respondents herein — was the negligence of the petitioners, and that the 24 October 1978 "early warning notice" supposedly sent to the affected municipalities, the same notice involved in the case at bar, was insufficient. We thus, cannot now rule otherwise not only because such a decision binds this Court with respect to the cause of the inundation of the town of Norzagaray, Bulacan on 26-27 October 1978 which resulted in the loss of lives and the destruction to property in both cases, but also because of the fact that on the basis of its meticulous analysis and evaluation of the evidence adduced by the parties in the cases subject of CA-G.R. CV Nos. 27290-93, public respondent found as conclusively established that indeed, the petitioners were guilty of "patent gross and evident lack of foresight, imprudence and negligence in the management and operation of Angat Dam," and that "the extent of the opening of the spillways, and the magnitude of the water released, are all but products of defendants-appellees' headlessness, slovenliness, and carelessness." Its findings and conclusions are binding upon Us, there being no showing of the

existence of any of the exceptions to the general rule that findings of fact of the Court of Appeals are conclusive upon this Court. Elsewise stated, the challenged decision can stand on its own merits independently of Our decision in G.R. No. 96410. In any event, We reiterate here Our pronouncement in the latter case that *Juan F. Nakpil & Sons vs. Court of Appeals,* is still good law as far as the concurrent liability of an obligor in the case of force majeure is concerned. In the *Nakpil* case, We held:

"To exempt the obligor from liability under Article 1174 of the Civil Code, for a breach of an obligation due to an 'act of God,' the following must concur: (a) the cause of the breach of the obligation must be independent of the will of the debtor; (b) the event must be either unforeseeable or unavoidable; (c) the event must be such as to render it impossible for the debtor to fulfill his obligation in a normal manner; and (d) the debtor must be free from any participation in, or aggravation of the injury to the creditor. *(Vasquez vs. Court of Appeals, 138 SCRA 553; Estrada vs. Consolacion, 71 SCRA 423; Austria vs. Court of Appeals, 39 SCRA 527; Republic of the Phil. vs. Luzon Stevedoring Corp., 21 SCRA 279; Lasam vs. Smith, 45 Phil. 657).*

Thus, if upon the happening of a fortuitous event or an act of God, there concurs a corresponding fraud, negligence, delay or violation or contravention in any manner of the tenor of the obligation as provided for in Article 1170 of the Civil Code, which results in loss or damage, the obligor cannot escape liability.

The principle embodied in the act of God doctrine strictly requires that the act must be one occasioned exclusively by the violence of nature and all human agencies are to be excluded from creating or entering into the cause of the mischief. When the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence is thereby humanized, as it were, and removed from the rules applicable to the acts of God. *(1 Corpus Juris, pp. 1174-1175).*

Thus, it has been held that when the negligence of a person concurs with an act of God in producing a loss, such person is not exempt from liability by showing that the immediate cause of the damage was the act of God. To be exempt from liability for loss because of an act of God, he must be free from any previous negligence or misconduct by which that loss or damage may have been occasioned. *(Fish & Elective Co. vs. Phil. Motors, 55 Phil. 129; Tucker vs. Milan, 49 O.G. 4379; Limpangco & Sons vs. Yangco Steamship Co., 34 Phil. 594, 604; Lasam vs. Smith, 45 Phil. 657).*"

Accordingly, petitioners cannot be heard to invoke the act of God or *force majeure* to escape liability for the loss or damage sustained by the private respondents since they, the petitioners, were guilty of negligence. The event then was not occasioned exclusively by an act of God or *force majeure*; a human factor — negligence or imprudence — had intervened. The effect then of the force majeure in question may be deemed to have, even if only partly, resulted from the participation of man. Thus, the whole occurrence

was thereby humanized, as it were, and removed from the rules applicable to acts of God.

SOUTHEASTERN COLLEGE, INC. vs.
COURT OF APPEALS, et al.
G.R. No. 126389, July 10, 1998

Petition for review under Rule 45 of the Rules of Court seeking to set aside the Decision promulgated on July 31, 1996, and Resolution dated September 12, 1996 of the Court of Appeals, in CA-G.R. No. 41422, entitled *"Juanita de Jesus vda. de Dimaano, et al. vs. Southeastern College, Inc.,"* which reduced the moral damages awarded below from P1,000,000.00 to P200,000.00. The Resolution under attack denied petitioner's motion for reconsideration.

Private respondents are owners of a house at 326 College Road, Pasay City, while petitioner owns a four-storey school building along the same College Road. On October 11, 1989, at about 6:30 in the morning, a powerful typhoon "Saling" hit Metro Manila. Buffeted by very strong winds, the roof of petitioner's building was partly ripped off and blown away, landing on and destroying portions of the roofing of private respondents' house. After the typhoon had passed, an ocular inspection of the destroyed buildings was conducted by a team of engineers headed by the city building official, Engr. Jesus L. Reyna. Pertinent aspects of the latter's Report 5 dated October 18, 1989 stated, as follows:

"5. One of the factors that may have led to this calamitous event is the formation of the buildings in the area and the general direction of the wind. Situated in the peripheral lot is an almost U-shaped formation of 4-storey building. Thus, with the strong winds having a westerly direction, the general formation of the buildings becomes a big funnel-like structure, the one situated along College Road, receiving the heaviest impact of the strong winds. Hence, there are portions of the roofing, those located on both ends of the building, which remained intact after the storm.

6. Another factor and perhaps the most likely reason for the dislodging of the roofings structural trusses is the improper anchorage of the said trusses to the roof beams. The "diameter steel bars embedded on the concrete roof beams which serve as truss anchorage are not bolted nor nailed to the trusses. Still, there are other steel bars which were not even bent to the trusses, thus, those trusses are not anchored at all to the roof beams."

It then recommended that "to avoid any further loss and damage to lives, limbs and property of persons living in the vicinity," the fourth floor of subject school building be declared as a "structural hazard."

In their Complaint before the Regional Trial Court of Pasay City, Branch 117, for damages based on *culpa aquiliana*, private respondents alleged that the damage to their house rendered the same uninhabitable,

forcing them to stay temporarily in others' houses. And so they sought to recover from petitioner P117,116.00, as actual damages, P1,000,000.00, as moral damages, P300,000.00, as exemplary damages and, P100,000.00, for and as attorney's fees; plus costs.

In its Answer, petitioner averred that subject school building had withstood several devastating typhoons and other calamities in the past, without its roofing or any portion thereof giving way; that it has not been remiss in its responsibility to see to it that said school building, which houses school children, faculty members, and employees, is "in tip-top condition," and furthermore, typhoon "Saling" was "an act of God and therefore beyond human control" such that petitioner cannot be answerable for the damages wrought thereby, absent any negligence on its part.

[The trial court, giving credence to the ocular inspection report to the effect that subject school building had a "defective roofing structure," found that, while typhoon "Saling" was accompanied by strong winds, the damage to private respondents' house "could have been avoided if the construction of the roof of (petitioner's) building was not faulty." Respondent Court of Appeals affirmed with modification the trial court's disposition by reducing the award of moral damages from P1,000,000.00 to P200,000.00.]

The pivot of inquiry here, determinative of the other issues, is whether the damage on the roof of the building of private respondents resulting from the impact of the falling portions of the school building's roof ripped off by the strong winds of typhoon "Saling," was, within legal contemplation, due to fortuitous event? If so, petitioner cannot be held liable for the damages suffered by the private respondents. This conclusion finds support in Article 1174 of the Civil Code, which provides:

"Art 1174. Except in cases expressly specified by the law, or when it is otherwise declared by stipulation, or when the nature of the obligation requires the assumption of risk, no person shall be responsible for those events which could not be foreseen, or which, though foreseen, were inevitable."

The antecedent of fortuitous event or *caso fortuito* is found in the Partidas which defines it as "an event which takes place by accident and could not have been foreseen." Escriche elaborates it as "an unexpected event or act of God which could neither be foreseen nor resisted." Civilist Arturo M. Tolentino adds that "[f]ortuitous events may be produced by two general causes: (1) by nature, such as earthquakes, storms, floods, epidemics, fires, etc., and (2) by the act of man, such as an armed invasion, attack by bandits, governmental prohibitions, robbery, etc."

In order that a fortuitous event may exempt a person from liability, it is necessary that he be free from any previous negligence or misconduct by reason of which the loss may have been occasioned. An act of God cannot be invoked for the protection of a person who has been guilty of gross negligence in not trying to forestall its possible adverse consequences. When a person's negligence concurs with an act of God in producing damage or

injury to another, such person is not exempt from liability by showing that the immediate or proximate cause of the damage or injury was a fortuitous event. When the effect is found to be partly the result of the participation of man — whether it be from active intervention, or neglect, or failure to act — the whole occurrence is hereby humanized, and removed from the rules applicable to acts of God.

In the case under consideration, the lower court accorded full credence to the finding of the investigating team that subject school building's roofing had "no sufficient anchorage to hold it in position especially when battered by strong winds." Based on such finding, the trial court imputed negligence to petitioner and adjudged it liable for damages to private respondents.

After a thorough study and evaluation of the evidence on record, this Court believes otherwise, notwithstanding the general rule that factual findings by the trial court, especially when affirmed by the appellate court, are binding and conclusive upon this Court. After a careful scrutiny of the records and the pleadings submitted by the parties, we find exception to this rule and hold that the lower courts misappreciated the evidence proffered.

There is no question that a typhoon or storm is a fortuitous event, a natural occurrence which may be foreseen but is unavoidable despite any amount of foresight, diligence or care. In order to be exempt from liability arising from any adverse consequence engendered thereby, there should have been no human participation amounting to a negligent act. In other words, the person seeking exoneration from liability must not be guilty of negligence. Negligence, as commonly understood, is conduct which naturally or reasonably creates undue risk or harm to others. It may be the failure to observe that degree of care, precaution, and vigilance which the circumstances justly demand, or the omission to do something which a prudent and reasonable man, guided by considerations which ordinarily regulate the conduct of human affairs, would do. From these premises, we proceed to determine whether petitioner was negligent, such that if it were not, the damage caused to private respondents' house could have been avoided?

At the outset, it bears emphasizing that a person claiming damages for the negligence of another has the burden of proving the existence of fault or negligence causative of his injury or loss. The facts constitutive of negligence must be affirmatively established by competent evidence, not merely by presumptions and conclusions without basis in fact. Private respondents, in establishing the culpability of petitioner, merely relied on the aforementioned report submitted by a team which made an ocular inspection of petitioner's school building after the typhoon. As the term imparts, an ocular inspection is one by means of actual sight or viewing. What is visual to the eye though, is not always reflective of the real cause behind. For instance, one who hears a gunshot and then sees a wounded person, cannot always definitely conclude that a third person shot the victim. It could have been self-inflicted or caused accidentally by a stray bullet. The relationship of cause and effect must be clearly shown.

In the present case, other than the said ocular inspection, no investigation was conducted to determine the real cause of the partial unroofing of petitioner's school building. Private respondents did not even show that the plans, specifications and design of said school building, were deficient and defective. Neither did they prove any substantial deviation from the approved plans and specifications. Nor did they conclusively establish that the construction of such building was basically flawed.

On the other hand, petitioner elicited from one of the witnesses of private respondents, city building official Jesus Reyna, that the original plans and design of petitioner's school building were approved prior to its construction. Engr. Reyna admitted that it was a legal requirement before the construction of any building to obtain a permit from the city building official (city engineer, prior to the passage of the Building Act of 1977). In like manner, after construction of the building, a certification must be secured from the same official attesting to the readiness for occupancy of the edifice. Having obtained both building permit and certificate of occupancy, these are, at the very least, *prima facie* evidence of the regular and proper construction of subject school building.

Furthermore, when part of its roof needed repairs of the damage inflicted by typhoon "Saling," the same city official gave the go-signal for such repairs — without any deviation from the original design — and subsequently, authorized the use of the entire fourth floor of the same building. These only prove that subject building suffers from no structural defect, contrary to the report that its "U-shaped" form was "structurally defective." Having given his unqualified imprimatur, the city building official is presumed to have properly performed his duties in connection therewith.

In addition, petitioner presented its vice president for finance and administration who testified that an annual maintenance inspection and repair of subject school building were regularly undertaken. Petitioner was even willing to present its maintenance supervisor to attest to the extent of such regular inspection but private respondents agreed to dispense with his testimony and simply stipulated that it would be corroborative of the vice president's narration.

Moreover, the city building official, who has been in the city government service since 1974, admitted in open court that no complaint regarding any defect on the same structure has ever been lodged before his office prior to the institution of the case at bench. It is a matter of judicial notice that typhoons are common occurrences in this country. If subject school building's roofing was not firmly anchored to its trusses, obviously, it could not have withstood long years and several typhoons even stronger than "Saling."

In light of the foregoing, we find no clear and convincing evidence to sustain the judgment of the appellate court. We thus hold that petitioner has not been shown negligent or at fault regarding the construction and maintenance of its school building in question and that typhoon "Saling" was the proximate cause of the damage suffered by private respondents' house.

With this disposition on the pivotal issue, private respondents' claim for actual and moral damages as well as attorney's fees must fail. Petitioner cannot be made to answer for a purely fortuitous event. More so because no bad faith or willful act to cause damage was alleged and proven to warrant moral damages.

Private respondents failed to adduce adequate and competent proof of the pecuniary loss they actually incurred. It is not enough that the damage be capable of proof but must be actually proved with a reasonable degree of certainty, pointing out specific facts that afford a basis for measuring whatever compensatory damages are borne. Private respondents merely submitted an estimated amount needed for the repair of the roof of their subject building. What is more, whether the "necessary repairs" were caused ONLY by petitioner's alleged negligence in the maintenance of its school building, or included the ordinary wear and tear of the house itself, is an essential question that remains indeterminable.

4. ASSUMPTION OF RISK

A. REQUISITES.

The doctrine of assumption of risk is consistent with the Latin maxim *volenti non fit injuria*. The doctrine involves three (3) elements or requirements: (1) the plaintiff must know that the risk is present; (2) he must further understand its nature; and that (3) his choice to incur it is free and voluntary. *(Prosser and Keeton, p. 487).*

In relation to the last requisite, it has been held that the plaintiff is excused from the force of the rule if an emergency is found to exist or if the life or property of another is in peril or when he seeks to rescue his endangered property. *(Ilocos Norte Electric Company vs. Court of Appeals, 179 SCRA 5 [1989] citing 65A C.J.S. 301 and Harper and James, "The Law of Torts," 1956 v. 2, p. 1167).*

Thus, in the *Ilocos Norte Electric Company* case, the deceased was electrocuted when she ventured out of her house and waded through floodwaters. The defendant company was found to have failed to prevent the fallen lines from causing damage. As a supplier of electricity it was found to have failed to be in constant vigil to prevent or avoid any probable incident that might imperil life or limb. No assumption of risk was ascribed to the deceased because an emergency was at hand as deceased's property, a source of her livelihood, was faced with an impending loss. Furthermore, the deceased, at the time the fatal incident occurred, was at a place where she had the right to be without regard to defendant's consent as she was on her way to protect her merchandise.

B. KINDS.

a. Express Waiver of the Right to Recover.

The "express consent perspective" contemplates the most basic sense of the doctrine. Under this perspective, there is assumption of risk if the plaintiff, in advance, has expressly waived his right to recover damages for the negligent act of the defendant. He has given his express consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. For instance, if the plaintiff was warned that it is still dangerous to take the vehicle from the repair shop because the repairs are still untested, there would be an express assumption of risk if he nevertheless took the vehicle from the shop with the express waiver of liability in favor of the proprietor.

However, in *Pleasantville Development Corporation vs. Court of Appeals* (253 SCRA 10, 19 [1996]), the Supreme Court ruled that a person cannot contract away his right to recover damages resulting from negligence. Even if such waiver was made, the same is contrary to public policy and cannot be allowed. Rights can be waived unless the waiver is contrary to law, public order, public policy, morals or good customs, or prejudicial to a third person with a right recognized by law. (citing *Art. 6, Civil Code and Canete vs. San Antonio Agro-Industrial Development Corporation, 113 SCRA 723 [1982]). Pleasantville* case involved a buyer of a subdivision lot who erroneously built on another's lot because he was told to do so by the petitioner corporation. One of the defenses invoked by the petitioner corporation was that there was a waiver in the Contract of Sale of the right to recover damages based on negligence.

At any rate, it should be noted, that the waiver contemplated here is the waiver of the right to recover before the negligent act was committed. It cannot be stipulated in the contract that one of the parties therein is barred from claiming damages based on negligence. If the waiver was made after the cause of action accrued, the waiver is valid and may be construed as condonation of the obligation.

b. Implied Assumption.

(1) Dangerous Conditions.

A person who, knowing that he is exposed to a dangerous condition, voluntarily assumes the risk of such dangerous condition may not recover from the defendant who maintained such dangerous conditions. Thus, a person who maintained his house near a railroad track

assumes the usual dangers attendant to the operation of a locomotive. *(Rodrigueza vs. Manila Electric Railroad).*

Similarly, spectators at sports events, customers at amusement parks, and guests who find dangerous conditions when they enter business premises are deemed to have assumed the risk ordinarily attendant thereto, so long as proper warning was made. *(Prosser and Keeton, pp. 485-486).*

CASES:

TRANSPORTO vs. MIJARES
1 CAR 2s 860 [1961]

On December 23, 1956, plaintiff Antonio Transporto was a checker and sugar analyst of La Carlota-Ponteverdra Sugar Planter's Association; while defendant Hernani Mihares was a bench chemist of La Carlota Sugar Central. Both had their offices in the Analysis Department of La Carlota Sugar Central, La Carlota Negros Occidental. At about 12:30 noon of the aforesaid date, Alfredo Balo, an employee of the sugar central, called plaintiff's attention to an unusually big-sized firecracker on the table of Vicente Lim, chief of the Analysis Department. Plaintiff approached the table, examined the firecracker, big in size, thickly covered with cardboard in order to scare the children, and that it was a fake firecracker and would not explode. He further stated that he used to explode bigger-sized firecrackers, and that if held tightly, one would not get hurt by the explosion thereof. His office companions laughed unbelievingly at such remark. Apparently irked by the laughter of his companions, plaintiff challenged them to a bet of P100.00, despite the statement of Vicente Lim, the owner of said object, and of defendant that the firecracker was a real one and would explode. Defendant accepted the bet but for P20.00 only. Plaintiff agreed. Defendant gave his P20.00 to plaintiff and told plaintiff to go ahead and ignite the firecracker with his lighted cigarette, but plaintiff said that he had better explode the firecracker outside the laboratory because there were people inside. Plaintiff and defendant stepped out, followed only by Ramon Pilado. Once, outside, plaintiff made a gesture of igniting the firecracker, but defendant stopped him, asking how he could be sure that the plaintiff would not throw the firecracker at him after lighting the same. Thereupon, plaintiff suggested that the firecracker be tied to his hand, which suggestion defendant followed, by tying the firecracker to the right palm of plaintiff who extended his hand for the purpose. Plaintiff, then, simulated igniting the fuse with his cigarette and suddenly thrust his hand to defendant, at the same time shouting, "Boom!" Defendant brushed aside plaintiff's hand and ran away, apparently scared. Plaintiff laughed at defendant, calling him a coward. When the defendant realized that plaintiff was merely joking, he dared plaintiff to ignite the fuse. Plaintiff held the firecraker tightly, ignited the fuse which was about six inches long and extended his

arm. When the firecracker exploded, plaintiff exclaimed at defendant, "You lost," and immediately headed for the laboratory. It was Ramon Pillado who called plaintiff's attention that his right hand was bleeding. Plaintiff looked at his hand and said:

"Well, it is an accident; it is my fault." He asked to be taken to the Provincial Hospital where he was confined for 14 days. He paid P172.00 for the hospital room x x x; P53.35 for medicine x x x; and P200.00 for subsistence and transportation expenses of his family in accompanying and attending him in the hospital.

Plaintiff's monthly salary was P150.00, which he failed to receive since the date of the incident, December 23, 1956, because after he left the hospital, his employer, the Planters' Association, did not take him back. However, beginning December, 1956, the Association employed his son. Upon his discharge from the hospital, plaintiff asked for monetary help from defendant, and both agreed that defendant pay plaintiff P1,000.00; P500.00 of which was deposited on January 21, 1957 x x x

In February, 1957, plaintiff demanded payment of the balance of P500.00 but defendant simply told plaintiff that he was already paid. x x x

[Plaintiff thereafter filed an action for damages before the trial court but the latter dismissed the case. On appeal, the Court of Appeals sustained the dismissal.]

The facts being as above related, satisfactorily established by the evidence, this appeal cannot be maintained with success. As is seen, "the plaintiff played the part of a bravado," to use the language of the trial court. At first, he expressed the belief that the firecracker was a fake one and would not explode, but when assured by the owner, Vicente Lim, and also by the defendant, that it was a real one and would explode, he boasted that if he held it tightly he would not get hurt even if it exploded. Those who heard him laughed mockingly. Evidently irked thereby, he challenged everyone to a bet of P100.00. No one dared accept his bet except the defendant, but the latter would bet only P20.00. Even so, plaintiff accepted defendant's bet of P20.00.

It was said that when plaintiff noticed that the fuse of the firecracker was ignited, he called-off the bet, but the defendant refused. This theory of plaintiff was properly rejected by the trial court because "if the plaintiff," said it, "did not like to take the risk after the fuse was ignited, he could have easily pulled out the fuse with his left hand or he could have smothered it by smashing it on the ground."

This case should, therefore, be governed by the doctrine of "*volenti non fit injuria*" (no wrong is done to him who consents), that is, "that to which a person assents is not esteemed, in law, an injury," the facts and circumstances being such as to warrant the conclusion that the plaintiff, freely and voluntarily, with full knowledge of the nature and extent of the risk he ran,

impliedly agreed to incur it. When a person, knowing and appreciating the danger and the risk, elects voluntarily to encounter them, he can no more maintain an action founded upon the statute than he can in cases to which the statute has no application. *(See Birmingham Railway & Electric Co. vs. Allen, 20 L.R.A. 457, and the cases cited therein; also Tamayo vs. Gsell, 35 Phil. 954).* In Francisco, Torts and Damages, 1957 ed., pp. 197-198, we read the following on the matter of "assumption of risk":

"The principle that one who voluntarily assumed the risk of injury from a known danger is debarred from a recovery is recognized in negligence cases. As stated, a plaintiff who by his conduct, has brought himself within the operation of the maxim, *'volenti non fit injuria,'* cannot recover on the basis of the defendant's negligence. In the words of the maxim as translated, 'that to which a person assents is not esteemed in law was injury.' * * * It is said that one who knows, appreciates, and deliberately exposes himself to a danger 'assumes the risk' thereof. One cannot deliberately incur an obvious risk of personal injury, especially when preventive measures are at hand, and then hold the author of the danger for the ensuing injury."

MURPHY vs. STEEPLECHASE AMUSEMENT CO.
166 N.E. 173 [1929]

CARDOZO, *C.J.*

The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, New York. One of the supposed attractions is known as "The Flopper." It is a moving belt, running upward on an inclined plane, on which passenger sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and with padded flooring beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as everyone understood, than the slowly-moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, adventure about it, if the risk had not been there. The very name above the gate, the Flopper, was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even stand and keep their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a

fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb in that it stopped and started violently and suddenly and was not properly equipped to prevent the injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard or other device to prevent a fall therefrom. No other negligence is charged.

We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him in a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive ephithet, a summary of the sensations of a tense and crowded moment. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen.

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must must have been taken to avert them. Nothing happened to the plaintiff except what common experience tells us may happen at any time as a consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different case there would also be if the accidents have been so many as to show that the game in its inherent nature too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at the emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say.

None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap for the unwary, too perilous to be endured. According to the defendant's estimate, two hundred and fifty thousand visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass. One might well say that a skating rink should be abandoned because skaters sometimes fall.

(2) Contractual Relations.

There may be implied assumption of risk if the plaintiff entered into a relation with the defendant. By entering into a relationship freely and voluntarily where the negligence of the defendant is obvious, the plaintiff may be found to accept and consent to it, and to undertake to look out for himself and to relieve the defendant of the duty. *(Prosser and Keeton, p. 485).* Thus, there may be assumption of risk if the plaintiff entered into a contractual relation with the defendant.

Assumption of risk is a defense of an employer in a tort case filed by his employee. The nature and extent of the doctrine as applied to cases where there is employer-employee relationship between the parties was explained in *Cerezo vs. Atlantic Gulf and Pacific Co. (supra, at 26):*

> "In England, it was said in the case of *Thomas vs. Quartermaine* (18 Q.d. 685) that the Act (Employer's Liability Act) had not varied the effect of the maxim *volenti non-fit injuria* so far as it involves the ordinary risks inherent in his particular employment. To the same effect is *O'Maley vs. South Boston Gas Light Co.* (158 Mas. 135); *Birmingham Ry. & Electric Co. vs. Allen* (99 Ala. 359); *Whitcomb vs. Standard Oil Co.,* (153 Ind. 513). But while the Act made no change in the doctrine of assumption of risk in favor of the workmen since the enactment of these Acts. The doctrine is based on the implied consent of the servant to accept or continue in the employment after becoming aware of the risk which resulted in his injury. It was formerly held that mere acceptance of the employment or continuance in it with knowledge of the risk was conclusive of the workmen's consent to accept the risk, and the usual practice was, when evidence of this nature was satisfactory, to direct a verdict or nonsuit in favor of the defendant. The trend of modern public sentiment in favor of compensation for industrial accidents, however, has had the influence of making the assumption of risk almost entirely of fact, instead of, as under the former practice, practically inferring his consent from the fact of his knowledge of the risk, however unwilling he may be, in fact, to do so. This new theory of the assumption of risk, however, does not abrogate the doctrine at all. It merely

> requires more convincing evidence of the employee's consent to assume the risk. It is still true that the employee assumes the ordinary risks inherent in the industry in which he is employed. But as to those abnormal risks arising from unusual conditions, the new view of the doctrine requires the question of fact and to require cogent and convincing evidence of such consent.…"

Consistent with the above-discussed rules, the Supreme Court ruled in *Rakes vs. Atlantic Gulf and Pacific Company (supra at 34),* that an employee cannot be said to have assumed a risk which is not incident to his employment. The risk is not incident to the employment of the plaintiff if the occurrence was due to the failure of the employer to repair a portion of the workplace. Thus, if a worker of the railroad company was injured because the track sagged, the railroad company cannot claim that the employee assumed the risk because the injury resulted by reason of the company's failure to repair the tract or to duly inspect it. The employee may not be deemed to have stipulated that the employer might neglect his legal duty.

Afialda vs. Hisole (85 Phil. 67 [1949]) is an example of a case where there was assumption of risk. The plaintiff's deceased brother, upon whom she depended for support, was hired by the defendants as caretaker of their carabaos at a fixed compensation. While tending the animals, the caretaker was gored by one of them and he died as a consequence. There was assumption of risk in the case because it was the caretaker's business to try to prevent the animals from causing injury or damage to anyone, including himself. And being injured by the animal under those circumstances, was one of the risks of the occupation which he had voluntarily assumed and for which he must take the consequences. The Supreme Court relied on the decision of the Spanish Supreme Court (cited in Manresa, Commentaries Vol. 12, p. 578) where it was held that the death of an employee who was bitten by a feline which his master had asked him to take to his establishment was declared to be a veritable accident of labor.

In the contract of common carriage, there is assumption of the ordinary risk involved in transportation of goods and passengers. As a rule, when a passenger boards a common carrier, he takes the risks incidental to the mode of travel he has taken. After all, a carrier is not an insurer of the safety of its passengers and is not bound absolutely and at all events to carry them safely without injury. *(Yobido vs. Court of Appeals, 281 SCRA 1, 8 [1997]).*

(3) Dangerous Activities.

Persons who voluntarily participate in dangerous activities

assume the risks which are usually present in such activities. The rule may apply to professional athletes who are deemed to assume the risks of injury incident to their trade. For example, a basketball player is deemed to have assumed the risk of suffering from injuries incident to such contact sport. Sprained ankle or dislocations of the bone are common occurrences in basketball.

A baseball player may also be subject to the defense of assumption of risk if he sustained severe damage to his knee when he slipped in the wet and muddy outfield while chasing a fly ball. If he knew about the general condition of the field, his continued participation in the game constituted assumption of risk. Awareness of the risk is not to be determined in a vacuum but must be assessed against the background of the skill and experience of the particular plaintiff, and in that assessment, a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport. *(Maddox vs. City of New York, 487 N.E. 2d 553 [1985]).*

(4) Defendant's negligence.

Another situation where there is implied admission is when the plaintiff is aware of the risk created by the defendant's negligence, yet he voluntarily decided to proceed to encounter it. *(Prosser and Keeton, p. 481).* For example, if the plaintiff has been supplied with a product which he knows to be unsafe, he is deemed to have assumed the risk of using such unsafe product. This type of assumption of risk is what is contemplated as a defense under Article 97 of the Consumer Act. (see Chapter 12).

5. EFFECT OF DEATH

Death of the defendant will not extinguish the obligation based on quasi-delict. In fact, an action survives even if the defendant dies during the pendency of the case if the said case is an action to recover for an injury to persons or property by reason of tort committed by the deceased. *(Board of Liquidators vs. Heirs of Kalaw, L-18805, Aug. 14, 1967; Aguas, et al. vs. Llemos, et al., L-18107, Aug. 30, 1962).* The case will continue through the legal representative who will substitute the deceased. *(Section 16, Rule 3, 1997 Rules of Civil Procedure).*

6. PRESCRIPTION

A. WHEN PERIOD COMMENCES.

The prescriptive period for quasi-delict is four (4) years counted

from the date of the accident. (Article 1146, Civil Code; *Diocesa Paulan, et al. vs. Zacarias Sarabia, et al., 104 Phil. 1050 [1958]; Jamelo vs. Serfino, 44 SCRA 464 [1972]; Ferrer vs. Ericta, 84 SCRA 705 [1978]; Kramer, Jr. vs. Court of Appeals, 178 SCRA 518 [1989]).*

The Supreme Court explained in *Kramer, Jr. (ibid.)* that the right of action accrues when there exists a cause of action, which consists of three (3) elements, namely: a) a right in favor of the plaintiff by whatever means and under whatever law it arises or is created; b) an obligation on the part of the defendant to respect such right; and c) an act or omission on the part of such defendant violative of the right of the plaintiff. The prescriptive period must be counted when the last element of commission of an act or omission violative of the right of the plaintiff, which is the time when the cause of action arises.

B. DOCTRINE OF RELATIONS OR RELATIONS BACK DOCTRINE.

In *Allied Banking Corporation vs. Court of Appeals* (178 SCRA 526 [1989]), the Supreme Court ruled that the defendant cannot properly invoke the *Relations Back Doctrine* in the computation of the prescriptive period. The private respondent in the said case obtained a loan from Genbank as evidence by a promissory note. On March 25, 1977, the Monetary Board of the Central Bank issued a resolution forbidding Genbank from doing business. Another resolution was issued on March 29, 1977 ordering the liquidation of the bank. Later, Allied Bank acquired all the assets and liabilities of Genbank. Allied bank filed a complaint against the private respondent on February 7, 1979 when the said private respondent failed to comply with his obligation.

On June 17, 1987, the private respondent filed a motion to admit Amended/Supplemental Complaint and Third Party Complaint. The third party complaint was directed against the Monetary Board; the private respondent alleged therein that he was prevented from performing his obligation by reason of the tortious interference by the Central Bank's Monetary Board. The third party complaint was not admitted on the ground, among others, of prescription under Article 1146 of the Civil Code. The private respondent countered that the claim against the Central Bank has not prescribed. Relying on the doctrine of relations, the private respondent argued that the third party complaint should be deemed to have been filed when the original complaint was filed. The Supreme Court explained the doctrine in one of the footnotes of the case:

> "That principle of law by which an act done at one time is considered by fiction of law to have been done at some antecedent period. It is a doctrine which, although of equitable origin, has a well recognized application to proceedings at law; a legal fiction invented to promote the ends of justice or prevent injustice and occurrence of injuries where otherwise there would be no remedy.
>
> The doctrine, when invoked, must have connection with actual fact, must be based on some antecedent lawful rights. It has also been referred to as *'the doctrine of relation back.'"*

Unfortunately for the private respondent, the Supreme Court did not sustain his argument and ruled instead that under Article 1146 of the Civil Code, the cause of action accrued on March 25, 1977.

It should be noted, however, that the Supreme Court did not totally reject the doctrine of relations. The Supreme Court did not rule that the doctrine is inapplicable in this jurisdiction. It is believed that the same may be applied under certain exceptional circumstances.

For example, the doctrine should be applied where the injury was discovered long after the accident. The offended party should not be prejudiced in such case and the prescriptive period should commence to run only upon discovery of the injury. It is not unusual that the effect of the negligent act is latent and may become apparent only after quite some time. Thus, if the injury becomes apparent only after several years, the prescriptive period should commence to run only after discovery. For example, a doctor negligently transfused blood to a patient that was contaminated with HIV. If the effect became apparent only after five (5) years, the four (4) year prescriptive period should commence only when it was discovered after five (5) years and not when the negligent act was committed. At the very least, the filing of an action after the expiration of the prescriptive period should, by fiction of law, be considered as having been filed within said period.

7. INVOLUNTARINESS

There is no specific provision dealing with the effect of involuntariness in *quasi delictual actions*. In the law on contracts, force and intimidation result in vitiated consent and the resulting contract is considered voidable. On the other hand, under the Revised Penal Code, the person acting because of the force or intimidation employed upon him is subsidiarily liable to the offended party. In such a case, however, the liability is not based on negligence but may be classified as strict liability.

It is believed that involutariness is a complete defense in quasi-delict cases and the defendant is therefore not liable if force was exerted on him. This may happen, for instance, when the defendant was forced to drive his vehicle by armed men. He was, at pain of death, forced to drive at a very fast clip because the armed men were escaping from policemen. It is believed that the defendant cannot be held liable, if a bystander is hit as a consequence.

The case of *Laidlaw v. Sage* (*158 N.Y. 73, 52 N.E. 679 [1899]) decided by the Court of Appeals of New York is pertinent. In the said case, a stranger caused the explosion of a dynamite in the office of the defendant after the latter failed to comply with the stranger's demand to deliver $1,200,000.00. The plaintiff, who was present at the time of the explosion, was allegedly pushed to one side by the defendant and was severely injured as a consequence. The plaintiff sued the defendant for damages but the Court denied the plaintiff's claim ruling that:*

"That at the time of the occurrence which was the subject of this action, the defendant suddenly and unexpectedly found himself confronted by a terrible and impending danger which, which would naturally, if not necessarily, terrify and appall the most intrepid, is shown by the undisputed evidence. If, with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare, indeed. That the duties and responsibilities of a person confronted with such danger are different and unlike those which follow his actions in performing the ordinary duties of life under other conditions is well-established principle of law. The rule applicable to such a condition is stated in Moak's Underhill on Torts (page 14), as follows: 'The law presumes that an act or omission done or neglected under the influence of pressing danger was done or neglected involuntarily." It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature; and that, where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself."

DEFENSES IN NEGLIGENCE CASES

CHAPTER 5

CAUSATION

1. DEFINITION OF PROXIMATE CAUSE

The most widely quoted, and what is said to be the best definition of proximate cause, is that it is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *(57 Am. Jur. 2d 482; 65 CJS 1128; Black's Law Dictionary 1979 Ed., p. 1103).* A formulation of the same definition had been adopted in this jurisdiction in *Bataclan vs. Medina* (102 Phil. 181 [1957] cited in *Fernando vs. Court of Appeals, 208 SCRA 714; Urbano vs. Intermediate Appellate Court, 157 SCRA 1; PBC v. Court of Appeals, 269 SCRA 695; Reynera v. Hiceta, 306 SCRA 102, 108 [1999]).*

Other definitions of proximate cause inject the element of foreseeability. Thus, in the same case, *Bataclan vs. Medina,* the Supreme Court cited this more comprehensive definition of proximate cause:

> "The proximate legal cause is that acting first and producing the injury, either immediately or by settling other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately affecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment his act or default that an injury to some person might probably result therefrom."

Another definition which includes the element of foreseeability is found in *Pilipinas Bank vs. Court of Appeals* (234 SCRA 435 [1994] citing *People vs. Desalina, 57 O.G. 8694)* which goes this way:

> "x x x The concept of proximate cause is well defined in our corpus of jurisprudence as 'any cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the result complained of and without which would not

> have occurred and from which it ought to have been foreseen or reasonably anticipated by a person of ordinary case that the injury complained of or some similar injury, would result therefrom as a natural and probable consequence."

It is believed that definitions which include the element of foreseeability are misleading and are inconsistent with the provisions of the New Civil Code. As will be discussed hereunder, the actor is liable for the damages which resulted from his acts, whether the same is foreseen or unforeseen.

It is likewise important to state that even the best definition of proximate cause cannot be considered satisfactory because the terms used in the definition will themselves require definition. *(57 Am. Jur. 2s 482).* There are even opinions to the effect that proximate cause can only be determined by common sense and logic.

2. DISTINGUISHED FROM OTHER TERMS

A. REMOTE CAUSE.

The proximate cause is distinguished from remote cause which is defined as that cause which some independent force merely took advantage of to accomplish something not the natural effect thereof. *(57 Am. Jur. 2d 484).*

CASE:

CONSOLACION GABETO vs. AGATON ARANETA
42 Phil. 252 [1921]

This action was instituted in the Court of First Instance of Iloilo by Consolacion Gabeto, in her own right as widow of Proceso Gayetano, and as *guardian ad litem* of the three children, Conchita Gayetano, Rosita Gayetano, and Fermin Gayetano, for the purpose of recovering damages incurred by the plaintiff as a result of the death of the said Proceso Gayetano, supposedly caused by the wrongful act of the defendant Agaton Araneta. Upon hearing the evidence, his Honor, Judge L.M. Southworth, awarded damages to the plaintiff in the amount of P3,000, from which judgment the defendant appealed.

It appears in evidence that on August 4, 1918, Basilio Ilano and Proceso Gayetano took a carromata near Plaza Gay, in the City of Iloilo, with a view to going to a cockpit on Calle Ledesma in the same City. When the driver of the carromata had turned his horse and started in the direction indicated, the defendant, Agaton Araneta, stepped out into the street, and laying his hands

on the reins, stopped the horse, at the same time protesting to the driver that he himself had called this carromata first. The driver, one Julio Pagnaya, replied to the effect that he had not heard or seen the call of Araneta, and that he had taken up the two passengers then in the carromata as the first who had offered employment. At or about the same time Pagnaya pulled on the reins of the bridle to free the horse from the control of Agaton Araneta, in order that the vehicle might pass on. Owing, however, to the looseness of the bridle on the horse's head or to the rottenness of the material of which it was made, the bit came out of the horse's mouth; and it became necessary for the driver to get out, which he did, in order to fix the bridle. The horse was then pulled over to near the curb, by one or the other — it makes no difference which — and Pagnaya tried to fix the bridle.

While he was thus engaged, the horse, being free from the control of the bit, became disturbed and moved forward, in doing which he pulled one of the wheels of the carromata up on the sidewalk and pushed Julio Pagnaya over. After going a few yards further the side of the carromata struck a police telephone box which was fixed to a post on the sidewalk, upon which the box came down with a crash and frightened the horse to such an extent that he set out at full speed up the street.

Meanwhile one of the passengers, to wit, Basilio Ilano, had alighted while the carromata was as yet alongside the sidewalk; but the other, Proceso Gayetano, had unfortunately retained his seat, and after the runaway horse had proceeded up the street to a point in front of the Mission Hospital, the said Gayetano jumped or fell from the rig, and in so doing received injuries from which he soon died.

As to the facts above stated the evidence cannot be said to be materially in conflict; but there is decided conflict upon the point of the exact relation of the defendant Agaton Araneta, to the runaway. The evidence for the plaintiff on this point consists chiefly of the testimony of Julio Pagnaya and of Basilio Ilano. They both say that while yet in the middle of the street, the defendant jerked the bridle, which caused the bit to come out of the horse's mouth, and Julio says that at that juncture the throat latch of the bridle was broken. Be this as it may, we are of the opinion that the mere fact that the defendant interfered with the carromata by stopping the horse in the manner stated would not make him liable for the death of Proceso Gayetano; because it is admitted by Julio Pagnaya that he afterwards got out of the carromata and went to the horse's head to fix the bridle. The evidence is furthermore convincing to the effect that, after Julio Pagnaya alighted, the horse was conducted to the curb and that an appreciable interval of time elapsed — same witnesses say several minutes — before the horse started on his career up the street.

It is therefore evident that the stopping of the rig by Agaton Araneta in the middle of the street was too remote from the accident that presently ensued to be considered the legal or proximate cause thereof. Moreover, by getting out and taking his post at the head of the horse, the driver was the person primarily responsible for the control of the animal, and the defendant cannot be charged with liability for the accident resulting from the action of

the horse thereafter.

Julio Pagnaya testifies to one fact which, if it were fully accredited, would possibly put a different complexion on the case; for he says that when the horse was pulled over to the curb, the defendant, by way of emphasizing his verbal denunciation of Pagnaya, gesticulated with one of his arms and incidentally brought his hand down on the horse's nose. This, according to Pagnaya, is what made the horse run away. There is no other witness who testifies to this: and it is noteworthy that Basilio Ilano does not mention it. A decided preponderance of the evidence in our opinion is against it.

The evidence indicates that the bridle was old, and the leather of which it was made was probably so weak as to be easily broken. Julio Pagnaya had a natural interest in refuting this fact, as well as in exculpating himself in other respects; and we are of the opinion that the several witnesses who testified for the defendant gave a more credible account of the affair than the witnesses for the plaintiff. According to the witnesses for the defendant, it was Julio who jerked the rein, thereby causing the bit to come out of the horse's mouth; and they say that Julio, after alighting, led the horse over to the curb, and proceeded to fix the bridle; and that in so doing the bridle was slipped entirely off, when the horse, feeling himself free from control, started to go away as previously stated.

Upon the whole we are constrained to hold that the defendant is not legally responsible for the death of Proceso Gayetano; and though reluctant to interfere with the findings of fact of a trial court when there is a conflict of testimony, the evidence in this case so clearly preponderates in favor of the defendant, that we have no recourse but to reverse the judgment.

The judgment will therefore be reversed, and the defendant will be absolved from the complaint; and it is so ordered, without express finding as to costs of either instance. So ordered.

B. NEAREST CAUSE.

The word "proximate" is defined as "being in immediate relation with something else; next" and "near." *(Webster's Dictionary, 1992 Ed.)*. Hence, the impression that is being given by the word is that it is the nearest cause. Contrary to the impression being given by the term, however, proximate cause is not necessarily the nearest cause. Proximate cause is not necessarily the last link in the chain of events but that which is the procuring efficient and predominant cause. *(Pennsylvania Fire Ins. Co. vs. Sikes, 166 ALR 375, 197 Okla. 137, 168 P2d 1016)*. As the Supreme Court said in one case, the requirement is that the act was the proximate cause, "not implying, however, as might be inferred from the word itself, the nearest in point of time or relation, but rather the efficient cause, which may be the most remote of an operative chain. It must be that which sets the others

in motion and is to be distinguished from a mere preexisting condition upon which the effective cause operates, and must have been adequate to produce the resultant damage without the intervention of an independent cause." *(The Atlantic Gulf and Pacific Company vs. The Government of the Phil. Islands, G.R. No. L-4195, February 18, 1908, citing Insurance Co. vs. Boon, 95 U.S. 117, 130 and 133; Scheffer vs. Railroad Co., 105, U.S. 249; St. Louis I. M. & S. R. Co. vs. Commercial Ins. Co., 139 U.S. 223, 237; Washington and G. Railway Co. vs. Hickey, 166 U.S. 521; the G.R. Booth, 171 U.S. 450)*

This rule is illustrated in *Rodrigueza vs. Manila Railroad Company. (supra at 173, citing 38 Am. Dec. , 64, 77; Kansas City, etc. Railroad Co. vs. Blaker, 64 L.R.A. 81; Pennsylvania Railroad Co. vs. Hope, 80 Pa. St., 373).* In the said case, embers were negligently emitted from one of the trains of the defendant resulting in a fire in one of the houses near the tracks (house 1). Because of the wind, fire was communicated to another house (house 2) and then to another (house 3). One of the arguments of the railroad company in trying to escape liability to the owners of "houses 2 and 3 " is that the fire did not directly come from its train but from "house 1." The Supreme Court rejected the argument ruling that what was important was the admitted fact that the fire originated in the negligent acts of the defendant and the circumstance that fire may have been communicated to the two other house through the first house instead of having been directly communicated from the locomotive through the action of the wind, is immaterial.

C. CONCURRENT CAUSES.

The proximate cause is not necessarily the sole cause of the accident. The defendant is still liable in case there is concurrent causes brought about by acts or omissions of third persons. The actor is not protected from liability even if the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm so long as the actor's negligent conduct actively and continuously operate to bring about harm to another. *(Africa vs. Caltex, supra at 157).* In the same vein, the primary cause remains the proximate cause even if there is an intervening cause which merely cooperated with the primary cause and which did not break the chain of causation. *(ibid.).*

It is also the effect of the rule on concurrent causes that the doctrine of the last clear chance hereinbelow discussed, cannot be

extended into the field of joint tortfeasors as a test of whether only one of them should be held liable to the injured person by reason of his discovery of the latter's peril, and it cannot be invoked as between defendants concurrently negligent. *(Bustamante vs. Court of Appeals, 193 SCRA 603 [1991]).*

In cases where there is concurrent causes or negligence, the joint tortfeasors are solidarily liable. *(Article 2194, NCC).* In *Francisco Vinluan vs. The Court of Appeals, et al.* (G.R. Nos. L-21477-81. April 29, 1966), the Supreme Court ruled that the drivers as well as the owners of the vehicles — including the owner of the common carrier where the plaintiff was riding — are solidarily liable to a passenger who was injured due to the negligence of the said drivers. However, there is persuasive authority for the rule that the liability of the employer should not be joint and several with their drivers.

The rules were summarized by the Supreme Court in *Far Eastern Shipping Company vs. Court of Appeals* (297 SCRA, pp. 83-84 [1998], citing *65 C.J.S, Negligence, Section 110, pp. 1184-1189; Sanco, Philippine Law on Torts and Damages, 1984 Ed., 259-260; Dimayuga vs. Phil. Commercial & Industrial Bank, et al., 200 SCRA 143 [1991]; Ouano Arrastre Service, Inc. vs. Aleonar, et al., 202 SCRA 619 [1991]; Singapore Airlines Limited vs. Court of Appeals, et al., 243 SCRA 143 [1995]; Inciong, Jr. vs. Court of Appeals, 257 SCRA 578 [1996]):*

> "It may be said, as a general rule, that negligence in order to render a person liable need not be the sole cause of an injury. It is sufficient that his negligence, concurring with one or more efficient causes other than plaintiff's, is the proximate cause of the injury. Accordingly, where several causes combine to produce injuries, a person is not relieved from liability because he is responsible for only one of them, it being sufficient that the negligence of the person charged with injury is an efficient cause without which the injury would not have resulted to as great an extent, and that such cause is not attributable to the person injured. It is no defense to one of the concurrent tortfeasors that the injury would not have resulted from his negligence alone, without the negligence or wrongful acts of the other concurrent tortfeasor. Where several causes producing an injury are concurrent and each is an efficient cause without which the injury would not have happened, the injury may be attributed to all or any of the causes and recovery may be had against any or all of the responsible persons although under the circumstances of the case, it may appear that one of them to the injured person was not the same. No actor's negligence ceases to be the proximate cause merely because it does not exceed the negligence of other actors. Each wrongdoer is responsible for the entire result and

is liable as though his acts were the sole cause of the injury.

> There is no contribution between joint tortfeasors whose liability is solidary since both of them are liable for the total damage. Where the concurrent or successive negligent acts or omissions of two or more persons, although acting independently, are in combination the direct and proximate cause of a single injury to a third person, it is impossible to determine what proportion each contributed to the injury and either of them is responsible for the whole injury. Where their concurring negligence resulted in injury or damage to a third party, they become joint tortfeasors and are solidarily liable for the resulting damage under Article 2194 of the Civil Code."

It was ruled, however, that the plaintiff cannot recover if the negligence of both the plaintiff and the defendant can be considered the concurrent proximate causes of the injury. *(Bernardo vs. Legaspi, 29 Phil. 12 [1914]; Syjuco, Inc. vs. Manila Railroad Company, CA-G.R. No. 22631-R, December 17, 1959, 56 O.G. 4410).*

CASES:

PROSPERO SABIDO vs. CARLOS CUSTODIO
124 Phil. 516 [1966]

CONCEPCION, *C.J.*:

Prospero Sabido and Aser Lagunda seek the review by *certiorari* of a decision of the Court of Appeals, affirming that of the Court of First Instance of Laguna, sentencing the Laguna-Tayabas Bus Co., Nicasio Mudales, and herein petitioners, Prospero Sabido and Aser Lagunda, to jointly and severally indemnify Belen Makabuhay Custodio and her son, Agripino Custodio, Jr., in the sum of P6,000 and to pay the costs of the suit.

The facts are set forth in the decision of the Court of Appeals from which we quote:

"Upon a careful study and judicious examining of the evidence on record, we are inclined to concur in the findings made by the trial court. Here is how the Court *a quo* analyzed the facts of this case:

'In Barrio Halang, Municipality of Lumban, Province of Laguna, two trucks, one driven by Nicasio Mudales and belonging to Laguna Tayabas Bus Company, and the other driven by Aser Lagunda and owned by Prospero Sabido, going in opposite directions met each other in a road curve. Agripino Custodio, a passenger of LTB bus, who was hanging on the left side as truck was full of passengers was sideswiped by the truck driven by Aser Lagunda. As a result, Agripino Custodio was injured and died. (Exhibit A).

'It appears clear from the evidence that Agripino Custodio was hanging

in the left side of the LTB Bus. Otherwise, were he sitting inside the truck, he could not have been struck by the six by six truck driven by Aser Lagunda. This fact alone, of allowing Agripino Custodio to hang on the side of the truck, makes the defendant Laguna Tayabas Bus Company liable for damages. For certainly its employees, who are the driver and conductor were negligent. They should not have allowed Agripino Custodio to ride their truck in that manner.

'To avoid any liability, Aser Lagunda and Prospero Sabido throw all the blame on Nicasio Mudales. From the testimony, however, of Belen Makabuhay, Agripino Custodio's widow, we can deduce that Aser Lagunda was equally negligent as Nicasio Mudales. Belen testified that the 6 x 6 truck was running fast when it met the LTB Bus. And Aser Lagunda had time and opportunity to avoid the mishap if he had been sufficiently careful and cautious because the two trucks never collided with each other. By simply swerving to the right side of the road, the 6 x 6 truck could have avoided hitting Agripino Custodio. It is incredible that the LTB was running on the middle of the road when passing a curve. He knows it is dangerous to do so. We are rather of the belief that both trucks did not keep close to the right side of the road so they sideswiped each other and thus Agripino Custodio was injured and died. In other words, both drivers must have driven their trucks not in the proper line and are, therefore, both reckless and negligent'.

"We might state by way of additional observations that the sideswiping of the deceased and his two fellow passengers took place on broad daylight at about 9:30 in the morning of June 9, 1955 when the LTB bus with full load of passengers was negotiating a sharp curve of a bumpy and sliding downward a slope, whereas the six by six truck was climbing up with no cargoes or passengers on board but for three helpers, owner Sabido and driver Lagunda. (tsn. 308-309, Mendoza). Under the above-stated condition, there exists strong persuasion to accept what Belen Makabuhay and Sofia Mesina, LTB passengers, had testified to the effect that the 6 x 6 cargo truck was running at a fast rate of speed. (tsn. 15, 74, 175 Mendoza). From the lips of no less than driver Lagunda himself come the testimonial admission that the presence of three hanging passengers located at the left side of the bus was noted when his vehicle was still at a distance of 5 or 7 meters from the bus, and yet despite the existence of a shallow canal on the right side of the road which he could pass with ease, Lagunda did not care to exercise prudence to avert the accident simply because to use his own language the canal 'is not a passage of trucks.'"

Based upon these facts, the Court of First Instance of Laguna and the Court of Appeals concluded that the Laguna Tayabas Bus Co. — hereinafter referred to as the carrier — and its driver Nicasio Mudales (none of whom has appealed), had violated the contract of carriage with Agripino Custodio, whereas petitioners Sabido and Lagunda were guilty of a *quasi delict*, by reason of which all of them were held solidarily liable in the manner above indicated.

Petitioners now maintain: (1) that the death of Agripino Custodio was

due exclusively to the negligence of the carrier and its driver; (2) that petitioners were not guilty of negligence in connection with the matter under consideration; (3) that petitioners cannot be held solidarily liable with the carrier and its driver; and (4) that the complaint against petitioners herein should be dismissed.

With respect to the first two (2) points, which are interrelated, it is urged that the carrier and its driver were clearly guilty of negligence for having allowed Agripino Custodio to ride on the running board of the bus, in violation of Section 42 of Act No. 3992, and that this negligence was the proximate cause of Agripino's death. It should be noted, however, that the lower court had, likewise, found the petitioners guilty of contributory negligence, which was as much a proximate cause of the accident as the carrier's negligence, for petitioners' truck was running at a considerable speed, despite the fact that it was negotiating a sharp curve, and, instead of being close to its right side of the road, said truck was driven on its middle portion and so near the passenger bus coming from the opposite direction as to sideswipe a passenger riding on its running board.

The views of the Court of Appeals on the speed of the truck and its location at the time of the accident are in the nature of findings of fact, which we cannot disturb in a petition for review by *certiorari*, such as the one at bar. At any rate, the correctness of said finding is borne out by the very testimony of petitioner Lagunda to the effect that he saw the passengers riding on the running board of the bus while the same was still five (5) or seven (7) meters away from the truck driven by him. Indeed, the distance between the two (2) vehicles was such that he could have avoided sideswiping said passengers if his truck were not running at a great speed.

Although the negligence of the carrier and its driver is independent, to its execution, of the negligence of the truck driver and its owner, both acts of negligence are the proximate cause of the death of Agripino Custodio. In fact, the negligence of the first two (2) would not have produced this result without the negligence of petitioners' herein. What is more, petitioners' negligence was the last, in point of time, for Custodio was on the running board of the carrier's bus sometime before petitioners' truck came from the opposite direction, so that, in this sense, petitioners' truck had the last clear chance.

Petitioners contend that they should not be held solidarily liable with the carrier and its driver, because the latter's liability arises from a breach of contract, whereas that of the former springs from a quasi-delict. The rule is, however, that "According to the great weight of authority, where the concurrent or successive negligent acts or omission of two or more persons, although acting independently of each other, are, in combination, the direct and proximate cause of a single injury to a third person and it is impossible to determine in what proportion each contributed to the injury, either is responsible for the whole injury, even though his act alone might not have caused the entire injury, or the same damage might have resulted from the

acts of the other tortfeasor. . . ." *(38 Am. Jur. 946, 947).*

FRANCISCO VINLUAN vs. THE COURT OF APPEALS
G.R. Nos. L-21477-81, April 29, 1966

REGALA, *J.*:

Seven persons were killed and thirteen others were injured in Bangar, La Union, on February 16, 1958, when a passenger bus on which they were riding caught fire after hitting a post and crashing against a tree. The bus, owned by petitioner and driven by Hermenegildo Aquino, came from San Fernando, La Union and was on its way to Candon, Ilocos Sur. It appears that, as the bus neared the gate of the Gabaldon school building in the municipality of Bangar, another passenger bus owned by Patricio Hufana and driven by Gregorio Hufana tried to overtake it but that instead of giving way, Aquino increased the speed of his bus and raced with the overtaking bus. Aquino lost control of his bus as a result of which it hit a post, crashed against a tree and then burst into flames.

Among those who perished were Timoteo Mapanao, Francisca Lacsamana, Narcisa Mendoza and Gregorio Sibayan, whose heirs sued petitioner and the latter's driver, Hermenegildo Aquino, for damages for breach of contract of carriage. Carolina Sabado, one of those injured, also sued petitioner and the driver for damages. The complaints were filed in the Court of First Instance of La Union.

x x x

Nor should it make any difference that the liability of petitioner springs from contract while that of respondents arises from quasi-delict. As early as 1931, we already ruled in *Gutierrez vs. Gutierrez*, *56 Phil., 177,* that in case of injury to a passenger due to the negligence of the driver of the bus on which he was riding and of the driver of another vehicle, the drivers as well as the owners of the two vehicles are jointly and severally liable for damages. Some members of the Court, though are of the view that under the circumstances they are liable on *quasi-delict*.

3. TESTS OF PROXIMATE CAUSE

As explained in Chapter 2, quasi-delictual actions involve three (3) requirements: 1) negligence; 2) damage; and 3) the causal connection between the damage and the negligent act or omission. In other words, proof of negligence and damage is not enough. It is still required that the plaintiff presents proof that the proximate cause of the damage to the plaintiff is the negligent act or omission of the defendant.

American case law distinguishes between cause-in-fact tests

and policy tests of negligence. In determining the proximate cause of the injury, it is first necessary to determine if defendant's negligence was the *cause-in-fact* of the damage to the plaintiff. If defendant's negligence was not a *cause-in-fact*, the inquiry stops; but if it is a cause-in-fact, the inquiry shifts to the question of limit of liability of the defendant. The latter determination of the extent of liability involves a question of policy. Considerations of public policy may be given due weight in fixing the limits of legal liability and practical considerations must at times determine the bounds of correlative rights and duties as well as the point beyond which the courts will decline causal connection. *(Comstock vs. Wilson, 76 A.L.R. 676, 257 NY 231).*

In other words, the question of proximate cause does not only involve cause and effect analysis. It also involves policy considerations that limit the liability of the defendants in negligence cases. The mere fact that the negligence of the defendant is a factor in bringing about the injury does not necessarily mean that he shall be liable. The dissenting opinion in the famous case of *Palsgraf vs. Long Island R.R. (162 N.E. 99 [N.Y. 1928]; 59 ALR 1253)* explained the concept of proximate cause:

> "It may well be that there is no such thing as negligence in the abstract. "Proof of negligence in the air, so to speak, will not do." In an empty world negligence would not exist. It does involve a relationship between man and his fellows, but not merely a relationship between man and those whom he might reasonably expect his act would injure; rather, a relationship between him and those whom he does in fact injure. If his act has a tendency to harm someone, it harms him a mile away as surely as it does those on the scene. We now permit children to recover for the negligent killing of the father. It was never prevented on the theory that no duty was owing to them. A husband may be compensated for the loss of his wife's services. To say that the wrongdoer was negligent as to the husband as well as to the wife is merely an attempt to fit facts to theory. An insurance company paying a fire loss recovers its payment of the negligent incendiary. We speak of subrogation — of suing in the right of the insured. Behind the cloud of words is the fact they hide, that the act, wrongful as to the insured, has also injured the company. Even if it be true that the fault of the father, wife, or insured will prevent recovery, it is because we consider the original negligence not the proximate cause of the injury. *(Pollock, Torts [12th Ed.] 463).*
>
> In the well-known *Polemis* Case, (1921) 3 K.B. 560, Scrutton, L.J., said that the dropping of a plank was negligent, for it might injure "workman or cargo or ship." Because of either

possibility, the owner of the vessel was to be made good for his loss. The act being wrongful, the doer was liable for its proximate results. Criticized and explained as this statement may have been, I think it states the law as it should be and as it is . . .

The proposition is this: Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone. There needs be duty due the one complaining, but this is not a duty to a particular individual because as to him harm might be expected. Harm to some one being the natural result of the act, not only that one alone, but all those in fact injured may complain. We have never, I think, held otherwise. Indeed in the *Di Caprio* Case we said that a breach of a general ordinance defining the degree of care to be exercised in one's calling is evidence of negligence as to every one. We did not limit this statement to those who might be expected to be exposed to danger. Unreasonable risk being taken, its consequences are not confined to those who might probably be hurt.

If this be so, we do not have a plaintiff suing by "derivation or succession." Her action is original and primary. Her claim is for a breach of duty to herself — not that she is subrogated to any right of action of the owner of the parcel or of a passenger standing at the scene of the explosion.

The right to recover damages rests on additional considerations. The plaintiff's rights must be injured, and this injury must be caused by the negligence. We build a dam, but are negligent as to its foundations. Breaking, it injures property down stream. We are not liable if all this happened because of some reason other than the insecure foundation. But, when injuries do result from our unlawful act, we are liable for the consequences. It does not matter that they are unusual, unexpected, unforeseen, and unforeseeable. But there is one limitation. The damages must be so connected with the negligence that the latter may be said to be the proximate cause of the former.

These two words have never been given an inclusive definition. What is a cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations, as does the existence of negligence itself. Any philosophical doctrine of causation does not help us. A boy throws a stone into a pond. The ripples spread. The water level rises. The history of that pond is altered to all eternity. It will be altered by other causes also. Yet, it will be forever the resultant of all causes combined. Each

one will have an influence. How great only omniscience can say. You may speak of a chain, or, if you please, a net. An analogy is of little aid. Each cause brings about future events. Without each the future would not be the same. Each is proximate in the sense it is essential. But that is not what we mean by the word. Nor on the other hand do we mean sole cause. There is no such thing.

Should analogy be thought helpful, however, I prefer that of a stream. The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet, for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water strained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.

As we have said, we cannot trace the effect of an act to the end, if end there is. Again, however, we may trace it part of the way. A murder at Sarajevo may be the necessary to an assassination in London twenty years hence. An overturned lantern may burn all Chicago. We may follow the fire from the shed to the last building. We rightly say that the fire started by the lantern caused its destruction.

A cause, but not the proximate cause. What we do mean by the word "proximate" is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics. Take our rule as to fires. Sparks from my burning haystack set on fire my house and my neighbor's. I may recover from a negligent railroad. He may not. Yet the wrongful act as directly harmed the one as the other. We may regret that the line was drawn just where it was, but drawn somewhere it had to be. We said the act of the railroad was not the proximate cause of our neighbor's fire. Cause it surely was. The words we used were simply indicative of our notions of public policy. Other courts think differently. But somewhere they reach the point where they cannot say the stream comes from any one source."

A. CAUSE IN FACT TESTS

a. Philosophical Foundations.

Cause is called by one philosopher as the cement of the universe. *(J.L. Mackie, Cement of the Universe, citing David Hume).* The description is no exaggeration because the idea of cause is so central to the human mind that it is difficult to imagine thought without it.

Its explanatory power is unrivalled, its influence on the world views without parallel. System after system of philosophical reflection has relied on the idea of cause to elaborate meaning and value. *(David Appelbaum, The Vision of Hume, 1996 Ed., p. 21).*

It has been observed that the dominant view in the determination of causality is what was observed by David Hume, said to be the greatest philosopher ever to write in the English language. *(Marc Stauch, Causation, Risk and Loss of Chance in Medical Negligence, Oxford Journal of Legal Studies, Vol. 17, No. 2, Summer 1997, p. 205, citing David Hume, Treatise on Human Nature, Book I, Part III).* Hume believed that if causation is but another mind construct, its use guarantees no revelation of reality. *(David Appelbaum, supra).* He observed in *Inquiry Concerning Human Understanding* that our knowledge of cause and effect "is not, in any instance, attained by reasoning *a priori*, but arises entirely from experience, when we find that any particular objects are constantly conjoined with each other." *(From: Ten Great Works of Philosophy, 1969 Ed., p. 173, 196 ed. by Robert Paul Wolff).* Thus, our notion of causality according to Hume is not some mysterious quality in the objects themselves. Rather, we consider that there is such causality because we have hitherto observed that objects of those two types are regularly conjoined, we expect them to go together on this occasion too. *(March Stauch, supra, p. 207).* (Hume warned, however, that the connection is between thoughts in the mind and not events in the real world). David Hume further explained in *Inquiry Concerning Human Understanding* that:

> "It appears, then, that this idea of a necessary connection among events arises from a number of similar instances which occur, of the constant conjunction of these events; nor can that idea ever be suggested by any of these instances surveyed in all possible lights and positions. But there is nothing in a number of instances, different from every single instance, which is supposed to be exactly similar, except only that after a repetition of similar instances the mind is carried by habit, upon the appearance of one event, to expect its usual attendant, is the sentiment or impression from which we form the idea of power or necessary connection. Nothing further is in the case. Contemplate the subjects on all sides, you will never find any other origin of that idea. This is the sole difference between one instance, from which we can never receive the idea of connection, and a number of similar instances by which it is suggested. The first time a man saw the communication of motion by impulse, as by the shock of two billiard balls, he could not pronounce that the one event was connected, but only that it was conjoined with the other. After he has observed several instances of this nature, he then pronounces them to be

connected. What alteration has happened to give rise to this new idea of connection? Nothing but that he now feels these events to be connected in his imagination, and can readily foretell the existence of one from the appearance of the other. When we say, therefore, that one object is connected with another, we mean only that they have acquired a connection in our thought and give rise to this inference by which they prove of each other's existence — a conclusion which is somewhat extraordinary, but which seems founded on sufficient evidence. Nor will its evidence be weakened by any general diffidence of the understanding or skeptical suspicion concerning every conclusion which is new and extraordinary. No conclusions can be more agreeable to skepticism than such as make discoveries concerning the weakness and narrow limits of human reason and capacity.

And what stronger instance can be produced of the surprising ignorance and weakness of the understanding than the present? For surely, if there be any relation among objects which it imports us to know perfectly, it is that of cause and effect. On this are founded all our reasonings concerning matter of fact or existence. By means of it alone we attain any assurance concerning objects which are removed from the present testimony of our memory and senses. The only immediate utility of all sciences is to teach us how to control and regulate future events by their causes. Our thoughts and inquiries are, therefore, every moment employed about this relation; yet so imperfect are the ideas which we form concerning it that it is impossible to give any just definition of cause, except what is drawn from something extraneous and foreign to it. Similar objects are always conjoined with similar. Of this we have experience. Suitably to this experience, therefore, we may define cause to be an *object followed by another, and where all the objects, similar to the first, are followed by objects similar to the second.* Or in other words, *where, if the first object hand not been, the second never had existed.* The appearance of a cause always conveys the mind, by a customary transition, to the idea of the effect. Of this also we have experience. We may, therefore, suitably to this experience, form another definition of cause and call it *an object followed by another, and whose appearance always conveys the thought to that other.* But thought both these definitions be drawn from circumstances foreign to the cause, we cannot remedy this inconvenience or attain any more perfect definition which may point out that circumstance in the cause which gives it a connection to its effect. We have no idea of this connection, nor even any distinct notion what it is we desire to know when we endeavor at a conception of it. We say, for instance, that the vibration of this string is the cause of this particular sound. But what do we mean by that affirmation? We either mean *that his vibration is followed by this sound, and*

> *that all similar vibrations have been followed by similar sounds;* or, *that this vibration is followed by this sound, and that, upon the appearance of one, the mind anticipates the senses and forms immediately an idea of the other.* We may consider the relation of cause and effect in either of these two lights; but beyond these we have no idea of it. *(Ten Great Works of Modern Philosophy, pp. 231-232).*

John Stuart Mill is said to have refined Hume's account of causality. Mill explained that it may be that whenever C (Cause) is present, E (Effect) is seen to follow, in which case C is said to be sufficient for E; alternatively, it may be that whenever E is present, C is found to have occurred first, in which case C is necessary for E. Mill likewise explained that where C is in fact sufficient for E, it most invariably comprises a complex of conditions or a causal set, whose combined presence is then followed by E. *(Marc Stauch, supra).*

Legal theorists Hart and Honore, explained that when we look for the cause of an occurrence, "we are looking for something, usually earlier in time, which is abnormal or an interference in the sense that it is not present when things are as usual." *(H.L.A. Hart and Tony Honore, Causation in Law, 2nd Ed., p. 46).* "In adopting this approach, we distinguish between those members of the causal set which are standard and habitual feature of the environment ('background conditions') and a member whose presence represents a deviation from the norm ('candidate condition')." *(Marc Stauch, supra, p. 208).*

J.L. Mackie explained that causal statements are commonly made in some context, against a background which includes the assumption of some causal field. He explained: "A causal statement will be the answer to a causal question, and the question, 'What caused this explosion?' can be expanded into 'What made the difference between those times, or those cases, within a certain range, in which no such explosion occurred, and this case in which an explosion did occur? Both cause and effect are seen as differences within a field; anything that is part of the assumed (but commonly unstated) description of the field itself will, then, be automatically ruled out as a candidate for the role of cause. Consequently, if we take the field as being this block of flats as normally used and lived in, we must take Jone's striking a match to light his cigarette as part of the field, and therefore not as the cause of, or even a cause of, or as causing, the explosion. What caused the explosion must be a difference in relation to the field, and the gas leak, or the presence of the gas that had leaked out, is the obvious candidate." *(J.L. Mackie, The Cement of the Universe, 1974 Ed.)*

H.L.A. Hart and A.M. Honore refer to the "cone of causation." They observed that "if we look into the past of any given event, there is an infinite number of events, each of which is a necessary condition of the given event and so, as much as any other, is its cause. This is the "cone" of causation, so called because, since any event has a number of simultaneous conditions, the series fans out as we go back in time." *(HLA Hart and A.M. Honore, supra).*

In *Paradoxes of Legal Science,* Justice Cardozo also discussed the infinite number of events that preceded an event in question. He cited Lord Shaw who referred to what is known as the "net" of causation. Justice Cardozo discussed the problem of causation in law:

> "x x x The law has its problems of causation. It must trace events to its causes, or say with Hume that there is no cause, but only juxta-position or succession. If it recognizes causation, as it does, it must determine which antecedent shall be deemed to be the jural cause, the antecedent to be selected from an infinite series of antecedents as big with the event. We are told very often that the law concerns itself with proximate causes and no others. The statement is almost meaningless, or rather, to the extent that on the surface it has meaning, it is far away from truth. Sometimes in the search for the jural cause, the law stops close to the event, but sometimes and often, it goes many stages back. The principle of relativity of causation tells us that its methods could not well be different. 'Cause,' says Lord Haldane in his book, *The Reign of Relativity,* 'is very indefinite expression. Externality to the effect is of its essence, but its meaning is relative in all cases to the subject-matter. For the housemaid the cause of the fire is the match she lights and applies. For the physicist the cause of the fire is the conversion of potential into kinetic energy, through the combination of carbon atoms with those of oxygen and the formation of oxides in the shape of gases which become progressively oxidized. For the judge who is trying a case of arson it is the wicked action of the prisoner in the dock. In each case there is a different field of inquiry, determined from a different standpoint. But no such field is even approximately exhaustive. The complete cause, if it could be found, would extend to the entire ground of the phenomenon that had to be explained, and this ground could be completely stated it would be indistinguishable from the effect itself, including, as it would do, the whole of the conditions of existence. Thus, we see that when we speak of the cause of an event we are only picking out what is relevant to the standpoint of a special inquiry, and is determined in its scope by the particular concept which our purpose makes us have in view.
>
> Here is the key to the juridical treatment of the problems of causation. We pick out the cause which our judgment ought to

> be treated as the dominant one with reference, not merely to the event itself, but to the jural consequences that ought to attach to the event. There is an opinion by Lord Shaw in the English House of Lords in which he refers to the common figure of speech whereby a succession of causes is represented as a chain. He reminds us that the figure, though convenient, is inadequate. 'Causation,' he says, 'is not a chain, but a net.' At each point, influences, forces, events, precedent and simultaneous meet, and the radiation from each point extends to infinitely. From this complex web the law picks out now this cause and now that one. Thus, the same event may have one jural cause when it is considered as giving rise to a cause of action upon contract, and another when it is considered as giving rise to a cause of action for a tort. The law accepts or rejects one or another as it measures its own ends and the social benefits or evils of rejection or acceptance."

b. Main Tests.

As explained earlier, the initial step in determining proximate cause is to determine if the negligent act or omission of the defendant is the "*cause-in-fact*" of plaintiff's damage or injury. Under the rubric of "cause-in-fact," courts address generally the empirical question of causal connection. *(Epstein, p. 467).* In an ordinary vehicular accident, for example, the defendant will not be made liable for the injury if he can establish that the plaintiff had that injury prior to the accident. The defendant did not cause (in fact) any harm which occurred before his wrongful conduct; nor is the defendant liable for any harm that was caused by some independent event. *(ibid.).* It is necessary that there is proof that defendant's conduct is a factor in causing plaintiff's damage. *(57 Am. Jur. 2d 497).* What needs to be determined is whether the defendant's act or omission is a causally relevant factor.

In making such determination, two main tests are being applied: 1) the *"but for"* test or the *sine qua non* test; and 2) the *substantial factor* test.

(1) Sine Qua Non Test.

The basic conception of cause is the alternative definition of David Hume in the above-quoted work (although the "in other words" definition is not the same as the first definition). He said: "Or in other words, where if the first object had not been, the second never had existed." This concept is the foundation of what is known as the *but for test*.

Simply stated, defendant's conduct is the cause in fact of the

injury under the *but for* test if the damage would not have resulted had there been no negligence on the part of the defendant. Conversely, defendant's negligent conduct is not the cause in fact of the plaintiff's damage if the accident could not have been avoided in the absence thereof. *(57 Am. Jur. 2d 501-502).*

For example, if the plaintiff was injured because he was hit by a portion of a negligently constructed wall which collapsed, the negligence in the construction of the wall is the cause in fact of the injury because the injury to the plaintiff would not have resulted had there been no negligence on the part of the defendant. On the other hand, if the plaintiff was hit by an object which fell from the window of the same building, the negligent construction of the wall is not the cause in fact of the injury because the accident could not have been avoided in the absence thereof.

(2) Substantial Factor Test.

The *substantial factor* test, on other hand, makes the negligent conduct the cause in fact of the damage if it was a substantial factor in producing the injuries. In order to be a substantial factor in producing the harm, the causes set in motion by the defendant must continue until the moment of the damage or at least down the setting in motion of the final active injurious force which immediately produced or preceded the damage. *(65 CJS 1157).* If the defendant's conduct was already determined to be the cause in fact of the plaintiff's damage under the *but for* test, it is necessarily the cause in fact of the damage under the *substantial factor* test. In other words, if the accident would not have occurred had there been no negligence of the part of the defendant, the defendants conduct is a substantial factor in bringing about the damage or injury. Whenever this test is applied, the same is being applied both as "cause-in-fact" test and a policy test.

The *substantial factor* test is important in cases where there are concurrent causes. Here the issues are not factual but conceptual: when are harms attributable to the defendant whose own actions are combined with those of other persons and natural events? *(Epstein, p. 468).* The application of the *but for* test will lead to an absurd conclusion if concurrent causes are involved. For example, the plaintiff was injured when he fell from a horse which was frightened by two approaching vehicles. If the drivers of both vehicles, A and B, were negligent and either vehicle was sufficient to frighten the horse, the application of the *but for* test will result to an absurd conclusion that the negligence of either driver cannot be considered the cause in fact

of the injury because the damage have likewise resulted if only one driver was negligent. It cannot be said that the damage would not have resulted had there been no negligence on the part of A. It cannot likewise be said that damage would not have resulted had there been no negligence on the part of B. However, under the *substantial factor* test, the concurrent causes will still be considered the cause if fact of the injury because the negligence of both A and B are substantial factors in bringing about the injury.

(3) Necessary and Sufficient (NESS) Test.

Another test, referred to as the NESS Test, was recently developed to solve problems regarding concurrent causes. The act or omission is a cause-in-fact if it is a necessary element of a sufficient set (NESS). However, the test is based on the concept of causation by David Hume and John Stuart Mill, and systematically elaborated for legal purposes by Professors Hart and Honore in *Causation in Law* and Professor Wright in *Causation in Tort Law (John G. Fleming, The Law of Torts, 7th Edition, p. 173).*

Professor Fleming restated the test as follows: "Whether a particular condition qualifies as a casually relevant factor will depend on whether it was necessary to complete a set of conditions jointly sufficient to account for the given occurrence" *(ibid., p. 173).* The meaning of the terms "necessary" and "sufficient" are consistent with how they are understood in Logic. Thus, a "necessary condition" for the occurrence of a specified event is a circumstance in whose absence the event cannot occur while a "sufficient condition" for the occurrence of an event is a circumstance in whose presence the event must occur *(Irving Copi and Carl Cohen, Introduction to Logic, 10th Edition, pp. 496-497).* Otherwise stated, "sufficient" means that the existence of the cause ensures that its effects also exist while "necessary" means that its non-existence ensures in the same sense that its effect do not exists. Thus, for the Cause (C) to be sufficient for the Effect (E) is for E to exist if C does; and that for C to be necessary for E is for E not to exist if C does not (*D.H. Mellon, The Facts of Causation, 1995 Ed., pp. 13-14).*

Professor Richard W. Wright explained the NESS test in this wise:

> "The basic concept of causation is formalized in the NESS (necessary element of a sufficient set) test of causal contribution, which in its full form states that a condition contributed to some consequence if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the oc-

currence of the consequence. The relevant notion of sufficiency is not merely logical or empirical , but rather requires each element of the applicable causal generalization, in both the antecedent ("if" part) and the consequent ("then" part) must have been in actual existence (concretely instantiated) on the particular occasion.

The NESS test subsumes and integrates the Restatement's necessary-condition test and its (cleaned up) independently-sufficient-condition test, which are merely corollaries of the NESS test that apply in certain types of situations. The NESS test reduces down to the necessary condition (but-for) test if there was only one set of conditions that was or would have been sufficient for the occurrence of the consequence on the particular occasion, or, if there was more than one such set, if the condition was necessary for the sufficiency of each of the sets. Yet the NESS test is more inclusive than the but-for test. A condition was a cause under the NESS test if it was necessary for the sufficiency of any actually sufficient set, even if, due to other duplicative (actually sufficient) or preempted (would have been sufficient) set of conditions, it was not — as required by the but-for test — necessary in the circumstances for the consequence." *(Richard W. Wright, Once More into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility, 54 Vanderbilt Law Review 27 [2001]; See also, Wright, Causation in Tort Law, 73 Calif. L.Rev. 1735 [1985]; Wright, Causation, Responsibility, Risk, Probability, Naked Statatistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts, 73 IOWA L.Rev 1001 [1988])*

The test was also explained in this wise:

The more accurate 'NESS test', developed by Richard Wright in North America following suggestions by J.L. Mackie, and Hart and Honore, expressly allows for the contrary possibility. In such cases, it holds that our candidate condition may still be termed 'a cause' where it is shown to be a necessary element in just one of several co-present causal sets each independently sufficient for the effect. There are in fact two ways that such co-presence can manifest itself, and Wright terms these, respectively, 'duplicative' and 'pre-emptive' causation. The first occurs when two (or more) such sets operate simultaneously to produce the effect; in other words, the effect is over-determined. This was the case in our previous example of the damage to a building by fire: the conflagration began in two places at once, through the carelessly discarded cigarette and the short-circuit, respectively. It is apparent that, in contrast to the 'but for' test (whose counter-intuitive result is that neither was a cause), the NESS test allows us to regard both the cigarette and short-circuit as causative of the damage.

> Pre-emptive causation, by contrast, occurs when, through coming about first in time, one causal set 'trumps' another, potential set lurking in the background. The causal potency of the latter is frustrated for, as Wright states, a 'necessary condition for the sufficiency of any set of actual antecedent conditions is that the injury not have occurred already as a result of other actual conditions outside the set.' An example offered by Wright of causal pre-emption is where D shoots and kills P as he is about to drink from a cup poisoned by C. Here, the NESS test makes it clear that it is D's act, on the other hand, does not satisfy the NESS test: poison does not feature in the list of necessary elements in any operative set of conditions sufficient for P's death; instead it is a necessary part of a potential but, as things turn out, inoperative, causal set."
>
> x x x
>
> Causation cases involving the presence of more than one causal set not only show up the limitation of the 'but for' test; there are also instances of a broader concept, namely 'multiple causation.' The latter arises where, in addition to mere background conditions, we are aware of more than one candidate condition competing for the title 'cause' of the event. In the case of co-present causal sets, the phenomenon occurs because each of the sets will crystallize around at least one candidate condition.
>
> On the other hand, multiple causation can also occur within the confines of a single causal set. This will be the case if there are a number of candidate conditions (deviations from the norm), which, taken one at a time, would not in fact have been sufficient to complete the set in conjunction only with the background conditions. Wright mentions the example of a corpulent man who slips while running down some poorly lit stairs: here, there are three possible candidates for causing the fall and it may be that the accident came about only through the cumulative working of all three." *(Marc Stauch, supra, pp. 210-211)*

A better understanding of the last discussed test can be derived by analyzing a given situation using NESS terms. Let us take an example similar to that given by Professor Wright. Suppose a man slips while running down a slippery stairs and two candidate causes can be seen because they are not normally present: (a) the man slipped simply because he was running; and (b) the man slipped because the stairs is slippery. There are at least four possibilities here.

a) The slippery stairs is the only cause. The fact that the stairs was slippery was a necessary element of a sufficient set to make him slip and the fact that the man was running was not part of a set that is sufficient. The man would have slipped even if he was not running.

b) The slippery stairs is only one of the causes simultaneously occurring. The fact that the man was running was sufficient for the injury but the fact that the stairs was slippery was equally sufficient. The operation of the running did not pre-empt but rather duplicated the effect of the slippery stairs. In other words, there are two overlapping causal sets; the causes are over-determined.

c) The slippery stairs was a member of a causal set contributing to the effect. The slippery stairs alone would not have been sufficient to cause the injury and the fact that the man was running was equally insufficient. The injury was a cumulative effect of all the causes, including the slippery stairs and running.

d) The slippery stairs may not have caused the injury. One possibility is that the man's running may have been the only cause; it is part of a set that was necessary. Another possibility is that both causes are sufficient and could have independently caused the injury but the fact that the man was running pre-empted the other, slippery stairs; the causal potency of the slippery stairs was frustrated.

The slippery stairs will be considered a cause-in-fact of the injury in the situations contemplated in (a), (b) and (c) and obviously not in situation (d).

It cannot be overemphasized, however, that the problem at this stage "is concerned with a question which arises (at least in theory) in every case, that is to say, whether the defendant's act (or omission) should be excluded from the events which contributed to the occurrence of the plaintiff's loss. If it is so excluded, that is the end of the case, for it there is no connection between the defendant's act and the loss there is no reason for a private law system of liability to operate with regard to him." *(W.V.H. Rogers, Winfield & Jolowicz on Torts, 1998 15th Edition, p. 195).* The first stage of causation is primarily a matter of historical mechanics although it necessarily involves the questions about what would have happened in different circumstances. (*ibid*., p. 196). However, in most cases, the first stage of causation inquiry is comparatively unimportant in practice because it will usually be obvious whether it is satisfied and it will not form the basis of argument or adjudication. It eliminates the irrelevant but its function is certainly not to provide a conclusive determination of the defendant's liability. (*ibid*., p. 197).

B. POLICY TESTS.

A finding that the defendant's negligence was the cause in fact of

the damage to the plaintiff will not necessarily result to a finding that the same negligence is the proximate cause of the damage or injury to the plaintiff. The law, as a matter of policy, may limit the liability of the defendant to certain consequences of his action. If the damage or injury to the plaintiff is beyond the limit of the liability fixed by law, the defendant's conduct cannot be considered the proximate cause of the damage. Such limit of liability is determined by applying what are known as policy tests.

Thus, in deciding negligence cases, it is likewise necessary to determine the policy tests adopted in a particular jurisdiction. The different policy tests which are being used to determine the extent of the defendant's liability for negligence include: a) foreseeability test; b) natural and probable consequence test; c) natural and ordinary or direct consequences test; d) hindsight test; e) orbit of risk test; and f) the substantial factor test.

The above-specified policy tests may be divided into two (2) groups. The first group includes the element of foreseeability while the other does not require that the injury is within the foreseeable risk created by the defendant. The first may be referred to as the "foresight perspective" while the other as the "directness perspective." They were briefly explained in this wise:

> "Analytically, the problem of proximate cause in turn can be addressed in two distinct ways. One possibility is to ask whether the chain of events that in fact occurred was sufficiently "foreseeable," "natural" or "probable" at the outset for the defendant to be held liable for the ultimate harm that ensued, assuming that causation in fact can be established. That judgment is made from the standpoint of the defendant at the time the tortious conduct was committed. The second approach starts with the injury and works back towards the wrongful action of the defendant, seeking to determine whether any act of a third party or the plaintiff, or any event, severed the causal connection between the harm and the defendant's wrongful conduct. Here, the question is only whether, when all the evidence is in, it is permissible to say that the defendant "did it," that is, brought about the plaintiff's harm." *(Epstein, p. 468).*

Under the foreseeability test and other similar tests like the natural and probable consequence test, the defendant is not liable for unforeseeable consequences of his acts. The liability is limited within the risk created by the defendant's negligent act. Direct consequences tests, on the other hand, makes the defendant liable for damages which are beyond the risk. Direct consequences are those which follow in the sequence from the effect of the defendant's act

upon conditions existing and forces already in operation at the time, without the intervention of any external forces, which come into active operation later. *(Prosser and Keeton, p. 294).*

The justification for introducing the element of foreseeability in the determination of proximate cause is stated in *Overseas Tankship (U.K.) Ltd. vs. Morts Dock & Engineering Co., Ltd. (A.C. 388 [P.C. Aust.] [1961] or what is known as the Wagon Mound 1 case)* in this wise:

> "Enough has been said to show that the authority of *Polemis* has been severely shaken though lip service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified, and that, in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with the current ideas of justice or morality that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct.' It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore the civilized order requires the observance of a minimum standard of behaviour.
>
> This concept applied to the slowly developing law of negligence has led to a great variety of expressions which can, as it appears to their Lordship, be harmonized with little difficulty with the single exception of the so-called rule in *Polemis*. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them. Thus, it is that over and over again it has happened that in different judgments in the same case, and sometimes in a single judgment, liability for a consequence has been imposed on the ground that it was reasonably foreseeable or alternatively, on the ground that it was natural or necessary or probable. The two grounds have been treated as coterminous, and so they largely are. But, where they are not, the question arises to which the wrong answer was given in *Polemis*. For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible — and all are agreed that some limitation there must be — why should that test (reasonable foreseeability) be rejected which, since he is judged by what the

> reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the 'direct' consequences) be substituted which leads to nowhere but the never-ending and insoluble problems of causation. 'The lawyer," said Sir Frederic Pollock, 'cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.' Yet this is just what he has most unfortunately done and must continue to do if the rule in *Polemis* is to prevail. x x x"

The proponents of the direct consequence test and other similar tests which do not require foreseeability answers the above ratiocination by explaining that "if a great loss is to be suffered, it is better that it should fall upon the wrongdoer than upon one innocent victim, or a hundred. 'The simple question is, whether a loss, that must be borne somewhere, is to be visited on the head of the innocent or guilty.'" *(Prosser and Keeton, p. 293, citing Fent vs. Toledo, Peoria & Western Railway Co., 1871, 59 Ill. 349).*

4. TESTS APPLIED IN THE PHILIPPINES

The determination of the applicable test is likewise a problem in this jurisdiction. The problem is being compounded by the fact that there is little literature on proximate cause. Examination of decisions of the Supreme Court and the Court of Appeals do not immediately reveal the applicable rule because more often than not, the discussion of proximate cause contain mere salutary citations of definitions and previous decisions.

Nevertheless, it had also been acknowledged that the determination of proximate cause depends on whether public policy requires that the plaintiff or defendant should bear the loss. *(Reyes and Puno, p. 167)*. The difference between this jurisdiction, however, with that of other jurisdictions is that the New Civil Code contains a chapter on Damages which specifies the type of damage for which the defendant may be held liable as well as the limit of such liability. In other words, the policy on the kind of damage and the extent of damage to be awarded to the plaintiff is already expressed in statutory provisions.

A. CAUSE-IN-FACT TESTS.

The "but for" test is being applied in this jurisdiction. The definition of proximate cause, in fact, includes a statement which indicates the applicability of the "but for test." The definition in *Bataclan vs. Medina (supra)* includes a statement that the cause

should be that without which the damages would not have resulted.

The substantial factor test is likewise being applied in this jurisdiction. The substantial factor test as it is contemplated in the *Restatement, Second, of Torts* of the American Law Institute had been cited in cases decided in this jurisdiction. *(Philippine Rabbit vs. Court of Appeals, G.R. No. 66102, Aug. 30, 1990)*. The very same definition adopted in *Bataclan* reflects the observation of one legal writer that "the issue of proximate causation asks whether the defendant's conduct could be regarded as a 'substantial factor' in bringing about plaintiff's harm, and that inquiry often is translated into one that asks whether any of the human actions or natural events that occur after defendant's conduct but before the plaintiff's harm severs the causal connection between them." *(Epstein, p. 468)*.

It is believed that the "NESS" test can also be applied in multiple causation cases. There is no statutory provision that fixes the applicable test hence the NESS test is an acceptable test and it might even be superior in multiple causation cases.

CASE:

PILIPINAS BANK vs. HON. COURT OF APPEALS
234 SCRA 435 [1994]

x x x

The facts as found both by the trial court and the respondent court are:

"As payments for the purchased shoe materials and rubber shoes, Florencio Reyes issued postdated checks to Winner Industrial Corporation for P20,927.00 and Vicente Tui, for P11,419.50, with due dates on October 10 and 12, 1979, respectively.

To cover the face value of the checks, plaintiff, on October 10, 1979, requested PCIB Money Shop's manager Mike Potenciano to effect the withdrawal of P32,000.00 from his savings account therein and have it deposited with his current account with Pilipinas Bank (then Filman Bank), Biñan Branch. Roberto Santos was requested to make the deposit.

In depositing in the name of FLORENCIO REYES, he inquired from the teller the current account number of Florencio Reyes to complete the deposit slip he was accomplishing. He was informed that it was '815' and so this was the same current account number he placed on the deposit slip below the depositor's name FLORENCIO REYES.

Noting that the account number coincided with the name Florencio, Efren Alagasi, then Current Account Bookkeeper of Pilipinas Bank, thought it was for Florencio Amador who owned the listed account number. He, thus, posted the deposit in the latter's account not noticing that the depositor's

surname in the deposit slip was REYES.

On October 11, 1979, the October 10 check in favor of Winner Industrial Corporation was presented for payment. Since the ledger of Florencio Reyes indicated that his account had only a balance of P4,078.43, it was dishonored and the payee was advised to try it for next clearing.

On October 15, 1979, the October 10, 1979 check was redeposited but was again dishonored. Likewise, the October 12, 1979 check in favor of Vicente Tui when presented for payment on that same date met the same fate but was advised to try the next clearing. Two days after the October 10 check was again dishonored, the payee returned the same to Florencio Reyes and demanded a cash payment of its face value which he did if only to save his name. The October 12, 1979 check was redeposited on October 18, 1979, but again dishonored for the reason that the check was drawn against insufficient fund. Furious over the incident, he immediately proceeded to the bank and urged an immediate verification of his account.

Upon verification, the bank noticed the error. The P32,000.00 deposit posted in the account of Florencio Amador was immediately transferred to the account of Reyes upon being cleared by Florencio Amador that he did not effect a deposit in the amount of P32,000.00. The transfer having been effected, the bank then honored the October 12, 1979 check." (Exh. "C").

On the basis of these facts, the trial court ordered petitioner to pay to the private respondent: (1) P200,000.00 as compensatory damages; (2) P100,000.00 as moral damages; (3) P25,000.00 as attorney's fees; and (4) the costs of suit. On appeal to the respondent court, the judgment was modified as aforestated.

In this petition for review, petitioner argues:

"I. Respondent Court of Appeals erred on a matter of law, in not applying the first sentence of Article 2179, New Civil Code, in view of its own finding that respondent Reyes' own representative committed the mistake in writing down the correct account number;

II. Respondent Court of Appeals erred, on a matter of law, in holding that respondent Reyes has the right to recover moral damages and in awarding the amount of P50,000.00, when there is no legal nor factual basis for it;

III. The Honorable Court of Appeals erred, on a matter of law, in holding petitioner liable for attorney's fees in the amount of P20,000.00, when there is no legal nor factual basis for it."

We find no merit in the petition.

First. For Article 2179 of the Civil Code to apply, it must be established that private respondent's own negligence was the immediate and proximate cause of his injury. The concept of proximate cause is well defined in our corpus of jurisprudence as "any cause which, in natural and continuous

sequence, unbroken by any efficient intervening cause, produces the result complained of and without which would not have occurred and from which it ought to have been foreseen or reasonably anticipated by a person of ordinary case that the injury complained of or some similar injury, would result therefrom as a natural and probable consequence." In the case at bench, the proximate cause of the injury is the negligence of petitioner's employee in erroneously posting the cash deposit of private respondent in the name of another depositor who had a similar first name. As held by the trial court:

x x x x x x x x x

"Applying the test, the bank employee is, on that basis, deemed to have failed to exercise the degree of care required in the performance of his duties. As earlier stated, the bank employee posted the cash deposit in the account of Florencio Amador from his assumption that the name Florencio appearing on the ledger without, however, going through the full name, is the same Florencio stated in the deposit slip. He should have continuously gone beyond mere assumption, which was proven to be erroneous, and proceeded with clear certainty, considering the amount involved and the repercussions it would create on the totality of the person notable of which is the credit standing of the person involved should a mistake happen. The checks issued by the plaintiff in the course of his business were dishonored by the bank because the ledger of Florencio Reyes indicated a balance insufficient to cover the face value of checks."

Second. In light of this negligence, the liability of petitioner for moral damages cannot be impugned. So we held in *Bank of the Philippine Islands vs. IAC, et al.:*

"The bank is not expected to be infallible but, as correctly observed by respondent Appellate Court, in this instance, it must bear the blame for not discovering the mistake of its teller despite the established procedure requiring the papers and bank books to pass through a battery of bank personnel whose duty it is to check and countercheck them for possible errors. Apparently, the officials and employees tasked to do that did not perform their duties with due care, as may be gathered from the testimony of the bank's lone witness, Antonio Enciso, who casually declared that 'the approving officer does not have to see the account numbers and all those things. Those are very petty things for the approving manager to look into.' (p. 78, Record on Appeal). Unfortunately, it was a 'petty thing,' like the incorrect account number that the bank teller wrote on the initial deposit slip for the newly-opened joint current account of the Canlas spouses, that sparked this half-a-million-peso damage suit against the bank.

While the bank's negligence may not have been attended with malice and bad faith, nevertheless, it caused serious anxiety, embarrassment and humiliation to the private respondents for which they are entitled to recover reasonable moral damages. *(American Express International, Inc. IAC, 167 SCRA 209)*. The award of reasonable attorney's fees is proper for the private respondents were compelled to litigate to protect their interest. (Art. 2208, Civil Code). However, the absence of malice and bad faith renders the award

of exemplary damages improper. *(Globe Mackay Cable and Radio Corp. vs. Court of Appeals, 176 SCRA 778).*"

B. POLICY TESTS.

a. Rule under the 1889 Civil Code.

There is a conflict of opinion regarding the applicability of the foresight perspective in determining proximate cause. The ruling in the early case of *Algarra vs. Sendejas (27 Phil. 284 [1914])* indicate the applicability of the foreseeability test:

> "x x x The liability of the present defendant includes only those damages which were "foreseen or may have been foreseen" at the time of the accident, and which are the necessary and immediate consequences of his fault. In discussing the question of damages under the civil law, Gutierrez (vol. 4, pp. 64, 65) says:
>
> "In the impossibility of laying down a surer rule, the Code understands known damages to be those which in the prudent discernment of the judge merit such a qualification, although their consequences may not be direct, immediate, inevitable.
>
> "If it is a question of losses occasioned through other causes, except fraud, and the contracting parties have not covenanted any indemnity for the case of nonfulfillment, then the reparation of the losses or damages shall only comprise those that are the necessary and immediate consequence of that fault. This rule may not be very clear, but is the only one possible in a matter more of the domain of prudence than of law."
>
> In its decision of April 18, 1901, the Supreme Court of Spain said: "Neither were the errors incurred that are mentioned in the third assignment, since the indemnity for damages is understood to apply to those caused the complainant directly, and not to those which, indirectly and through more or less logical deductions, may affect the interests of the Ayuntamiento de Viana, as occurs in the present case where the increase of wealth concerns not only the Ayuntamiento but also the province and the state, yet, not on this account does any action lie in their behalf as derived from the contracts with Urioste."
>
> This doctrine is also affirmed in the more recent decision of March 18, 1909, in the following words: "For the calculation of the damages claimed, it is necessary, pursuant to the provisions of Article 924 of the Law of Civil Procedure to give due regard to the nature of the obligation that was unfulfilled and to the reasonable consequences of its nonfulfillment, because the conviction sought can be imposed only when there exists a natural and true

relation between such nonfulfillment and the damages, whatever reason there may be to demand them on another account."

In the case of *Garcia Gamo vs. Compañia Madrileña de Alumbrado, etc.* (101 Jurisp., 662), it appeared that an employee of the defendant company whose duty it was to clean and light the street lamps left a stepladder leaning against a tree which stood in a public promenade. The seven-year old son of the plaintiff climbed the tree by means of the ladder, and while endeavoring to cut some branches fell to the ground, sustaining severe injuries which eventually caused his death. The plaintiff lost in the lower courts and on appeal to the Supreme Court the decision of those lower courts was affirmed with the following statement:

"That in this sense — aside from the fitness of the judgment appealed from, inasmuch as the acquittal of the defendant party resolves all the issues argued at the trial, if no counterclaim was made — the assignments of error in the appeal cannot be sustained, because, while the act of placing the stepladder against the tree in the manner and for the purposes aforestated, was not permissible it was regularly allowed by the local authorities, and that fact did not precisely determine the injury, which was due first to the abandonment of the child by his parents and secondly to his own imprudence, according to the findings of the trial court, not legally objected to in the appeal; so it is beyond peradventure that the circumstances necessary for imposing the obligations arising from guilt or negligence do not concur in the present case."

The court here simply held that the injury to the child could not be considered as the probable consequence of an injury which could have been foreseen from the act of the company's employee in leaving the ladder leaning against the tree.

In *De Alba vs. Sociedad Anonima de Tranvias* (102 Jurisp., 928), a passenger was standing on the platform of a street car while it was in motion when, or rounding a curve, the plaintiff fell off and under the car, thereby sustaining severe injuries which took several months to heal. He was not allowed to recover in the lower courts and on appeal the Supreme Court sustained the inferior tribunals saying:

"Whereas, considering the circumstances of the accident that happened to D. Antonio Morales de Alba, such as they were held by the trial court to have been proved, the evidence does not disclose that any liability whatever in the said accident, for acts or omissions, may be charged against the employees of the street car, as being guilty through fault or negligence, since it was shown that the car was not traveling at any unusual speed nor was this increased on rounding the curve, but that the ac-

cident was solely due to the fact that the car in turning made a movement which caused the plaintiff to lose his balance; and whereas no act whatever has been proved of any violation of the regulations, nor can it be required of street-car employees, who have to attend to their respective duties, that they should foresee and be on the alert to notify the possibility of danger when not greater than that which is more or less inherent to this mode or travel; therefore the appeal can not be upheld, and with all the more reason since the passenger who takes the risk of travelling on the platform, especially when there is an unoccupied seat in the car, should be on his guard against a contingency so natural as that of losing his balance to a greater or less extent when the car rounds a curve."

In *Crespo vs. Garcia* (112 Jurisp., 796), the plaintiff, a servant woman, 72 years old, was injured in the performance of her duties by the sudden and unexpected failure of the upper floor of a house in which she was working. The owner and the architect of the building were made defendants and after due trial it was held that no responsibility attached to them for the failure of the floor, consequently the plaintiff was not allowed to recover.

On her appeal to the Supreme Court that tribunal said:

"Whereas, the trial court held, in view of all the evidence adduced, including the expert and other testimony, that the act which occasioned the injury suffered by Doña Maria Alonso Crespo, was accidental, without fault of anybody, and consequently fortuitous, and that, in so considering it to absolve the defendants, he did not incur the second error assigned on the appeal, because, without overlooking the import and legal value of the affidavit adduced at the trial, he held that the defendants in their conduct were not liable for any omission that might constitute such fault or negligence as would oblige them to indemnify the plaintiff; and to support the error assigned no legal provision whatever was cited such as would require a different finding, nor was any other authentic document produced than the aforesaid affidavit which contained an account of the ocular inspection and the expert's report, which, as well as the testimony of the witnesses, the trial court was able to pass upon in accordance with its exclusive power — all points of proof which do not reveal any mistake on the part of the judge, whose opinion the appellant would substitute with his own by a different interpretation."

These authorities are sufficient to show that liability for acts *ex delicto* under the Civil Code is precisely that embraced within the "proximate cause" of the Anglo-Saxon law of torts.

"The general rule, as frequently stated, is that in order that an act or omission may be the proximate cause of an injury, the

injury must be the natural and probable consequence of the act or omission and such as might have been foreseen by an ordinarily responsible and prudent man, in the light of the attendant circumstances, as likely to result therefrom . . .

"According to the later authorities foreseeableness, as an element of proximate cause, does not depend upon whether an ordinarily reasonable and prudent man would or ought in advance to have anticipated the result which happened, but whether, if such result and the chain of events connecting it with the act complained of had occurred to his mind, the same would have seemed natural and probable and according to the ordinary course of nature. Thus, as said in one case, 'A person guilty of negligence, or an unlawful act, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent or unlawful act have thought reasonable to follow, if they had occurred to his mind.' *(Wabash R. etc. Co. vs. Coker, 81 Ill. App. 660, 664; Cooley on Torts, sec. 15).*"

"The view which I shall endeavor to justify is that, for the purpose of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate,' or, to anticipate a little, 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was 'immediate' or not does not matter. That which a man actually foresees is to him, at all events, natural and probable." *(Webb's Pollock on Torts, p. 31).*

Almost half a century thereafter, Justice J.B.L. Reyes clarified that the rule under the Old Civil Code is the same as the rule in contracts. He explained in *Silva vs. Peralta (*2 SCRA 1025 [1961]) that:

"As to the award of damages, against Saturnino Silva, it is to be noted that while the latter's liability was extra-contractual in origin, still, under the Civil Code in 1889, the damages resulting from a tort are measured in the same manner as those due from a contractual debtor in bad faith, since he must answer for such damages, whether he had foreseen them or not, just as he must indemnify not only for *damnum emergens* but also for *lucrum cessans*, as required by Article 1106. Article 1002 of the 1889 Civil Code of Spain formulated no standard for measuring quasi-delictual damages, the article merely prescribing that the

guilty party "shall be liable for the damages so done." This indefiniteness led modern civil law writers to hold that the standards set is Articles 1106 and 1107, placed in the general rules on obligations, *"rigen por igual para las contractuales y las extras contractuales, las preestablecidas y las que borten ex-lege de actos ilicitos." (Roces, Notes to Fisher) "Los Daños Civiles y su Reparación." (1927).* Since liability for damages arises in either case from a breach of a pre-existing obligation (to behave without fault or negligence in case of quasi-delicts, and, in case of contracts, to observe the conduct required by the stipulation), it is logical to conclude with Planiol that *"La responsibilidad contractual y la extra contractual tienen el mismo fundamento, por lo que se hallan sujetas en principio a idénticas reglas." (6 Planiol-Ripert, Derecho Civil, p. 529, sec. 378).* Giogi is of the same opinion. *(5 Teoria de Obligaciones, pp. 133, 207-208).* So is de CossÌo y Corral *("El Dolo en el Derecho Civil," pp. 132-133):*

"Pero si ello es asi, resulta claro que la aproximación entre esta clase de culpa y la contractual, es cada día mayor, hasta el extremo de que, seg˙n hemos antes indicado, solamente se pueden seúalar diferencias accessorias, y muchas veces aparentes entre una y otra. En primer tÈrmino, porque el concepto de culpa contractual se extiende no sólo a las obligaciones nacidas ex contractu, sino, en general, a todas aquellas preexistentes entre las partes a la realidad del acto dañoso (obligaciones legales). De otra parte, porque si bien consideramos las cosas, la responsabilidad llamada extra-contractual, deriva siempre del quebrantamiento de un deber general, implicitamente reconocido por la ley cual es el de que todos deben actual socialmente con la debida dili-gencia, evitando causar daño a los demás, y un derecho que todo ciudadano tiene, correlativamente, a no ser dañado en su patrimonio y bienes por la conducta dolosa o negligente de los demás. En tás sentido, habría siempre entre el autor del daño y la victima, una relación juridica, constituída por este derecho y aquel deber.

Esta idea de unidad entre amba instituciones se traduce en que las pretendidas diferencias en orden a la extensión de la indemnización, en ambos casos, no puedan defenderse a la vista de los pseceptos de nuestro Derecho positivo. En efecto, no contiene el Capítulo II del Título XVI del Libro del nuestro Código civil norma alguan referente a la extensión de la indemnización que en cada caso haya de prestarse, lo que nos obliga forzosamente a acudir a las normas generales contenidas en el capítulo II, del Título I de dicho libro IV, relativo a los "efectos de las obligaciones", que ninguna razón permite limitar a las de naturaleza contractual, ya que el artículo 1.101 habla genéricamente de obligaciones; el 1.102, de "todas las obligaciones"; el 1.103, de "toda clase de obligaciones", y en ninguno de los artículos subsiguientes se hace refe-rencia a una clase especial de obligaciones, sino a todas en

general.

> *Que las disposiciones de este Capítulo son aplicables en los casos de culpa extracontractual, es doctrina constantemente reconocida por la jurispredencia del Tribunal Supremo. Así, en la sentencia de 14 de diciembre de 1894, concret·ndose a los artÌculos 1.101, 1.103 y 1.104, afirma que son de caráter general y aplicables a toda clase de obligaciones, no ofreciendo contradicción con las especiales de los artÌculos 1.902 y 1.903; la sentencia de 15 de enero de 1902, permite interpretar los artículos 1.902 y 1.903 por los 1.103 y 1.106, a los efectos de determinar los elementos que han de entrar en la indemnización. La misma doctrina se mantiene en la sentencia de 2 de diciembre de 1946, y en otras muchas que pudiÈmos aducir."*

b. Rule under the New Civil Code.

The provisions of the New Civil Code on actual damages are consistent with the view expressed in *Silva vs. Peralta*. Article 2202 of the Civil Code provides that:

> "Art. 2202. In crimes and quasi-delicts, the defendant shall be liable for all damages which are the natural and probable consequences of the act or omission complained of. It is not necessary that such damages have been foreseen or could have reasonably been foreseen by the defendant."

In other words, the definition of proximate cause which includes the element of foresight is not consistent with the express provision of the New Civil Code. A person may be held liable whether the damage to the plaintiff may be unforeseen. Thus, the "directness" approach explained earlier, as well as the substantial factor test, may be applied in this jurisdiction. The language of the direct and natural consequence test had also appeared in jurisprudence. Thus, *Taylor vs. Manila Electric Railroad and Light Co. (supra, at 202)* merely requires as a third element of quasi-delict "the connection of cause and effect between the negligence and the damage." Similarly, *Vda. De Gregorio vs. Go Ching Bing* referred to the "proximate, immediate and direct cause of the death of the plaintiffs."

However, the language of Article 2202 is somewhat misleading because it requires that the damage is the "natural and probable" consequence of the negligent act. Obviously, the terms used are not the same as that contemplated in the "natural and probable consequence" test of proximate cause in American jurisprudence because the latter involves foreeability. *Reyes and Puno* explained that "natural and probable" involves two things, that is, causality and adequacy.

(p. 179). Causality means "that the damage would not have resulted without fault or negligence of the defendant" while adequacy means that the fault of the defendant would normally result in the damage suffered by the obligee. (*ibid*., citing Cammarota).

It should likewise be pointed out in this connection that there are certain areas in law which are problematical in other jurisdiction but are, to a certain extent, clarified by the New Civil Code. For instance, plaintiff's entitlement to an award of damages for emotional distress is no longer a question in this jurisdiction because there are specific provisions under the New Civil Code which specify cases when the defendant is liable therefrom. Another example is the provision which expressly provides for liability for lost profits or *lucrum cessans*. Liability for purely economic loss are disallowed in some jurisdictions because they are supposed to be unforeseeable. This is not to say that it is no longer necessary that causal connection is established in case those damages are being claimed. The New Civil Code, however, eliminates the problem in part by expressly providing that they are recoverable. Thus, the defendant can no longer use as a defense that emotional distress by nature has no causal connection with the negligent act or omission. The defendant cannot invoke the rule that that no recovery can be had for fright as ruled in some cases in the United States (See *Mitchell v. Rochester Ry. Co., 151 NY 107 [1896])* because the Civil Code expressly provides moral damages in those cases.

Consistent with the above-discussed rules, it is also settled that the defendant is liable for the injuries sustained by those who may be considered unforeseeable plaintiffs. The defendant is liable not only to the person to whom the negligent act was directed but to persons who may be directed but even to third persons. For example, the defendant may be held liable for damages to third persons otherwise called indirect damages. *(Reyes and Puno, p. 166).* In the same manner, third persons who are dependent for support upon the injured party may recover damages. *(Manzanares vs. Moreta, 38 Phil. 821; Bernal vs. House, 54 Phil. 327; Article 2206, NCC).* These third persons cannot be considered foreseeable plaintiffs at the time of the occurrence of the negligent act or omission.

5. CAUSE AND CONDITION

Traditionally, Courts distinguish "cause" from "condition" maintaining that the defendant's act or omission is not considered the cause if it merely created a "passive static condition."

In *Phoenix Construction vs. Intermediate Appellate Court (supra at 11)*, the Supreme Court adopted the view that it is no longer practicable to distinguish between cause and condition. The Supreme Court adopted *Prosser and Keeton's* view that:

> "Cause and condition. Many courts have sought to distinguish between the active "cause" of the harm and the existing "conditions" upon which that cause operated. If the defendant has created only a passive static condition which made the damage possible, the defendant is said not to be liable. But so far as the fact of causation is concerned, in the sense of necessary antecedents which have played an important part in producing the result, it is quite impossible to distinguish between active forces and passive situations, particularly since, as is invariably the case, the latter are the result of other active forces which have gone before. The defendant who spills gasoline about the premises creates a "condition," but the act may be culpable because of the danger of fire. When a spark ignites the gasoline, the condition has done quite as much to bring about the fire as the spark; and since that is the very risk which the defendant has created, the defendant will not escape responsibility. Even the lapse of a considerable time during which the "condition" remains static will not necessarily affect liability; one who digs a trench in the highway may still be liable to another who falls into it a month afterward. "Cause" and "condition" still find occasional mention in the decisions; but the distinction is now almost entirely discredited. So far as it has any validity at all, it must refer to the type of case where the forces set in operation by the defendant have come to rest in a position of apparent safety, and some new force intervenes. But even in such cases, it is not the distinction between "cause" and "condition" which is important, but the nature of the risk and the character of the intervening cause."

The Supreme Court explained in *Manila Electric Co. vs. Remoquillo, et al.* (99 Phil. 117, 125 [1956], citing 45 C.J. 931-932) that a prior and remote cause cannot be made the basis of an action is such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, succesive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior defective condition, such subsequent act or condition is the proximate cause.

a. Types of Dangerous Conditions.

There is no question, therefore, that even if the defendant had only created a condition, he may be held liable for damages if such condition resulted in harm to either person or property. One legal writer divided the most common examples of what he considers as dangerous conditions into three: 1) Those that inherently dangerous; 2) Those where a person places a thing which is not dangerous in itself, in a dangerous position; and 3) Those involving products and other things which are dangerous because they are defective. *(Richard A. Epstein, Theory of Strict Liability, 2 Journal of Legal Studies 151 [1973]).*

The first class of dangerous conditions includes things which are inherently dangerous because they retain their *potential energy* in full, even if they are stored or handled with utmost care. The smallest application of force, or small change in conditions can release or otherwise set in motion large forces that can cause harm in the narrow sense of that term. The potential for danger remains great even if its probability is low. *(ibid.).* For example, one creates a dangerous condition if he buries radioactive waste or hazardous chemicals in his backyard. A small change in temperature or humidity result to injuries to other people.

The second class of dangerous conditions includes cases where objects are placed in such a way that other people's right of way is not recognized. For instance, in *Phoenix Construction,* a dangerous condition was created because a truck was parked askew in such a way that it partly blocks ongoing traffic.

The second class also includes cases where objects are placed in an unstable position where the application of small force will permit the release of some greater force. Thus, if a person leaves a rock in an unstable position on top of a steep hill, there is a great possibility that somebody will be injured because it is bound to be pulled on the ground by the force of gravity.

The third class includes defective construction of a building. The thing itself is not supposed to be dangerous but it was negligently or erroneously produced or constructed.

Under the framework of determining the cause-in-fact, the dangerous conditions mentioned above are part of the causal set from which the candidate cause can be picked.

CASE:

RODRIGUEZA, et al. vs. THE MANILA RAILROAD CO.
G.R. No. 15688, November 19, 1921

STREET, *J.*:

This action was instituted jointly by Remigio Rodrigueza and three others in the Court of First Instance of the Province of Albay to recover a sum of money of the Manila Railroad Company as damages resulting from a fire kindled by sparks from a locomotive engine under the circumstances set out below. Upon hearing the cause upon the complaint, answer and an agreed statement of facts, the trial judge rendered judgment against the defendant company in favor of the plaintiffs and awarded to them the following sums respectively as damages, to wit: (1) to Remigio Rodrigueza, P3,000; (2) to Domingo Gonzaga, P400; (3) to Cristina Luna, P300; and (4) to Perfecta Losantas, P150; all with lawful interest from March 21, 1919. From this judgment the defendant appealed.

The facts as appearing from the agreed statement, in relation with the complaint, are to the effect that the defendant Railroad Company operates a line through the district of Daraga in the municipality of Albay; that on January 29, 1918, as one of its trains passed over said line, a great quantity of sparks were emitted from the smokestack of the locomotive, and fire was thereby communicated to four houses nearby belonging to the four plaintiffs respectively, and the same were entirely consumed. All of these houses were of light construction with the exception of the house of Remigio Rodrigueza, which was of strong materials, though the roof was covered with nipa and cogon. The fire occurred immediately after the passage of the train, and a strong wind was blowing at the time. It does not appear either in the complaint or in the agreed statement whose house caught fire first, though it is stated in the appellant's brief that the fire was first communicated to the house of Remigio Rodrigueza, from whence it spread to the others.

In the fourth paragraph of the complaint — which is admitted to be true — it is alleged that the defendant Railroad Company was conspicuously negligent in relation to the origin of said fire, in the following respects, namely, first, in failing to exercise proper supervision over the employees in charge of the locomotive; secondly, in allowing the locomotive which emitted these sparks to be operated without having the smokestack protected by some device for arresting sparks; thirdly, in using in its locomotive upon this occasion Bataan coal, a fuel of known inferior quality which, upon combustion, produces sparks in great quantity.

The sole ground upon which the defense is rested is that the house of Remigio Rodrigueza stood partly within the limits of the land owned by the defendant company, though exactly how far away from the company's track does not appear. It further appears that, after the railroad track was laid, the company notified Rodrigueza to get his house off the land of the company and to remove it from its exposed position. Rodrigueza did not comply with

this suggestion, though he promised to put an iron roof on his house, which he never did. Instead, he changed the materials of the main roof to nipa, leaving the kitchen and media-aguas covered with cogon. Upon this fact it is contended for the defense that there was contributory negligence on the part of Remigio Rodrigueza in having his house partly on the premises of the Railroad Company, and that for this reason the company is not liable. This position is in our opinion untenable for the reasons which we shall proceed to state.

In the first place, it will be noted that the fact suggested as constituting a defense to this action could not in any view of the case operate as a bar to a recovery by the three plaintiffs other than Remigio Rodrigueza, even assuming that the fire was first communicated to his house; for said three plaintiffs are in nowise implicated in the act which supposedly constitutes the defense. In this connection it will be observed that the right of action of each of these plaintiffs is totally distinct from that of his co-plaintiffs so much so that each might have sued separately, and the defendant, if it had seen fit to do so, might in this case have demurred successfully to the complaint for misjoinder of parties plaintiff. The fact that the several rights of action of the different plaintiffs arose simultaneously out of one act of the defendant is not sufficient of itself to require, or even permit, the joinder of such parties as co-plaintiffs in a single action (30 Cyc., 114) if objection had been made thereto. Domingo Gonzaga, Cristina Luna, and Perfecta Losantas are therefore entitled to recover upon the admitted fact that this fire originated in the negligent acts of the defendant; and the circumstance that the fire may have been communicated to their houses through the house of Remigio Rodrigueza, instead of having been directly communicated from the locomotive, is immaterial. *(See 38 Am. Dec., 64, 77; 1 11 R. C. L., 968-971; Kansas City, etc. Railroad Co. vs. Blaker, 64 L. R. A., 81; Pennsylvania Railroad Co. vs. Hope, 80 Pa. St., 373; 21 Am. Rep., 100.)*

With respect to the case of Remigio Rodrigueza it is to be inferred that his house stood upon this ground before the Railroad Company laid its line over this course; and at any rate there is no proof that this plaintiff had unlawfully intruded upon the railroad's property in the act of building his house. What really occurred undoubtedly is that the company, upon making this extension, had acquired the land only, leaving the owner of the house free to remove it. Hence, he cannot be considered to have been a trespasser in the beginning. Rather, he was there at the sufferance of the defendant company, and so long as his house remained in this exposed position, he undoubtedly assumed the risk of any loss that might have resulted from fires occasioned by the defendant's locomotives if operated and managed with ordinary care. But he cannot be held to have assumed the risk of any damage that might result from the unlawful negligent acts of the defendant. Nobody is bound to anticipate and defend himself against the possible negligence of another. Rather he has a right to assume that the other will use the care of the ordinarily prudent man. *(Philadelphia & Reading Railroad Co. vs. Hendrickson, 80 Pa. St., 182; 21 Am. Rep., 97).*

In the situation now under consideration the proximate and only cause of the damage that occurred was the negligent act of the defendant in causing this fire. The circumstance that Remigio Rodrigueza's house was partly on the property of the defendant company and therefore in dangerous proximity to passing locomotives was an antecedent condition that may in fact have made the disaster possible, but that circumstance cannot be imputed to him as contributory negligence destructive of his right of action, because, first, that condition was not created by himself; secondly, because his house remained on this ground by the toleration, and therefore with the consent of the Railroad Company; and thirdly, because even supposing the house to be improperly there, this fact would not justify the defendant in negligently destroying it. *(Grand Trunk Railway of Canada vs. Richardson, 91 U.S., 454; 23 L. ed., 356; Norfolk etc. Ry. Co. vs. Perrow, 101 Va., 345, 350).*

The circumstance that the defendant company, upon planting its line near Remigio Rodrigueza's house, had requested or directed him to remove it, did not convert his occupancy into a trespass, or impose upon him any additional responsibility over and above what the law itself imposes in such situation. In this connection it must be remembered that the company could at any time have removed said house in the exercise of the power of eminent domain, but it elected not to do so.

Questions similar to that now before us have been under the consideration of American courts many times, and their decisions are found to be uniformly favorable to recovery where the property destroyed has been placed in whole or in part on the right of way of the railroad company with its express or implied consent. *(L. R. Martin Timber Co. vs. Great Northern Railway Co., 123 Minn 423; Ann. Cas., 1915A, p. 496, note; Burroughs vs. Housa tonic R. R. Co., 16 Conn., 124; 38 Am. Dec., 64, 74; Southern Ry. Co. vs. Patterson, 105 Va., 6; 8 Ann. Cas., 44).* And the case for the plaintiff is apparently stronger where the company constructs its line in proximity to a house already built and fails to condemn it and remove it from its right of way.

6. EFFICIENT INTERVENING CAUSE

A. DEFINITION AND CONCEPT.

An efficient intervening cause is one that destroys the causal connection between the negligent act and injury and thereby negatives liability. *(Morril vs. Morril, 60 ALR 102, 104 NJL 557).* It is sometimes called, *novus actus interviens*. An intervening cause will be regarded as the proximate cause and the first cause as too remote, where the chain of events is so broken that they become independent and the result cannot be said to be the consequence of the primary cause. *(65 CJS 1198).* There is no efficient intervening cause if the force created by the negligent act or omission have either: (1) remained active itself or (2) created another force which remained active until it directly caused the result, or (3) created a new active risk of being

acted upon by the active force that caused the result. *(57 Am. Jur. 2d 507).* An efficient intervening cause is equivalent to the pre-emptive cause referred to in the NESS test of Professor Wright.

The test of the sufficiency of an intervening cause to defeat recovery for negligence is not to be found in the mere fact of its existence, but rather in its nature and manner in which it affects the continuity of operation of the primary cause or the connection between it and the injury. *(J. Oneal Sandel vs. State of South Carolina, 13 ALR 1268, 115 SC 168, 104 SE 567 [1920]).* Such intervening cause must be new and independent, not under the control of the original wrongdoer, or one which by the exercise of reasonable foresight and diligence, he should have anticipated and guarded against it. It must break the continuity of causal connection between the original negligent act or omission and the injury so that the former cannot be said to have been the efficient cause of the latter. *(ibid.).* For example, if A throws a hot object to B who in turn threw it to C, there is an intervening cause in the absence of which the C would not have been injured. Nevertheless, A is liable because he had wrongfully set in motion a force which continued to operate until it cause the injury. If A had thrown the object in a secluded place where it would not have cause injury and B had taken it up anew on its errand of mischief, there would have been a new cause, not dependent upon the first. Consequently, there is an efficient intervening cause in this last example.

A cause is not an intervening cause if it is already in operation at the time the negligent act is committed. For instance, in *Rodrigueza vs. Manila Electric Railroad*, the house of the plaintiff was razed by fire because of the sparks emitted by one of the trains of defendant railroad company. The fire started in one house and wind caused fire to transfer to another house until it reached plaintiff's property. The wind was not an intervening cause because it was already in operation at the time the negligent act of the defendant was performed. However, even if the wind was not yet operating, the same cannot be considered an efficient intervening cause because the wind did not break the chain of causation between the negligence of the defendant and the resulting damage to the plaintiff.

The efficient intervening cause may be the negligence of the defendant. The plaintiff may be negligent but the defendant's negligence pre-empted the effect of such negligence. The rule was applied in *McKee vs. Intermediate Appellate Court* (211 SCRA 517 [1992]). In the said case, the plaintiff, while driving in a highway, swerved his car to the opposite lane to avoid two children. As a result, the plaintiff's car was bumped by a speeding truck going to the opposite

direction. The Supreme Court explained:

> In any case, assuming, arguendo that Jose Koh is negligent, it cannot be said that his negligence was the proximate cause of the collision.

Proximate cause has been defined as:

> ". . . 'that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.' And more comprehensively, the proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinary prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom."
>
> Applying the above definition, although it may be said that the act of Jose Koh, if at all negligent, was the initial act in the chain of events, it cannot be said that the same caused the eventual injuries and deaths because of the occurrence of a sufficient intervening event, the negligent act of the truck driver, which was the actual cause of the tragedy. The entry of the car into the lane of the truck would not have resulted in the collision had the latter heeded the emergency signals given by the former to slow down and give the car an opportunity to go back into its proper lane. Instead of slowing down and swerving to the far right of the road, which was the proper precautionary measure under the given circumstances, the truck driver continued at full speed towards the car. The truck driver's negligence becomes more apparent in view of the fact that the road is 7.50 meters wide while the car measures 1.598 meters and the truck, 2.286 meters, in width. This would mean that both car and truck could pass side by side with a clearance of 3.661 meters to spare. 51 Furthermore, the bridge has a level sidewalk which could have partially accommodated the truck. Any reasonable man finding himself in the given situation would have tried to avoid the car instead of meeting it head-on.
>
> The truck driver's negligence is apparent in the records. He himself said that his truck was running at 30 miles (48 kilometers) per hour along the bridge while the maximum speed allowed by law on a bridge is only 30 kilometers per hour. Under Article 2185 of the Civil Code, a person driving a vehicle is presumed

> negligent if at the time of the mishap, he was violating any traffic regulation. We cannot give credence to private respondents' claim that there was an error in the translation by the investigating officer of the truck driver's response in Pampango as to whether the speed cited was in kilometers per hour or miles per hour. The law presumes that official duty has been regularly performed; unless there is proof to the contrary, this presumption holds. In the instant case, private respondents' claim is based on mere conjecture."

B. FORESEEABLE INTERVENING CAUSE.

The rule in this jurisdiction is to the effect that foreseeable intervening causes cannot be considered sufficient intervening causes. In *Phoenix Construction vs. Court of Appeals (supra at 11),* the Supreme Court cited the following observation of Prosser and Keeton:

> "Foreseeable Intervening Causes. If the intervening cause is one which in ordinary human experience is reasonably to be anticipated, or one which the defendant has reason to anticipate under the particular circumstances, the defendant may be negligent, among other reasons, because of failure to guard against it; or the defendant may be negligent only for that reason. Thus one who sets a fire may be required to foresee that an ordinary, usual and customary wind arising later will spread it beyond the defendant's own property, and therefore to take precautions to prevent that event. The person who leaves the combustible or explosive material exposed in a public place may foresee the risk of fire from some independent source. . . . In all of these cases there is an intervening cause combining with the defendant's conduct to produce the result, and in each case the defendant's negligence consists in failure to protect the plaintiff against that very risk."

Thus, in the above-discussed *Rodrigueza* case, even if the wind was not yet operating at the time the negligent act was committed, the same cannot be considered an efficient intervening cause because it was a foreseeable intervening cause. The wind may be considered one of those what *Honore* and *Hart* calls a "common recurrent feature of the environment." If the intervening cause is a recurrent feature of the environment, they cannot be considered efficient because they are foreseeable.

a. Medical Treatment as Intervening Cause.

Under this same principle, a tortfeasor is liable for the consequence of negligence, mistake, or lack of skill of a physician or surgeon

whose treatment aggravated the original injury. The same is considered a normal and foreseeable risk. The rule is based on the reasoning that the additional harm is either: (1) a part of the original injury, (2) the natural and probable consequences of the tortfeasor's original negligence or (3) the normal incidence of medical care necessitated by the tortfeasor's original negligence. *(22 Am. Jur. 2d 165)*. If at all, there will only be an efficient intervening cause where the original tortfeasor is not liable if the injured failed to exercise reasonable care in securing the services of a competent physician or surgeon. *(22 Am. Jur. 2d 164)*.

CASES:

VDA. DE BATACLAN, et al. vs. MARIANO MEDINA
102 Phil. 181 [1957]

MONTEMAYOR, *J.*:

Shortly after midnight, on September 13, 1952, bus No. 30 of the Medina Transportation, operated by its owner, defendant Mariano Medina, under a certificate of public convenience, left the town of Amadeo, Cavite, on its way to Pasay City, driven by its regular chauffeur, Conrado Saylon. There were about eighteen passengers, including the driver and conductor. Among the passengers were Juan Bataclan, seated beside and to the right of the driver, Felipe Lara, seated to the right of Bataclan, another passenger apparently from the Visayan Islands whom the witnesses just called Visaya, apparently not knowing his name, seated on the left side of the driver, and a woman named Natalia Villanueva, seated just behind the four last mentioned. At about 2:00 o'clock that same morning, while the bus was running within the jurisdiction of Imus, Cavite, one of the front tires burst and the vehicle began to zig-zag until it fell into a canal or ditch on the right side of the road and turned turtle. Some of the passengers managed to leave the bus the best way they could, others had to be helped or pulled out, while the three passengers seated beside the driver, named Bataclan, Lara and the Visayan and the woman behind them named Natalia Villanueva, could not get out of the overturned bus. Some of the passengers, after they had clambered up to the road, heard groans and moans from inside the bus, particularly, shouts for help from Bataclan and Lara, who said that they could not get out of the bus. There, is nothing in the evidence to show whether or not the passengers already free from the wreck, including the driver and the conductor, made any attempt to pull out or extricate and rescue the four passengers trapped inside the vehicle, but calls or shouts for help were made to the houses in the neighborhood. After half an hour, came about ten men, one of them carrying a lighted torch made of bamboo with a wick on one end, evidently fueled with petroleum. These men presumably approached the overturned bus, and almost immediately, a fierce fire started, burning and all but consuming the

bus, including the four passengers trapped inside it. It would appear that as the bus overturned, gasoline began to leak and escape from the gasoline tank on the side of the chassis, spreading over and permeating the body of the bus and the ground under and around it, and that the lighted torch brought by one of the men who answered the call for help set it on fire.

That same day, the charred bodies of the four doomed passengers inside the bus were removed and duly identified, specially that of Juan Bataclan. By reason of his death, his widow, Salud Villanueva, in her name and in behalf of her five minor children, brought the present suit to recover from Mariano Medina compensatory, moral, and exemplary damages and attorney's fees in the total amount of P87,150. After trial, the Court of First Instance of Cavite awarded P1,000 to the plaintiffs, plus P600 as attorney's fee, plus P100, the value of the merchandise being carried by Bataclan to Pasay City for sale and which was lost in the fire. The plaintiffs and the defendants appealed the decision to the Court of Appeals, but the latter court endorsed the appeal to us because of the value involved in the claim in the complaint.

x x x

We agree with the trial court that the case involves a breach of contract of transportation for hire, the Medina Transportation having undertaken to carry Bataclan safely to his destination, Pasay City. We also agree with the trial court that there was negligence on the part of the defendant, through his agent, the driver Saylon. There is evidence to show that at the time of the blow out, the bus was speeding, as testified to by one of the passengers, and as shown by the fact that according to the testimony of the witnesses, including that of the defense, from the point where one of the front tires burst up to the canal where the bus overturned after zig-zagging, there was a distance of about 150 meters. The chauffeur, after the blow-out, must have applied the brakes in order to stop the bus, but because of the velocity at which the bus must have been running, its momentum carried it over a distance of 150 meters before it fell into the canal and turned turtle.

There is no question that under the circumstances, the defendant carrier is liable. The only question is to what degree. The trial court was of the opinion that the proximate cause of the death of Bataclan was not the overturning of the bus, but rather, the fire that burned the bus, including himself and his co-passengers who were unable to leave it; that at the time the fire started, Bataclan, though he must have suffered physical injuries, perhaps serious, was still alive, and so damages were awarded, not for his death, but for the physical injuries suffered by him. We disagree. A satisfactory definition of proximate cause is found in Volume 38, pages 695-696 of American Jurisprudence, cited by plaintiffs-appellants in their brief. It is as follows:

> ". . . 'that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.' And more comprehensively, 'the proximate legal cause is that acting first and producing

> the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom."

It may be that ordinarily, when a passenger bus overturns, and pins down a passenger, merely causing him physical injuries, if through some event, unexpected and extraordinary, the overturned bus is set on fire, say, by lightning, or if some highwaymen after looting the vehicle sets it on fire, and the passenger is burned to death, one might still contend that the proximate cause of his death was the fire and not the overturning of the vehicle. But in the present case and under the circumstances obtaining in the same, we do not hesitate to hold that the proximate cause of the death of Bataclan was the overturning of the bus, this for the reason that when the vehicle turned not only on its side but completely on its back, the leaking of the gasoline from the tank was not unnatural or unexpected; that the coming of the men with a lighted torch was in response to the call for help, made not only by the passengers, but most probably, by the driver and the conductor themselves, and that because it was very dark (about 2:30 in the morning), the rescuers had to carry a light with them; and coming as they did from a rural area where lanterns and flashlights were not available, they had to use a torch, the most handy and available; and what was more natural than that said rescuers should innocently approach the overturned vehicle to extend the aid and effect the rescue requested from them. In other words, the coming of the men with the torch was to be expected and was a natural sequence of the overturning of the bus, the trapping of some of its passengers and the call for outside help. What is more, the burning of the bus can also in part be attributed to the negligence of the carrier, through its driver and its conductor. According to the witnesses, the driver and the conductor were on the road walking back and forth. They, or at least, the driver should and must have known that in the position in which the overturned bus was, gasoline could and must have leaked from the gasoline tank and soaked the area in and around the bus, this aside from the fact that gasoline when spilled, specially over a large area, can be smelt and detected even from a distance, and yet neither the driver nor the conductor would appear to have cautioned or taken steps to warn the rescuers not to bring the lighted torch too near the bus. Said negligence on the part of the agents of the carrier come under the codal provisions above-reproduced, particularly, Articles 1733, 1759 and 1763.

x x x

There is one phase of this case which disturbs if it does not shock us. According to the evidence, one of the passengers who, because of the injuries suffered by her, was hospitalized, and while in the hospital, she was

visited by the defendant Mariano Medina, and in the course of his visit, she overheard him speaking to one of his bus inspectors, telling said inspector to have the tires of the bus changed immediately because they were already old, and that as a matter of fact, he had been telling the driver to change the said tires, but that the driver did not follow his instructions. If this be true, it goes to prove that the driver had not been diligent and had not taken the necessary precautions to insure the safety of his passengers. Had he changed the tires, specially those in front, with new ones, as he had been instructed to do, probably, despite his speeding, as we have already stated, the blow out would not have occurred. All in all, there is reason to believe that the driver operated and drove his vehicle negligently, resulting in the death of four of his passengers, physical injuries to others, and the complete loss and destruction of their goods, and yet the criminal case against him, on motion of the fiscal and with his consent, was provisionally dismissed, because according to the fiscal, the witnesses on whose testimony he was banking to support the complaint, either failed to appear or were reluctant to testify. But the record of the case before us shows that several witnesses, passengers in that bus, willingly and unhesitatingly testified in court to the effect that the said driver was negligent. In the public interest, the prosecution of said erring driver should be pursued, this, not only as a matter of justice, but for the promotion of the safety of passengers on public utility buses. Let a copy of this decision be furnished the Department of Justice and the Provincial Fiscal of Cavite.

MERCEDES M. TEAGUE vs. ELENA FERNANDEZ
51 SCRA 181 [1973]

MAKALINTAL, Actg., *C.J.*:

The facts are stated in the decision of the Court of Appeals as follows:

"The Realistic Institute, admittedly owned and operated by defendant-appellee Mercedes M. Teague, was a vocational school for hair and beauty culture situated on the second floor of the Gil-Armi Building, a two-storey, semi-concrete edifice (Exhs. "C," "C-1" to "C-5" and "4") located at the corner of Quezon Boulevard and Soler Street, Quiapo, Manila. The said second floor was unpartitioned, had a total area of about 400 square meters, and although it had only one stairway, of about 1.50 meters in width, it had eight windows, each of which was provided with two fire-escape ladders (Exh. "4"), and the presence of each of said fire-exits was indicated on the wall (Exh. "5").

"At about four o'clock in the afternoon of October 24, 1955, a fire broke out in a store for surplus materials located about ten meters away from the institute. Soler Street lay between that store and the institute. Upon seeing the fire, some of the students in the Realistic Institute shouted 'Fire! Fire!' and thereafter, a panic ensued. Four instructresses and six assistant instructresses of the Institute were present and they, together with the registrar, tried to calm down the students, who numbered about 180 at the time, telling

them not to be afraid because the Gil-Armi Building would not get burned as it is made of concrete, and that the fire was anyway, across the street. They told the students not to rush out but just to go down the stairway two by two, or to use the fire-escapes. Mrs. Justina Prieto, one of the instructresses, took to the microphone so as to convey to the students the above admonitions more effectively, and she even slapped three students in order to quiet them down. Miss Frino Meliton, the registrar, whose desk was near the stairway, stood up and tried with outstretched arms to stop the students from rushing and pushing their way to the stairs. The panic, however, could not be subdued and the students, with the exception of the few who made use of fire-escapes, kept on rushing and pushing their way through the stairs, thereby causing stampede therein.

"Indeed, no part of the Gil-Armi Building caught fire. But, after the panic was over, four students, including Lourdes Fernandez, a sister of plaintiffs-appellants, were found dead and several others injured on account of the stampede.

"x x x x x x x x x."

The injuries sustained by Lourdes Fernandez consisted of lacerations in both eyes and on the upper lip, contused abrasions in different parts of the body, internal hemorrhage and fractures in the second and third right ribs. The cause of death, according to the autopsy report, was 'Shock due to traumatic fractures of the ribs with perinephric hematoma and lacerations of the conjunctiva of both eyes.'

x x x

[The Court ruled that there was violation of Section 491 of the Revised Ordinances of the City of Manila consisting in the fact that the second storey of the Gil-Armi building had only one stairway 1.5 meters wide, instead of two of at least 1.2 meters each, although at the time of the fire the owner of the building had a second stairway under construction. The Court ruled that there was negligence per se.]

The next issue, indeed the basic one, raised by the petitioner is whether or not the failure to comply with the requirement of the ordinance was the proximate cause of the death of Lourdes Fernandez. The case of *Villanueva Vda. de Bataclan, et al. vs. Medina, G.R. No. L-10126, October 22, 1957*, is cited in support of the contention that such failure was not the proximate cause. It is there stated by this Court:

"The proximate legal cause is that acting first and producing the injury, either immediately or by settling other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately affecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reason-

able ground to expect at the moment of his act or default that an injury to some person might probably result therefrom."

Having in view the decision just quoted, the petitioner relates the chain of events that resulted in the death of Lourdes Fernandez as follows: (1) violation of ordinance; (2) fire at a neighboring place; (3) shouts of "Fire! Fire!"; (4) panic in the Institute; (5) stampede; and (6) injuries and death.

As thus projected the violation of the ordinance, it is argued, was only a remote cause, if at all, and cannot be the basis of liability since there intervened a number of independent causes which produced the injury complained of. A statement of the doctrine relied upon is found in *Manila Electric Co. vs. Remoquillo, L-8328, May 18, 1956,* wherein this Court, citing *Corpus Juris*, said:

> "A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances which result in injury because of the prior defective condition, such subsequent act or condition is the proximate cause. (45 C.J., p. 931.)"

According to the petitioner "the events of fire, panic and stampede were independent causes with no causal connection at all with the violation of the ordinance." The weakness in the argument springs from a faulty juxtaposition of the events which formed a chain and resulted in the injury. It is true that the petitioner's non-compliance with the ordinance in question was ahead of and prior to the other events in point of time, in the sense that it was coetaneous with its occupancy of the building. But the violation was a continuing one, since the ordinance was a measure of safety designed to prevent a specific situation which would pose a danger to the occupants of the building. That situation was undue overcrowding in case it should become necessary to evacuate the building, which, it could be reasonably foreseen, was bound to happen under emergency conditions if there was only one stairway available. It is true that in this particular case there would have been no overcrowding in the single stairway if there had not been a fire in the neighborhood which caused the students to panic and rush headlong for the stairs in order to go down. But it was precisely such contingencies or events that the authors of the ordinance had in mind, for under normal conditions one stairway would be adequate for the occupants of the building. Thus, as stated in 38 American Jurisprudence, page 841: 'The general principle is that the violation of a statute or ordinance is not rendered remote as the cause of an injury by the intervention of another agency if the occurrence of the accident, in the manner in which it happened, was the very thing which the

statute or ordinance was intended to prevent.' To consider the violation of the ordinance as the proximate cause of the injury does not portray the situation in its true perspective; it would be more accurate to say that the overcrowding at the stairway was the proximate cause and that it was precisely what the ordinance intended to prevent by requiring that there be two stairways instead of only one. Under the doctrine of the cases cited by the respondents, the principle of proximate cause applies to such violation.

FILOMENO URBANO vs. HON. INTERMEDIATE APPELLATE COURT
G.R. No. 72964, January 7, 1988

This is a petition to review the decision of the then Intermediate Appellate Court which affirmed the decision of the then Circuit Criminal Court of Dagupan City finding petitioner Filomeno Urbano guilty beyond reasonable doubt of the crime of homicide.

The records disclose the following facts of the case.

At about 8:00 o'clock in the morning of October 23, 1980, petitioner Filomeno Urbano went to his ricefield at Barangay Anonang, San Fabian, Pangasinan located at about 100 meters from the tobacco seedbed of Marcelo Javier. He found the place where he stored his palay flooded with water coming from the irrigation canal nearby which had overflowed. Urbano went to the elevated portion of the canal to see what happened and there he saw Marcelo Javier and Emilio Erfe cutting grass. He asked them who was responsible for the opening of the irrigation canal and Javier admitted that he was the one. Urbano then got angry and demanded that Javier pay for his soaked palay. A quarrel between them ensued. Urbano unsheathed his bolo (about 2 feet long, including the handle, by 2 inches wide) and hacked Javier hitting him on the right palm of his hand, which was used in parrying the bolo hack. Javier who was then unarmed ran away from Urbano but was overtaken by Urbano who hacked him again hitting Javier on the left leg with the back portion of said bolo, causing a swelling on said leg. When Urbano tried to hack and inflict further injury, his daughter embraced and prevented him from hacking Javier.

Immediately thereafter, Antonio Erfe, Emilio Erfe, and Felipe Erfe brought Javier to his house about 50 meters away from where the incident happened. Emilio then went to the house of Barangay Captain Menardo Soliven but not finding him there, Emilio looked for barrio councilman Felipe Solis instead. Upon the advice of Solis, the Erfes together with Javier went to the police station of San Fabian to report the incident. As suggested by Corporal Torio, Javier was brought to a physician. The group went to Dr. Guillermo Padilla, rural health physician of San Fabian, who did not attend to Javier but instead suggested that they go to Dr. Mario Meneses because Padilla had no available medicine.

After Javier was treated by Dr. Meneses, he and his companions re-

turned to Dr. Guillermo Padilla who conducted a medico-legal examination. Dr. Padilla issued a medico-legal certificate (Exhibit "C" dated September 28, 1981) which reads:

"TO WHOM IT MAY CONCERN:

> "This is to certify that I have examined the wound of Marcelo Javier, 20 years of age, married, residing at Barangay Anonang, San Fabian, Pangasinan on October 23, 1980 and found the following:
>
> "1-Incised wound 2 inches in length at the upper portion of the lesser palmar prominence, right.
>
> "As to my observation the incapacitation is from (7-9) days period. This would was presented to me only for medico-legal examination, as it was already treated by the other doctor. (p. 88, Original Records)
>
> Upon the intercession of Councilman Solis, Urbano and Javier agreed to settle their differences. Urbano promised to pay P700.00 for the medical expenses of Javier. Hence, on October 27, 1980, the two accompanied by Solis appeared before the San Fabian Police to formalize their amicable settlement. Patrolman Torio recorded the event in the police blotter (Exhibit "A"), to wit:
>
> x x x x x x x x x
>
> "Entry Nr 599/27 Oct '80/1030H/ Re entry Nr 592 on page 257 both parties appeared before this Station accompanied by brgy councilman Felipe Solis and settled their case amicably, for they are neighbors and close relatives to each other. Marcelo Javier accepted and granted forgiveness to Filomeno Urbano who shoulder (sic) all the expenses in his medical treatment, and promising to him and to this Office that this will never be repeated anymore and not to harbour any grudge against each other." (p. 87, Original Records)

Urbano advanced P400.00 to Javier at the police station. On November 3, 1980, the additional P300.00 was given to Javier at Urbano's house in the presence of barangay captain Soliven.

At about 1:30 a.m. on November 14, 1980, Javier was rushed to the Nazareth General Hospital in a very serious condition. When admitted to the hospital, Javier had lockjaw and was having convulsions. Dr. Edmundo Exconde who personally attended to Javier found that the latter's serious condition was caused by tetanus toxin. He noticed the presence of a healing wound in Javier's palm which could have been infected by tetanus.

On November 15, 1980 at exactly 4:18 p.m., Javier died in the hospital. The medical findings of Dr. Exconde are as follows:

"DateDiagnosis

11-14-80 ADMITTED due to trismus

adm. at	DX: TETANUS
1:30 AM	Still having frequent muscle spasm. With difficulty opening his mouth.
#35, 421	Restless at times. Febrile
11-15-80	Referred. Novaldin 1 amp. inj. IM. Sudden cessation of respiration and HR after muscular spasm. O2 inhalation administered. Ambo bag resuscitation and cardiac massage done but to no avail. Pronounced dead by Dra. Cabugao at 4:18 P.M. PMC done and cadaver brought home by relatives." (p. 100, Original Records)

In an information dated April 10, 1981, Filomeno Urbano was charged with the crime of homicide before the then Circuit Criminal Court of Dagupan City, Third Judicial District.

Upon arraignment, Urbano pleaded "not guilty." After trial, the trial court found Urbano guilty as charged. He was sentenced to suffer an indeterminate prison term of from TWELVE (12) YEARS of *prision mayor*, as minimum to SEVENTEEN (17) years, FOUR (4) MONTHS and ONE (1) DAY of *reclusion temporal*, as maximum, together with the accessories of the law, to indemnify the heirs of the victim, Marcelo Javier, in the amount of P12,000.00 without subsidiary imprisonment in case of insolvency, and to pay the costs. He was ordered confined at the New Bilibid Prison, in Muntinlupa, Rizal upon finality of the decision, in view of the nature of his penalty.

The then Intermediate Appellate Court affirmed the conviction of Urbano on appeal but raised the award of indemnity to the heirs of the deceased to P30,000.00 with costs against the appellant.

The appellant filed a motion for reconsideration and/or new trial. The motion for new trial was based on an affidavit of Barangay Captain Menardo Soliven (Annex "A") which states:

> "That in 1980, I was the barrio captain of Barrio Anonang, San Fabian, Pangasinan, and up to the present having been re-elected to such position in the last barangay elections on May 17, 1982;
>
> "That sometime in the first week of November, 1980, there was a typhoon that swept Pangasinan and other places of Central Luzon including San Fabian, a town of said province;
>
> "That during the typhoon, the sluice or control gates of the Buedirrigation dam which irrigates the ricefields of San Fabian were closed and/or controlled so much so that water and its flow to the canals and ditches were regulated and reduced;
>
> "That due to the locking of the sluice or control gates of the dam leading to the canals and ditches which will bring water to the ricefields, the water in said canals and ditches become shallow which was suitable for catching mudfishes;

"That after the storm, I conducted a personal survey in the area affected, with my secretary Perfecto Jaravata;

"That on November 5, 1980, while I was conducting survey, I saw the late Marcelo Javier catching fish in the shallow irrigation canals with some companions;

"That few days thereafter, or on November 15, 1980, I came to know that said Marcelo Javier died of tetanus." (p.\ 33, *Rollo*)

The motion was denied. Hence, this petition.

In a resolution dated July 16, 1986, we gave due course to the petition.

The case involves the application of Article 4 of the Revised Penal Code which provides that "Criminal liability shall be incurred: (1) By any person committing a felony (delito) although the wrongful act done be different from that which he intended . . ." Pursuant to this provision "an accused is criminally responsible for acts committed by him in violation of law and for all the natural and logical consequences resulting therefrom." *(People vs. Cardenas, 56 SCRA 631).*

The record is clear that Marcelo Javier was hacked by the petitioner who used a bolo as a result of which Javier suffered a 2-inch incised wound on his right palm; that on November 14, 1981 which was the 22nd day after the incident, Javier was rushed to the hospital in a very serious condition and that on the following day, November 15, 1981, he died from tetanus.

Under these circumstances, the lower courts ruled that Javier's death was the natural and logical consequence of Urbano's unlawful act. Hence, he was declared responsible for Javier's death. Thus, the appellate court said:

"The claim of appellant that there was an efficient cause which supervened from the time the deceased was wounded to the time of his death, which covers a period of 23 days does not deserve serious consideration. True, that the deceased did not die right away from his wound, but the cause of his death was due to said wound which was inflicted by the appellant. Said wound which was in the process of healing got infected with tetanus which ultimately caused his death.

"Dr. Edmundo Exconde of the Nazareth General Hospital testified that the victim suffered lockjaw because of the infection of the wound with tetanus. And there is no other way by which he could be infected with tetanus except through the wound in his palm. (tsn., p. 78, Oct. 5, 1981). Consequently, the proximate cause of the victim's death was the wound which got infected with tetanus. And the settled rule in this jurisdiction is that an accused is liable for all the consequences of his unlawful act. *(Article 4, par. 1, R.P.C.; People vs. Red, CA 43 O.G. 5072; People vs. Cornel, 78 Phil. 418)*

"Appellant's allegation that the proximate cause of the victim's death was due to his own negligence in going back to work without his wound being properly healed, and lately, that he went to catch fish in dirty irrigation ca-

nals in the first week of November, 1980, is an afterthought, and a desperate attempt by appellant to wiggle out of the predicament he found himself in. If the wound had not yet healed, it is impossible to conceive that the deceased would be reckless enough to work with a disabled hand." (pp. 20-21, Rollo).

The petitioner reiterates his position that the proximate cause of the death of Marcelo Javier was due to his own negligence, that Dr. Mario Meneses found no tetanus in the injury, and that Javier got infected with tetanus when after two weeks he returned to his farm and tended his tobacco plants with his bare hands exposing the wound to harmful elements like tetanus germs.

The evidence on record does not clearly show that the wound inflicted by Urbano was infected with tetanus at the time of the infliction of the wound. The evidence merely confirms that the wound, which was already healing at the time Javier suffered the symptoms of the fatal ailment, somehow got infected with tetanus. However, as to when the wound was infected is not clear from the record.

In *Vda. de Bataclan, et al. vs. Medina* (102 Phil. 1181), we adopted the following definition of proximate cause:

x x x x x x x x x

". . . A satisfactory definition of proximate cause is found in Volume 38, pages 695-696 of American Jurisprudence, cited by plaintiffs-appellants in their brief. It is as follows:

> ". . . 'that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.' And more comprehensively, 'the proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events, each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom.'" (at pp. 185-186)

The issue, therefore, hinges on whether or not there was an efficient intervening cause from the time Javier was wounded until his death which would exculpate Urbano from any liability for Javier's death.

We look into the nature of tetanus —

"The incubation period of tetanus, *i.e.,* the time between injury and the appearance of unmistakable symptoms, ranges from 2 to 56 days. However, over 80 percent of patients become symptomatic within 14 days. A short incubation period indicates severe disease, and when symptoms occur within

2 or 3 days of injury, the mortality rate approaches 100 percent.

"Nonspecific premonitory symptoms such as restlessness, irritability, and headache are encountered occasionally, but the commonest presenting complaints are pain and stiffness in the jaw, abdomen, or back and difficulty swallowing. As the disease progresses, stiffness gives way to rigidity, and patients often complain of difficulty opening their mouths. In fact, trismus is the commonest manifestation of tetanus and is responsible for the familiar descriptive name of lockjaw. As more muscles are involved, rigidity becomes generalized, and sustained contractions called risus sardonicus. The intensity and sequence of muscle involvement is quite variable. In a small proportion of patients, only local signs and symptoms develop in the region of the injury. In the vast majority, however, most muscles are involved to some degree, and the signs and symptoms encountered depend upon the major muscle groups affected.

Reflex spasm usually occur within 24 to 72 hours of the first symptoms, on interval referred to as the onset time. As in the case of the incubation period, a short onset time is associated with a poor prognosis. Spasms are caused by sudden intensification of afferent stimuli arising in the periphery, which increases rigidity and causes simultaneous and excessive contraction of muscles and their antagonists. Spasms may be both painful and dangerous. As the disease progresses, minimal or inapparent stimuli produce more intense and longer-lasting spasms with increasing frequency. Respiration may be impaired by laryngospasm or tonic contraction of respiratory muscles which prevent adequate ventilation. Hypoxia may then lead to irreversible central nervous system damage and death.

Mild tetanus is characterized by an incubation period of at least 14 days and an onset time of more than 6 days. Trismus is usually present, but dysphagia is absent and generalized spasms are brief and mild. Moderately severe tetanus has a somewhat shorter incubation period and onset time; trismus is marked, dysphagia and generalized rigidity are present, but ventilation remains adequate even during spasms. The criteria for severe tetanus include a short incubation time, and an onset time of 72 hrs., or less, severe trismus, dysphagia and rigidity and frequent prolonged, generalized convulsive spasms. *(Harrison's Principle of Internal Medicine, 1983 Edition, pp. 1004-1005; Emphasis supplied).*

Therefore, medically speaking, the reaction to tetanus found inside a man's body depends on the incubation period of the disease.

In the case at bar, Javier suffered a 2-inch incised wound on his right palm when he parried the bolo which Urbano used in hacking him. This incident took place on October 23, 1980. After 22 days, or on November 14, 1980, he suffered the symptoms of tetanus, like lockjaw and muscle spasms. The following day, November 15, 1980, he died.

If, therefore, the wound of Javier inflicted by the appellant was already infected by tetanus germs at the time, it is more medically probable that

Javier should have been infected with only a mild cause of tetanus because the symptoms of tetanus appeared on the 22nd day after the hacking incident or more than 14 days after the infliction of the wound. Therefore, the onset time should have seen more than six days. Javier, however, died on the second day from the onset time. The more credible conclusion is that at the time Javier's wound was inflicted by the appellant, the severe form of tetanus that killed him was not yet present. Consequently, Javier's wound could have been infected with tetanus after the hacking incident. Considering the circumstance surrounding Javier's death, his wound could have been infected by tetanus 2 or 3 or a few but not 20 to 22 days before he died.

The rule is that the death of the victim must be the direct, natural, and logical consequence of the wounds inflicted upon him by the accused. *(People vs. Cardenas, supra)*. And since we are dealing with a criminal conviction, the proof that the accused caused the victim's death must convince a rational mind beyond reasonable doubt. The medical findings, however, lead us to a distinct possibility that the infection of the wound by tetanus was an efficient intervening cause later or between the time Javier was wounded to the time of his death. The infection was, therefore, distinct and foreign to the crime. *(People vs. Rellin, 77 Phil. 1038)*.

Doubts are present. There is a likelihood that the wound was but the remote cause and its subsequent infection, for failure to take necessary precautions, with tetanus may have been the proximate cause of Javier's death with which the petitioner had nothing to do. As we ruled in *Manila Electric Co. vs. Remoquillo, et al.* (99 Phil. 118):

"'A prior and remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury, even though such injury would not have happened but for such condition or occasion. If no danger existed in the condition except because of the independent cause, such condition was not the proximate cause. And if an independent negligent act or defective condition sets into operation the circumstances, which result in injury because of the prior defective condition, such subsequent act or condition is the proximate cause.' (45 C.J., pp. 931-932)." (at p. 125)

It strains the judicial mind to allow a clear aggressor to go scot free of criminal liability. At the very least, the records show he is guilty of inflicting slight physical injuries. However, the petitioner's criminal liability in this respect was wiped out by the victim's own act. After the hacking incident, Urbano and Javier used the facilities of barangay mediators to effect a compromise agreement where Javier forgave Urbano while Urbano defrayed the medical expenses of Javier. This settlement of minor offenses is allowed under the express provisions of Presidential Decree No. 1508, Section 2(3). *(See also People vs. Caruncho, 127 SCRA 16)*

[Interestingly, the Supreme Court limited the force of its discussion to the

criminal liability. The Court imposed civil liability under the well-settled doctrine that a person, while not criminally liable, may still be civilly liable. (citing People vs. Rogelio Ligon y Tria, et al., G.R. No. 74041, July 29, 1987)]

C. UNFORESEEN AND UNEXPECTED ACT OR CAUSE.

In *Africa vs. Caltex,* the defendant argued that the fire in the gasoline station which occurred while gasoline was being unloaded was caused through the acts of a stranger who, without authority, or permission of answering defendant, passed through the gasoline station and negligently threw a lighted match in the premises. The Supreme Court ruled that no evidence on this point was adduced, but assuming the allegation to be true it does not extenuate defendant's negligence. The Supreme Court adopted the view that "if the effects of the actor's negligent conduct actively and continuously operate to bring about harm to another, the fact that the active and substantially simultaneous operation of the effects of a third person's innocent, tortious or criminal act is also a substantial factor in bringing about the harm, does not protect the actor from liability. Stated in another way, the intervention of an unforeseen and unexpected cause, is not sufficient to relieve a wrongdoer from consequences of negligence, if such negligence directly and proximately cooperates with the independent cause in the resulting injury." *(citing Restatement of the Law of Torts, vol. 2, p. 1184, No. 439 and MacAfee, et al. vs. Traver's Gas Corp., et al., 153 S.W. 2nd 442.).*

Hence, the defendant is liable even if it combines with another independent or intervening cause and even if the injury would not have occurred without such other cause. *(Lachica vs. Gayoso, CA-G.R. No. 2083-R, January 9, 1950).* An unforseen and unexpected act of a third person may not therefore be considered efficient intervening cause if it is duplicative in nature or if it merely aggravated the injury that resulted because of a prior cause. The same conclusion can be reached if the third person's act is part of the causal set, together with defendant's negligence, that operated to cause the injury.

7. CONTRIBUTORY NEGLIGENCE

One of the perplexing problems relating to proximate cause is the concept of contributory negligence. As already mentioned in the preceding Chapter, contributory negligence is defined as conduct on the part of the injured party, 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. *(Valenzuela vs. Court of Appeals)*. There are authorities for the view that contributory negligence merely contributes to the injury.

In this section, we will endeavor to examine the different alternative situations where the plaintiff was likewise negligent in order determine the meaning of contributory negligence.

A. PLAINTIFF'S NEGLIGENCE IS THE CAUSE.

First, there is no question that the negligence of the plaintiff is not contributory negligence if it is the only cause, that is, it is necessary and sufficient to produce the result. In this situation defendant's act or omission is neither necessary nor sufficient to cause damage or injury. This situation may include the cases when only the plaintiff was negligent while the defendant is not negligent or defendant's negligence is not part of the causal set or the causal chain. Another situation included in the first group are cases when plaintiff's negligence is pre-emptive in nature.

B. COMPOUND CAUSES.

Secondly, there might be compound causes and plaintiff's negligence may have duplicative effect, that is, it is sufficient to bring about the effect but his negligence occurs simultaneously with that of the defendant. The latter's negligence is equally sufficient but not necessary for the effect because the damage would still have resulted due to the negligence of the plaintiff. It is submitted that in these cases, no recovery can be had. The plaintiff's negligence is not merely contributory because it is a concurring proximate cause.

C. PART OF THE SAME CAUSAL SET.

The third possibility is when the plaintiff's negligence, together with defendant's negligence, is part of the same causal set. Plaintiff's negligence is not sufficient to cause the injury while defendant's negligence is also not equally sufficient. The effect would result only if both are present together with normal background conditions. The effect would not have resulted without the concurrence of all of them.

It is believed that the plaintiff's negligence can still be considered merely contributory under the circumstances mentioned in the preceding paragraph. In fact, almost all (if not all) the cases cited earlier are examples of cases where the negligence of the plaintiff cooperated with the negligence of the defendant in order to bring about the damage or injury. *(See Rakes vs. AG&P; Phoenix Construction Inc. vs. Intermediate Appellate Court; Bank of Philippine Islands vs.*

Court of Appeals; Philippine Bank of Commerce vs. Court of Appeals; LBC Air Cargo, Inc. vs. Court of Appeals). It is submitted that the determination of proximate cause in these cases is only a matter of degree of participation.

In this situation, it is believed that apportionment should be made and each of the candidate causes given a percentage of participation. Obviously, it would be impossible to formulate a mathematical formula to determine with exactness the extent of mitigation brought about by the contributory negligence of the defendant. The courts are therefore given the discretion to determine the percentage of mitigation that will be imposed against the plaintiff. As already pointed out in the preceding chapter, the Supreme Court reduced the liability of the defendant up to fifty percent (50%).

Under a pure comparative negligence regime, the apportionment to both parties may result in the reduction of the liability of the defendant to more than half. It is believed, however, that the reduction cannot be more than fifty percent (50%) in this jurisdiction because reduction by more than fifty percent (50%) is no longer consistent with a finding that the defendant's negligence was the proximate cause of the damage or injury.

It should be noted however, that there is authority for the view that "degrees of causation may be impossible of rational assessment." (*Winfield*, p. 244). One legal writer commented that "to attempt to apportion damages by reference to degree of participation in the chain of causation is a hopeless enterprise, for it has no necessary connection with anything that would appeal to the ordinary person as being just and equitable." (*Granville Williams, "The Two Negligent Servants"* [1954] 17 M.L.R. 66, 69).

Nevertheless, it is believed that the solution is not to disregard degrees of participation in assessing the respective shares of the parties. The observation in *Winfield & Jolowicz on Torts* in this connection is worth quoting:

> "The result is, therefore, that there is no single principle for the apportionment of damages in cases of contributory negligence, and certainly no mathematical approach is possible. No doubt the extent of the plaintiff's lack of care for his own safety must be a major factor in all cases, but the court is directed by the statute to do what is 'just and equitable'. The matter is thus one for the discretion of the court, and, though the discretion must be exercised judicially, it is both unnecessary and undesirable that the exercise of the discretion be fettered by rigid rules requiring the court to take some aspects of the given case into account and to

> reject others. However, if the court comes to the conclusion that the actions of both parties contributed to the damage it has power neither to disregard the plaintiff's fault not to hold the plaintiff to guilty of '100% contributory negligence.'" (pp. 245 to 246)

D. DEFENDANT'S NEGLIGENCE IS THE ONLY CAUSE.

Lastly, the defendant's negligence may be sufficient and necessary to cause the damage and plaintiff's act or omission is neither necessary nor sufficient. Damage to the plaintiff was solely the result of the defendant's negligence. However, the plaintiff's negligence may have increased or aggravated the resulting damage or injury. In this particular case, the liability of the defendant should also be mitigated under the contributory negligence rule or under the doctrine of avoidable consequences, as the case may be.

8. LAST CLEAR CHANCE

A. ALTERNATIVE VIEWS.

a. Prevailing View.

The doctrine of the last clear chance was introduced in his jurisdiction about a hundred years ago in *Picart vs. Smith (supra).* The Supreme Court ruled therein that even if the plaintiff was guilty of antecedent negligence, the defendant is still liable because he had the last clear chance of avoiding injury. The law is that the person who has the *last fair chance to avoid* the impending harm and fails to do so is chargeable with the consequences, without reference to the prior negligence of the other party.

The doctrine has been reiterated, or at least discussed, in the number of cases leading us to conclude that the weight of authority indicates that the doctrine is applicable in this jurisdiction. *(Picart vs. Smith, supra; Del Prado vs. Manila Electric Co., 52 Phil. 900 [1929]; Ong vs. Metropolitan Waterworks, 104 Phil. 307 [1958]; Anuran, et al. vs. Buno, et al., 123 Phil. 1073 [1966]; Glan People's Lumber and Hardware, et al. vs. Intermediate Appellate Court, May 18, 1989; Pantranco North Express, Inc. vs. Baesa, 179 SCRA 384 [1989]; Philippine Rabbit Bus Lines, Inc. vs. Intermediate Appellate Court, August 30, 1990; Bustamante vs. Court of Appeals, 193 SCRA 603 [1991]; McKee vs. Intermediate Appellate Court, 211 SCRA 517 [1992]; Bank of Philippine Islands vs. Court of Appeals, 216 SCRA 51 [1992]; LBC Air Cargo, Inc. vs. Court of Appeals, 241 SCRA 619 [1995]; Philippine Bank of Commerce vs. Court of Appeals, 269 SCRA*

695 [1997]).

The doctrine of last clear chance was explained in one case in this wise:

> "The respondent court adopted the doctrine of "last clear chance." The doctrine, stated broadly, is that the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant, by exercising reasonable care and prudence, might have avoided injurious consequences to the plaintiff notwithstanding the plaintiffs negligence. In other words, the doctrine of last clear chance means that even though a person's own acts may have placed him in a position of peril, and an injury results, the injured person is entitled to recovery. As the doctrine is usually stated, a person who has the last clear chance or opportunity of avoiding an accident, notwithstanding the negligent acts of his opponent or that of a third person imputed to the opponent is considered in law solely responsible for the consequences of the accident. *(Sangco, Torts and Damages, 4th Ed., 1986, p. 165).*
>
> The practical import of the doctrine is that a negligent defendant is held liable to a negligent plaintiff, or even to a plaintiff who has been grossly negligent in placing himself in peril, if he, aware of the plaintiffs peril, or according to some authorities, should have been aware of it in the reasonable exercise of due case, had in fact an opportunity later than that of the plaintiff to avoid an accident *(57 Am. Jur., 2d, pp. 798-799)." (Bustamante vs. Court of Appeals, supra).*

b. Minority View.

However, Justice Feliciano expressed reservations over the applicability of the doctrine in this jurisdiction in *Phoenix Construction, Inc., et al. vs. The Intermediate Appellate Court, et al. (supra, at p. 11),* where the Supreme Court observed that:

> "Petitioners also ask us to apply what they refer to as the "last clear chance" doctrine. The theory here of petitioners is that while the petitioner truck driver was negligent, private respondent Dionisio had the "last clear chance" of avoiding the accident and hence his injuries, and that Dionisio having failed to take that "last clear chance" must bear his own injuries alone. The last clear chance doctrine of the common law was imported into our jurisdiction by *Picart vs. Smith* but it is a matter for debate whether, or to what extent, it has found its way into the Civil Code of the Philippines. The historical function of that doctrine in the common law was to mitigate the harshness of another common law doctrine or rule — that of contributory negligence.

> The common law rule of contributory negligence prevented any recovery at all by a plaintiff who was also negligent, even if the plaintiff's negligence was relatively minor as compared with the wrongful act or omission of the defendant. The common law notion of last clear chance permitted courts to grant recovery to a plaintiff who had also been negligent provided that the defendant had the last clear chance to avoid the casualty and failed to do so. Accordingly, it is difficult to see what role, if any, the common law last clear chance doctrine has to play in a jurisdiction where the common law concept of contributory negligence as an absolute bar to recovery by the plaintiff, has itself been rejected, as it has been in Article 2179 of the Civil Code of the Philippines.
>
> Is there perhaps a general concept of "last clear chance" that may be extracted from its common law matrix and utilized as a general rule in negligence cases in a civil law jurisdiction like ours? We do not believe so. Under Article 2179, the task of a court, in technical terms, is to determine whose negligence — the plaintiff's or the defendant's — was the legal or proximate cause of the injury. That task is not simply or even primarily an exercise in chronology or physics, as the petitioners seem to imply by the use of terms like "last" or "intervening" or "immediate." The relative location in the continuum of time of the plaintiff's and the defendant's negligent acts or omissions, is only one of the relevant factors that may be taken into account. Of more fundamental importance are the nature of the negligent act or omission of each party and the character and gravity of the risks created by such act or omission for the rest of the community. The petitioners urge that the truck driver (and therefore his employer) should be absolved from responsibility for his own prior negligence because the unfortunate plaintiff failed to act with that increased diligence which had become necessary to avoid the peril precisely created by the truck driver's own wrongful act or omission. To accept this proposition is to come too close to wiping out the fundamental principle of law that a man must respond for the foreseeable consequences of his own negligent act or omission. Our law on quasi-delicts seeks to reduce the risks and burdens of living in society and to allocate them among the members of society. To accept the petitioners' proposition must tend to weaken the very bonds of society."

It is believed that the opinion expressed in *Phoenix Construction, Inc.* is the correct rule. There is no logical reason why the doctrine of last clear chance should still be relied upon in determining proximate cause in the light of the prevailing concept on proximate case in this jurisdiction.

c. Third View.

It should be noted, however, that not all jurisdictions in the United States which subscribe to the doctrine of comparative negligence reject the doctrine of the last clear chance. In some states in the United States, the two doctrines are not considered inconsistent in any way. *(57 Am. Jur. 2d 866).* One ground stated in support of this position is that there can be no conflict between the doctrines if the last clear chance doctrine is viewed as a rule or phase of proximate cause. (*ibid*., p. 867). It has also been observed, however, that the doctrine is no longer applicable if the force created by the plaintiff's negligence continues until the happening of the injurious event. In such a case, the comparative negligence rule applies. *(ibid.).*

B. CASES WHEN THE DOCTRINE WAS APPLIED.

Examination of the cases where the Supreme Court applied the doctrine of last clear chance reveals that the doctrine is being applied for the purpose of determining the proximate cause of the accident. The Supreme Court do not relate the doctrine of the last clear chance to the rule on contributory negligence or comparative negligence. In fact, in most cases, the Supreme Court used the doctrine in determining if the negligence of the defendant was the proximate cause and that of the plaintiff as contributory.

For example, in *Picart vs. Smith,* the plaintiff was riding a pony on a bridge. Seeing an automobile ahead he improperly pulled his horse over to the railing on the right. The driver of the automobile, however guided his car toward the plaintiff without diminution of speed until he was only few feet away. He then turned to the right but passed so closely to the horse that the latter being frightened, jumped around and was killed by the passing car. Plaintiff Picart was thrown off his horse and suffered contusions which required several days of medical attention. He sued the defendant Smith for the value of his animal, medical expenses and damage to his apparel. He obtained judgment from the Supreme Court which, while finding that there was negligence on the part of both parties, held that of the defendant was the immediate and determining cause of the accident and that of the plaintiff, contributory because it was the more remote factor. The Supreme Court observed that:

> "It goes without saying that the plaintiff himself was not free from fault, for he was guilty of antecedent negligence in planting himself on the wrong side of the road. But as we have already stated, the defendant was also negligent; and in such case the problem always is to discover which agent is immediately and

> directly responsible. It will be noted that the negligent acts of the two parties were not contemporaneous, since the negligence of the defendant succeeded the negligence of the plaintiff by an appreciable interval. Under these circumstances the law is that the person who has the *last fair chance to avoid* the impending harm and fails to do so is chargeable with the consequences, without reference to the prior negligence of the other party." (emphasis supplied.).

In *Philippine Bank of Commerce vs. Court of Appeals (supra),* the Supreme Court applied the doctrine by ruling that even assuming that the plaintiff "was negligent in entrusting cash to a dishonest employee, thus, providing the latter with the opportunity to defraud the company, as advanced by the (defendant), yet it cannot be denied that the (defendant) bank, thru its teller, had the last clear opportunity to avert the injury incurred by its client, simply by faithfully observing their self-imposed validation procedure. The plaintiff's employee was able to get the plaintiff's money by using two deposit slips while depositing money with the defendant bank. The original slip contains the name of the employee's husband as depositor and his current account number. On the duplicate copy was written the account number of her husband but the name of the account holder was left blank. The defendant's teller would validate the two slip retaining only the original. After validation the plaintiff's employee filled up the name of the plaintiff in the blank portion of the duplicate and changed the name of her husband to that of the plaintiff. The scheme went on for one year with the teller accepting the explanation of the employee that the duplicate was only for her personal record and that she will fill it up later.

CASE:

GLAN PEOPLE'S LUMBER AND HARDWARE, et al. vs.
INTERMEDIATE APPELLATE COURT, et al.
G.R. No. 70493, May 18, 1989

NARVASA, *J.*:

There is a two-fold message in this judgment that bears stating at the outset. The first, an obvious one, is that it is the objective facts established by proofs presented in a controversy that determine the verdict, not the plight of the persons involved, no matter how deserving of sympathy and commiseration because, for example, an accident of which they are the innocent victims has brought them to reduced circumstances or otherwise tragically altered their lives. The second is that the doctrine laid done many, many years ago

in *Picart vs. Smith*, continues to be good law to this day.

The facts giving rise to the controversy at bar are tersely and quite accurately recounted by the Trial Court as follows:

"Engineer Orlando T. Calibo, Agripino Roranes, and Maximo Patos were on the jeep owned by the Bacnotan Consolidated Industries, Inc., with Calibo at the wheel, as it approached from the South Lizada Bridge going towards the direction of Davao City at about 1:45 in the afternoon of July 4, 1979. At about that time, the cargo truck, loaded with cement bags, GI sheets, plywood, driven by defendant Paul Zacarias y Infante, coming from the opposite direction of Davao City and bound for Glan, South Cotabato, had just crossed said bridge. At about 59 yards after crossing the bridge, the cargo truck and the jeep collided as a consequence of which Engineer Calibo died while Roranes and Patos sustained physical injuries. Zacarias was unhurt. As a result of the impact, the left side of the truck wag slightly damaged while the left side of the jeep, including its fender and hood, was extensively damaged. After the impact, the jeep fell and rested on its right side on the asphalted road a few meters to the rear of the truck, while the truck stopped on its wheels on the road.

On November 27, 1979, the instant case for damages was filed by the surviving spouse and children of the late Engineer Calibo who are residents of Tagbilaran City against the driver and owners of the cargo truck.

For failure to file its answer to the third party complaint, third party defendant, which insured the cargo truck involved, was declared in default."

The case filed by the heirs of Engineer Calibo — his widow and minor children, private respondents herein — was docketed as Civil Case No. 3283 of the Court of First Instance of Bohol. Named defendants in the complaint were "Felix S. Agad, George Lim and Felix Lim . . . (who) appear to be the co-owners of the Glan People's Lumber and Hardware . . . (and) Paul Zacarias y Infante." The defendants' answer however alleged that the lumber and hardware business was exclusively owned by George Y. Lim, this being evidenced by the Certificate of Registration issued by the Bureau of Domestic Trade; Fabio S. Agad was not a co-owner thereof but "merely employed by . . . George Y. Lim as bookkeeper"; and Felix Lim had no connection whatever with said business, "he being a child only eight (8) years of age."

"After (trial, and) a careful evaluation of the evidence, both testimonial and documentary," the Court reached the conclusion "that the plaintiffs failed to establish by preponderance of evidence the negligence, and thus the liability, of the defendants." Accordingly, the Court dismissed the complaint (and defendants' counterclaim) "for insufficiency of evidence." Likewise dismissed was third-party complaint presented by the defendants against the insurer of the truck. The circumstances leading to the Court's conclusion just mentioned, are detailed in the Court's decision, as follows:

1. Moments before its collision with the truck being operated by Zacarias, the jeep of the deceased Calibo was "zigzagging."

2. Unlike Zacarias who readily submitted himself to investigation by the police, Calibo's companions, Roanes (an accountant), and Patos, who suffered injuries on account of the collision, refused to be so investigated or give statements to the police officers. This, plus Roranes' waiver of the right to institute criminal proceedings against Zacarias, and the fact that indeed no criminal case was ever instituted in Court against Zacarias, were "telling indications that they did not attribute the happening to defendant Zacarias' negligence or fault."

3. Roranes' testimony, given in plaintiffs' behalf, was "not as clear and detailed as that of . . . Zacarias," and was "uncertain and even contradicted by the physical facts and the police investigators Dimaano and Esparcia."

4. That there were skid marks left by the truck's tires at the scene, and none by the jeep, demonstrates that the driver of the truck had applied the brakes and the jeep's driver had not; and that the jeep had on impact fallen on its right side is indication that it was running at high speed. Under the circumstances, according to the Court, given "the curvature of the road and the descending grade of the jeep's lane, it was negligence on the part of the driver of the jeep, Engr. Calibo, for not reducing his speed upon sight of the truck and failing to apply the brakes as he got within collision range with the truck."

5. Even if it be considered that there was some antecedent negligence on the part of Zacarias shortly before the collision, in that he had caused his truck to run some 25 centimeters to the left of the center of the road, Engr. Calibo had the last clear chance of avoiding the accident because he still had ample room in his own lane to steer clear of the truck, or he could simply have braked to a full stop.

The Court of Appeals saw things differently. It rendered judgment on the plaintiffs' appeal, reversing the decision of the Trial Court. It found Zacarias to be negligent on the basis of the following circumstances, to wit:

1) "the truck driven by defendant Zacarias occupied the lane of the jeep when the collision occurred," and although Zacarias saw the jeep from a distance of about 150 meters, he "did not drive his truck back to his lane in order to avoid collision with the oncoming jeep . . . ;" what is worse, "the truck driver suddenly applied his brakes even as he knew that he was still within the lane of the jeep;" had both vehicles stayed in their respective lanes, the collision would never have occurred, they would have passed "alongside each other safely;"

2) Zacarias had no license at the time; what he handed to Pfc. Esparcia, on the latter's demand, was the "driver's license of his co-driver Leonardo Baricuatro;"

3) the waiver of the right to file criminal charges against Zacarias should not be taken against "plaintiffs" Roranes and Patos who had the right, under the law, to opt merely to bring a civil suit.

The Appellate Court opined that Zacarias' negligence "gave rise to the presumption of negligence on the part of his employer, and their liability is both primary and solidary." It therefore ordered "the defendants jointly and solidarily to indemnify the plaintiffs the following amounts:

(1) P30,000.00 for the death of Orlando Calibo;

(2) P378,000.00 for the loss of earning capacity of the deceased;

(3) P15,000.00 for attorney's fees;

(4) Cost of suit."

The defendants George Lim, Felix Lim, Fabio S. Agad and Paul Zacarias have appealed to this Court on *certiorari* and pray for a reversal of the judgment of the Intermediate Appellate Court which, it is claimed, ignored or ran counter to the established facts. A review of the record confirms the merit of this assertion and persuades this Court that said judgment indeed disregarded facts clearly and undisputably demonstrated by the proofs. The appealed judgment, consequently, will have to be reversed.

The finding that "the truck driven by defendant Paul Zacarias occupied the lane of the jeep when the collision occurred" is a loose one, based on nothing more than the showing that at the time of the accident, the truck driven by Zacarias had edged over the painted center line of the road into the opposite lane by a width of twenty-five (25) centimeters. It ignores the fact that by the uncontradicted evidence, the actual center line of the road was not that indicated by the painted stripe but, according to measurements made and testified by Patrolman Juanito Dimaano, one of the two officers who investigated the accident, correctly lay thirty-six (36) centimeters farther to the left of the truck's side of said stripe.

The unimpugned testimony of Patrolman Dimaano, a witness for the private respondents, is to the effect that the jeep's lane was three (3) meters and seventy-five (75) centimeters wide, and that of the truck three (3) meters and three (3) centimeters, measured from the center stripe to the corresponding side lines or outer edges of the road. The total width of the road being, therefore, six (6) meters and seventy-eight (78) centimeters, the true center line equidistant from both side lines would divide the road into two lanes each three (meters) and thirty-nine (39) centimeters wide. Thus, although it was not disputed that the truck overrode the painted stripe by twenty-five (25) centimeters, it was still at least eleven (11) centimeters away from its side of the true center line of the road and well inside its own lane when the accident occurred. By this same reckoning, since it was unquestionably the jeep that rammed into the stopped truck, it may also be deduced that it (the jeep) was at the time travelling beyond its own lane and intruding into the lane of the truck by at least the same 11-centimeter width of space.

Not only was the truck's lane, measured from the incorrectly located center stripe uncomfortably narrow, given that vehicle's width of two (2) meters and forty-six (46) centimeters; the adjacent road shoulder was also

virtually impassable, being about three (3) inches lower than the paved surface of the road and "soft" — not firm enough to offer traction for safe passage — besides which, it sloped gradually down to a three foot-deep ravine with a river below. The truck's lane as erroneously demarcated by the center stripe gave said vehicle barely half a meter of clearance from the edge of the road and the dangerous shoulder and little room for maneuver, in case this was made necessary by traffic contingencies or road conditions, if it always kept to said lane. It being also shown that the accident happened at or near the point of the truck's approach to a curve, which called for extra precautions against driving too near the shoulder, it could hardly be accounted negligent on the part of its driver to intrude temporarily, and by only as small as a twenty-five centimeter-wide space (less than ten inches), into the opposite lane in order to insure his vehicle's safety. This, even supposing that said maneuver was in fact an intrusion into the opposite lane, which was not the case at all as just pointed out.

Nor was the Appellate Court correct in finding that Paulino Zacarias had acted negligently in applying his brakes instead of getting back inside his lane upon espying the approaching jeep. Being well within his own lane, as has already been explained, he had no duty to swerve out of the jeep's way as said Court would have had him do. And even supposing that he was in fact partly inside the opposite lane, coming to a full stop with the jeep still thirty (30) meters away cannot be considered an unsafe or imprudent action, there also being uncontradicted evidence that the jeep was "zigzagging" and hence no way of telling in which direction it would go as it approached the truck.

Also clearly erroneous is the finding of the Intermediate Appellate Court that Zacarias had no driver's license at the time. The traffic accident report attests to the proven fact that Zacarias voluntarily surrendered to the investigating officers his driver's license, valid for 1979, that had been renewed just the day before the accident, on July 3, 1979. The Court was apparently misled by the circumstance that when said driver was first asked to show his license by the investigators at the scene of the collision, he had first inadvertently produced the license of a fellow driver, Leonardo Baricuatro, who had left said license in Davao City and had asked Zacarias to bring it back to him in Glan, Cotabato.

The evidence not only acquits Zacarias of any negligence in the matter; there are also quite a few significant indicators that it was rather Engineer Calibo's negligence that was the proximate cause of the accident. Zacarias had told Patrolman Dimaano at the scene of the collision and later confirmed in his written statement at the police headquarters that the jeep had been "zigzagging," which is to say that it was travelling or being driven erratically at the time. The other investigator, Patrolman Jose Esparcia, also testified that eyewitnesses to the accident had remarked on the jeep's "zigzagging." There is moreover more than a suggestion that Calibo had been drinking shortly before the accident. The decision of the Trial Court adverts to further testimony of Esparcia to the effect that three of Calibo's companions at the beach party he was driving home from when the collision occurred, who, hav-

ing left ahead of him went to the scene when they heard about the accident, had said that there had been a drinking spree at the party and, referring to Calibo, had remarked: *"Sabi na huag nang mag drive . . . pumipilit."* (loosely translated, "He was advised not to drive, but he insisted.")

It was Calibo whose driver's license could not be found on his person at the scene of the accident, and was reported by his companions in the jeep as having been lost with his wallet at said scene, according to the traffic accident report, Exhibit "J." Said license unexplainedly found its way into the record some two years later.

Reference has already been made to the finding of the Trial Court that while Zacarias readily submitted to interrogation and gave a detailed statement to the police investigators immediately after the accident, Calibo's two companions in the jeep and supposed eyewitnesses, Agripino Roranes and Maximo Patos, refused to give any statements. Furthermore, Roranes who, together with Patos, had sustained injuries as a result of the collision, waived his right to file a criminal case against Zacarias.

Even, however, ignoring these telltale indicia of negligence on the part of Calibo, and assuming some antecedent negligence on the part of Zacarias in failing to keep within his designated lane, incorrectly demarcated as it was, the physical facts, either expressly found by the Intermediate Appellate Court or which may be deemed conceded for lack of any dispute, would still absolve the latter of any actionable responsibility for the accident under the rule of the last clear chance.

Both drivers, as the Appellate Court found, had a full view of each other's vehicle from a distance of one hundred fifty meters. Both vehicles were travelling at a speed of approximately thirty kilometers per hour. The private respondents have admitted that the truck was already at a full stop when the jeep plowed into it. And they have not seen fit to deny or impugn petitioners' imputation that they also admitted the truck had been brought to a stop while the jeep was still thirty meters away. From these facts the logical conclusion emerges that the driver of the jeep had what judicial doctrine has appropriately called the last clear chance to avoid the accident, while still at that distance of thirty meters from the truck, by stopping in his turn or swerving his jeep away from the truck, either of which he had sufficient time to do while running at a speed of only thirty kilometers per hour. In those circumstances, his duty was to seize that opportunity of avoidance, not merely rely on a supposed right to expect, as the Appellate Court would have it, the truck to swerve and leave him a clear path.

The doctrine of the last clear chance provides as valid and complete a defense to accident liability today as it did when invoked and applied in the 1918 case of *Picart vs. Smith, supra*, which involved a similar state of facts.

x x x

Since said ruling clearly applies to exonerate petitioner Zacarias and his employer (and co-petitioner) George Lim, an inquiry into whether or not

the evidence support the latter's additional defense of due diligence in the selection and supervision of said driver is no longer necessary and will not be undertaken. The fact is that there is such evidence in the record which has not been controverted."

C. CASES WHEN THE DOCTRINE WAS HELD INAPPLICABLE.

In most of the cases where the doctrine of last clear chance was discussed, the Supreme Court opted not to apply the same. The following are the reasons given by the Supreme Court in holding that the doctrine are inapplicable:

a. It does not apply if the plaintiff was not negligent, that is, only the defendant was negligent. *(Pantranco North Express, Inc. vs. Baesa; Mc Kee vs. IAC, supra).*

b. It cannot also apply where the party charged (defendant) is required to act instantaneously, and if the injury cannot be avoided by the application of all means at hand after the peril is or should have been discovered; at least in cases in which any previous negligence of the party charged cannot be said to have contributed to the injury. *(Ong vs. Metropolitan Water District; Mc Kee vs. IAC, supra; Rogelio Engada vs. Court of Appeals, No. 140698, June 30, 2003).*

c. It cannot be applied if defendant's negligence is a concurrent cause and which was still in operation up to the time the injury was inflicted. *(Bustamante vs. Court of Appeals, supra).* In other words, it cannot be applied in the field of joint tortfeasors and it cannot be invoked as between defendants who are concurrently negligent.

d. It does not arise where the plaintiff, a passenger, filed an action against a carrier based on contract. *(Anuran vs. Buno, supra; Philippine Rabbit Bus Lines, Inc. vs. Intermediate Appellate Court, August 30, 1990; Bustamante vs. Court of Appeals).*

e. It is not applicable if the actor, though negligent, was not aware of the danger or risk brought about by a prior fraud or negligent act. *(Bank of Philippine Islands vs. Court of Appeals, supra; LBC Air Cargo, Inc. vs. Court of Appeals, supra).*

With respect to the first situation mentioned above, there may be instances when courts use the concept of "last clear chance" in order to justify the ruling that the defendant is negligent even if the

plaintiff is clearly not negligent. However, a closer examination of these cases will indicate that the application of the doctrine of the "last clear chance" is not really necessary. The rulings are nothing more than statements that the damages or injuries are foreseeable. A ruling that the defendant was negligent because he has the last clear chance of avoiding the damage is nothing more than a finding that the defendant can reasonably foresee the injury and that a reasonable man in his position should have and could have avoided the same *(See: Edna A. Raynera, et al. v. Freddie Hiceta, et al., No. 120027, April 21, 1999, 306 SCRA 102).*

CASES:

PANTRANCO NORTH EXPRESS, INC. vs.
MARICAR BASCOS BAESA, et al.
G.R. Nos. 79050-51, November 14, 1989

In this Petition, Pantranco North Express, Inc. (PANTRANCO), asks the Court to review the decision of the Court of Appeals in CA-G.R. Nos. 05494-95 which affirmed the decisions of the Court of First Instance of Rosales, Pangasinan in Civil Case No. 561-R and Civil Case No. 589-R wherein PANTRANCO was ordered to pay damages and attorney's fees to herein private respondents.

The pertinent facts are as follows:

At about 7:00 o'clock in the morning of June 12, 1981, the spouses Ceasar and Marilyn Baesa and their children Harold Jim, Marcelino and Maricar, together with spouses David Ico and Fe O. Ico with their son Erwin Ico and seven other persons, were aboard a passenger jeepney on their way to a picnic at Malalam River, Ilagan, Isabela, to celebrate the fifth wedding anniversary of Ceasar and Marilyn Baesa.

The group, numbering fifteen (15) persons, rode in the passenger jeepney driven by David Ico, who was also the registered owner thereof. From Ilagan, Isabela, they proceeded to Barrio Capayacan to deliver some viands to one Mrs. Bascos and thenceforth to San Felipe, taking the highway going to Malalam River. Upon reaching the highway, the jeepney turned right and proceeded to Malalam River at a speed of about 20 kph. While they were proceeding towards Malalam River, a speeding PANTRANCO bus from Aparri, on its regular route to Manila, encroached on the jeepney's lane while negotiating a curve, and collided with it.

As a result of the accident David Ico, spouses Ceasar Baesa and Marilyn Baesa and their children, Harold Jim and Marcelino Baesa, died while the rest of the passengers suffered injuries. The jeepney was extensively damaged. After the accident the driver of the PANTRANCO Bus, Ambrosio Ramirez, boarded a car and proceeded to Santiago, Isabela. From that time on up to the present, Ramirez has never been seen and has apparently re-

mained in hiding.

All the victims and/or their surviving heirs except herein private respondents settled the case amicably under the "No Fault" insurance coverage of PANTRANCO.

Maricar Baesa through her guardian Francisca O. Bascos and Fe O. Ico for herself and for her minor children, filed separate actions for damages arising from quasi-delict against PANTRANCO, respectively docketed as Civil Case No. 561-R and 589-R of the Court of First Instance of Pangasinan.

In its answer, PANTRANCO, aside from pointing to the late David Ico's alleged negligence as the proximate cause of the accident, invoked the defense of due diligence in the selection and supervision of its driver, Ambrosio Ramirez.

[The trial court rendered judgment against PANTRANCO awarding damages in favor of the private respondents. The judgement was modified on appeal.]

x x x

Petitioner faults the Court of Appeals for not applying the doctrine of the "last clear chance" against the jeepney driver. Petitioner claims that under the circumstances of the case, it was the driver of the passenger jeepney who had the last clear chance to avoid the collision and was therefore negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm.

The doctrine of the last clear chance was defined by this Court in the case of *Ong vs. Metropolitan Water District, (104 Phil. 397 [1958])*, in this wise:

The doctrine of the last clear chance simply, means that the negligence of a claimant does not preclude a recovery for the negligence of defendant where it appears that the latter, by exercising reasonable care and prudence, might have avoided injurious consequences to claimant notwithstanding his negligence.

The doctrine applies only in a situation where the plaintiff was guilty of prior or antecedent negligence but the defendant, who had the last fair chance to avoid the impending harm and failed to do so, is made liable for all the consequences of the accident notwithstanding the prior negligence of the plaintiff. *(Picart vs. Smith, 37 Phil. 809 [1918]; Glan People's Lumber and Hardware, et al. vs. Intermediate Appellate Court, Cecilia Alferez Vda. de Calibo, et al., G.R. No. 70493, May 18, 1989).* The subsequent negligence of the defendant in failing to exercise ordinary care to avoid injury to plaintiff becomes the immediate or proximate cause of the accident which intervenes between the accident and the more remote negligence of the plaintiff, thus making the defendant liable to the plaintiff. *(Picart vs. Smith, supra).*

Generally, the last clear chance doctrine is invoked for the purpose of making a defendant liable to a plaintiff who was guilty of prior or antecedent

negligence, although it may also be raised as a defense to defeat claim for damages.

To avoid liability for the negligence of its driver, petitioner claims that the original negligence of its driver was not the proximate cause of the accident and that the sole proximate cause was the supervening negligence of the jeepney driver David Ico in failing to avoid the accident. It is petitioner's position that even assuming arguendo, that the bus encroached into the lane of the jeepney, the driver of the latter could have swerved the jeepney towards the spacious dirt shoulder on his right without danger to himself or his passengers.

The above contention of petitioner is manifestly devoid of merit.

Contrary to the petitioner's contention, the doctrine of "last clear chance" finds no application in this case. For the doctrine to be applicable, it is necessary to show that the person who allegedly had the last opportunity to avert the accident was aware of the existence of the peril or should, with exercise of due care, have been aware of it. One cannot be expected to avoid an accident or injury if he does not know or could not have known the existence of the peril. In this case, there is nothing to show that the jeepney driver David Ico knew of the impending danger. When he saw at a distance that the approaching bus was encroaching on his lane, he did not immediately swerve the jeepney to the dirt shoulder on his right since he must have assumed that the bus driver will return the bus to its own lane upon seeing the jeepney approaching from the opposite direction. As held by this Court in the case of *Vda. De Bonifacio vs. BLTB, G.R. No. L-26810, August 31, 1970, 34 SCRA 618*, a motorist who is properly proceeding on his own side of the highway is generally entitled to assume that an approaching vehicle coming towards him on the wrong side, will return to his proper lane of traffic. There was nothing to indicate to David Ico that the bus could not return to its own lane or was prevented from returning to the proper lane by anything beyond the control of its driver. Leo Marantan, an alternate driver of the Pantranco bus who was seated beside the driver Ramirez at the time of the accident, testified that Ramirez had no choice but to swerve the steering wheel to the left and encroach on the jeepney's lane because there was a steep precipice on the right. *(CA Decision, p. 2; Rollo, p. 45).* However, this is belied by the evidence on record which clearly shows that there was enough space to swerve the bus back to its own lane without any danger. *(CA Decision, p. 7; Rollo, p. 50).*

Moreover, both the trial court and the Court of Appeals found that at the time of the accident the Pantranco bus was speeding towards Manila. *(CA Decision, p. 2; Rollo, p. 45).* By the time David Ico must have realized that the bus was not returning to its own lane, it was already too late to swerve the jeepney to his right to prevent an accident. The speed at which the approaching bus was running prevented David Ico from swerving the jeepney to the right shoulder of the road in time to avoid the collision. Thus, even assuming that the jeepney driver perceived the danger a few seconds before the actual collision, he had no opportunity to avoid it. This Court has held that the last clear chance doctrine "can never apply where the party charged

is required to act instantaneously, and if the injury cannot be avoided by the application of all means at hand after the peril is or should have been discovered." *(Ong vs. Metropolitan Water District, supra).*

Petitioner likewise insists that David Ico was negligent in failing to observe Section 43(c), Article III Chapter IV of Republic Act No. 4136 * which provides that the driver of a vehicle entering a through highway or a stop intersection shall yield the right of way to all vehicles approaching in either direction on such through highway.

Petitioner's misplaced reliance on the aforesaid law is readily apparent in this case. The cited law itself provides that it applies only to vehicles entering a through highway or a stop intersection. At the time of the accident, the jeepney had already crossed the intersection and was on its way to Malalam River. Petitioner itself cited Fe Ico's testimony that the accident occurred after the jeepney had travelled a distance of about two (2) meters from the point of intersection. *(Petition p. 10; Rollo, p. 27).* In fact, even the witness for the petitioner, Leo Marantan, testified that both vehicles were coming from opposite directions *(CA Decision, p. 7; Rollo, p. 50),* clearly indicating that the jeepney had already crossed the intersection.

Considering the foregoing, the Court finds that the negligence of petitioner's driver in encroaching into the lane of the incoming jeepney and in failing to return the bus to its own lane immediately upon seeing the jeepney coming from the opposite direction was the sole and proximate cause of the accident without which the collision would not have occurred. There was no supervening or intervening negligence on the part of the jeepney driver which would have made the prior negligence of petitioner's driver a mere remote cause of the accident.

LBC AIR CARGO vs. COURT OF APPEALS
241 SCRA 619 [1995]

In this petition for review, the application of the doctrine of "proximate cause" and "last clear chance" is, once again, being put to test. The petition questions the decision of the Court of Appeals dated 18 July 1991, which has reversed that of the trial court.

The case arose from a vehicular collision which occurred at about 11:30 in the morning of 15 November 1987. Rogelio Monterola, a licensed driver, was traveling on board his Suzuki motorcycle towards Mangagoy on the right lane along a dusty national road in Bislig, Surigao del Sur. At about the same time, a cargo van of the LBC Air Cargo Incorporated, driven by defendant Jaime Tano, Jr., was coming from the opposite direction on its way to the Bislig Airport. On board were passengers Fernando Yu, Manager of LBC Air Cargo, and his son who was seated beside Tano. When Tano was approaching the vicinity of the airport road entrance on his left, he saw two vehicles racing against each other from the opposite direction. Tano stopped his vehicle and waited for the two racing vehicles to pass by. The stirred cloud of dust made visibility extremely bad. Instead of waiting for the dust to set-

tle, Tano started to make a sharp left turn towards the airport road. When he was about to reach the center of the right lane, the motorcycle driven by Monterola suddenly emerged from the dust and smashed head-on against the right side of the LBC van. Monterola died from the severe injuries he sustained.

A criminal case for "homicide thru reckless imprudence" was filed against Tano. A civil suit was likewise instituted by the heirs of deceased Monterola against Tano, along with Fernando Yu and LBC Air Cargo Incorporated, for the recovery of damages. The two cases were tried jointly by the Regional Trial Court, Branch 29, of Surigao del Sur.

[The trial court dismissed both cases on the ground that the proximate cause of the "accident" was the negligence of deceased. On appeal, the Court of Appeals reversed the decision of the trial court and ordered defendants to pay damages to the plaintiffs.]

In the instant petition for review, petitioners contend that —

"1. The Court of Appeals erred in finding that Jaime Tano, Jr. was negligent in the driving of his vehicle and in failing to give a signal to approaching vehicles of his intention to make a left turn.

"2. The Court of Appeals erred in not finding that the proximate cause of the accident was the victim's negligence in the driving of his motorcycle in a very fast speed and thus hitting the petitioner's cargo van."

The issues raised are thus essentially factual. The intrinsic merit of, as well as cogency in, the detailed analyses made by the Court of Appeals in arriving at its findings is at once apparent. Said the appellate court:

"That visibility was poor when Jaime Tano made a left turn was admitted by the latter.

"Q When these two vehicles passed by your parked vehicle, as you said, there were clouds of dust, did I get you right?

"A Yes sir, the road was dusty.

"Q So much so that you could no longer see the vehicles from the opposite direction following these vehicles?

"A It is not clear, sir, so I even turned on my left signal and the headlight.

"Q What do you mean by it was not clear, you could not see the incoming vehicles?

"A I could not see because of the cloud of dust.

"Q And it was at this juncture, when you were to follow your theory, when you started your LBC van again and swerved to the left leading to the Bislig airport?

"A I did not enter immediately the airport, I waited the dust to clear a

little before I drove.

x x x x x x x x x

"Q In other words when you said that it was slightly clear, you would like to tell the Honorable Court that you could only clearly see big vehicles . . . but not small vehicles like a motorcycle?

"A I could see clearly big vehicles but not small vehicles like a motorcycle.

"Q Like the motorcycle of Rogelio Monterola?

"A Yes, sir. I could not see clearly. (Tano, tsn, April 18, 1989, pp. 26-30) (p. 15, Appellant's brief).

"Tano should not have made a left turn under the conditions admitted by him. Under the Land Transportation and Traffic Code, driver of any vehicle upon a highway, before starting, stopping or turning from a direct line, is called upon to first see that such movement can be made in safety, and whenever the operation of any other vehicle approaching may be affected by such movement, shall give a signal plainly visible to the driver of such other vehicles of the intention to make such movement. *(Sec. 44, R.A. 4136, as amended)*. This means that before a driver turns from a direct line, in this case to the left, the driver must first see to it that there are no approaching vehicles and, if there are, to make the turn only if it can give a signal that is plainly visible to the driver of such other vehicle. Tano did neither in this case, for he recklessly made a left turn even as visibility was still very poor, and thus failed to see the approaching motorcycle and warn the latter of his intention to make a left turn. This is plain and simple negligence.

"In thus making the left turn, he placed his vehicle directly at the path of the motorcycle which, unaware of Tano's intention to make a left turn, smashed at Tano's vehicle. It was Tano's negligence that created the risk or the condition of danger that set into operation the event that led to the smashedup and untimely death of Rogelio Monterola.

"Rogelio Monterola's motorcycle would not have hit the cargo van had Tano, in operating it, not recklessly turned left when visibility was still poor, and instead observed the directive of the Land Transportation Code that before doing so, he should first see to it that such movement can be made in safety, and that whenever any other vehicle approaching may be affected by such movement, should give a signal plainly visible to the driver of such other vehicle of the intention to make such movement.

"That Rogelio Monterola was running fast despite poor visibility as evidenced by the magnitude of the damage to the vehicles is no defense. His negligence would at most be contributory. *(Article 2179, N.C.C.)*. Having negligently created the condition of danger, defendants may not avoid liability by pointing to the negligence of the former.

x x x x x x x x x

"Tano's proven negligence created a presumption of negligence on the part of

his employer, the LBC Air Cargo Corporation, in supervising its employees properly and adequately *(Phoenix Construction, Inc. vs. Intermediate Appellate Court, supra)*, which may only be destroyed by proof of due diligence in the selection and supervision of his employees to prevent the damage. *(Article 2180, N.C.C.).* No such defense was interposed by defendants in their answer.

"We, however, fail to see Fernando Yu's liability as Manager of LBC-Mangagoy Branch Office, there being no employer-employee relationship between him and Jaime Tano who is a driver of the LBC Air Cargo, Inc. It was held in *Philippine Rabbit Bus Lines, Inc., et al. vs. Phil. American Forwarders, Inc., 63 SCRA 231*, that the term 'Manager' in Article 2180 is used in the sense of 'employer.' Hence, no tortuous or quasi-delictual liability can be fastened on Fernando Yu as branch manager of LBC Air Cargo, Inc.

"Now for the amount of damages. Aside from the indemnity for death which *People vs. Sazon, 189 SCRA 700,* the evidence disclose that as a result of the accident, Rogelio Monterola's motorcycle was damaged, the repair cost of which amounted to P7,361.00 (Exh. E-1), for the hospitalization, wake and burial expenses, plaintiff spent P15,000.00. There is likewise no question that by reason of Rogelio Monterola's untimely death, his only child 14 years old Sherwin Monterola, suffered mental anguish, fright, serious anxiety, wounded feelings and moral shock that entitles him to moral damages which we hereby fix at P20,000.00. Because of defendants' refusal to indemnify the plaintiff for his father's death, the latter was compelled to litigate and engage the services of counsel. He is therefore entitled to an additional amount of P10,000.00 for attorney's fees and expenses of litigation.

"Considering, however, the contributory negligence of Rogelio Monterola in driving at a fast clip despite the fact that the road was dusty, we reduce the aggregate amount of damages to which the plaintiff is entitled by twenty percent." *(Phoenix Construction, Inc. vs. Intermediate Appellate Court, supra).*

From every indication, the proximate cause of the accident was the negligence of Tano who, despite extremely poor visibility, hastily executed a left turn (towards the Bislig airport road entrance) without first waiting for the dust to settle. It was this negligent act of Tano, which had placed his vehicle (LBC van) directly on the path of the motorcycle coming from the opposite direction, that almost instantaneously caused the collision to occur. Simple prudence required him not to attempt to cross the other lane until after it would have been safe from and clear of any oncoming vehicle.

Petitioners poorly invoke the doctrine of "last clear chance" (also referred to, at times, as "supervening negligence" or as "discovered peril"). The doctrine, in essence, is to the effect that where both parties are negligent, but the negligent act of one is appreciably later in time than that of the other, or when it is impossible to determine whose fault or negligence should be attributed to the incident, the one who had the last clear opportunity to avoid the impeding harm and failed to do so is chargeable with the consequences thereof. *(see Picart vs. Smith, 37 Phil. 809).* Stated differently, the rule would also mean that an antecedent negligence of a person does not preclude the recovery of

damages for the supervening negligence of, or bar a defense against liability sought by, another if the latter, who had the last fair chance, could have avoided the impending harm by the exercise of due diligence. *(Pantranco North Express, Inc. vs. Baesa, 179 SCRA 384; Glan People's Lumber and Hardware vs. Intermediate Appellate Court, 173 SCRA 464).*

In the case at bench, the victim was traveling along the lane where he was rightly supposed to be. The incident occurred in an instant. No appreciable time had elapsed, from the moment Tano swerved to his left to the actual impact, that could have afforded the victim a last clear opportunity to avoid the collision.

It is true, however, that the deceased was not all that free from negligence in evidently speeding too closely behind the vehicle he was following. We, therefore, agree with the appellate court that there indeed was contributory negligence on the victim's part that could warrant a mitigation of petitioners' liability for damages.

CAUSATION

CHAPTER 6

HUMAN RELATIONS: INTENTIONAL TORTS

This chapter and the next two chapters deal with torts covered by Chapter 2 of the Preliminary Title of the New Civil Code of the Philippines entitled "Human Relations." Although Chapter 2 covers negligent acts, the torts mentioned therein are mostly intentional in nature or torts involving malice or bad faith. The specific torts and their requisites will be discussed and arranged by topic and the statutory provisions, both under the Civil Code and special laws, on which they are based will be identified.

Other matters relating to independent civil actions, particularly those concerning concurrent causes of action and remedies are discussed in Chapter 9 of this work.

1. REASON FOR CHAPTER ON HUMAN RELATIONS

The Report of the Code Commission states the reason why Chapter 2 of the Preliminary Title of the New Civil Code entitled "Human Relations" — a chapter which is not found in Old Civil Code — was included in the draft of the New Civil Code. The Report states:

> "Chapter 2 of the Preliminary Title is devoted to "Human Relations." Therein are formulated some basic principles that are to be observed for the rightful relationship between human beings and for the stability of the social order. The present Civil Code merely states the effects of the law, but fails to draw the spirit of the law. This chapter is designed to indicate certain norms that spring from the fountain of good conscience. These guides for human conduct should run as golden threads through society, to the end that law may approach its supreme ideal, which is the sway and dominance of justice. x x x
>
> Needless to say, every sound legislation from time immemorial has sought to act as an arbiter between the conflicting rights of individuals. To accomplish so noble a mission, the lawmaker

> makes it imperative that every one duly respect the rights of others. (p. 39)"

Certain basic principles mentioned by the Code Commission had already been discussed in the initial chapter of this work — justice, equity, democracy, and the need to exalt human dignity. The examples given earlier show that such basic principles find further implementation in specific provisions in Chapter 2 of the Preliminary Title of the Civil Code. They will be examined more closely in the present chapter.

2. CATCH ALL PROVISIONS

A. CONCEPTS.

As pointed out in the preliminary chapter, the expanded coverage of tort finds resonance in Articles 19, 20 and 21 of the New Civil Code. Article 20 provides that every person who, contrary to law, willfully or negligently causes damage to another, shall indemnify the latter for the same. The Code Commission expressed the view that the rule under Article 20 "pervades the entire legal system, and renders it impossible that a person who suffers damage because another has violated some legal provision, should find himself without relief." *(Report, p. 39)*. Article 19, on the other hand, is believed to be a mere declaration of principles which is being implemented by other provisions. *(Velayo, etc. vs. Shell Co. of the Phils., Inc., 100 Phil. 186, 202 [1956])*. Article 19 declares a principle of law and Article 21 gives flesh to its provisions. *(Saudi Arabia Airlines vs. Court of Appeals, 297 SCRA 469 [1998])*.

The Supreme Court explained the significance of the said articles in this wise:

> Article 19, known to contain what is commonly referred to as the principle of abuse of rights, sets certain standards which may be observed not only in the exercise of one's rights but also in the performance of one's duties. These standards are the following: to act with justice; to give everyone his due; and to observe honesty and good faith. The law, therefore, recognizes the primordial limitation on all rights: that in their exercise, the norms of human conduct set forth in Article 19 must be observed. A right, though by itself legal because recognized or granted by law as such, may nevertheless become the source of some illegality. When a right is exercised in a manner which does not conform with the norms enshrined in Article 19 and results in damage to another, a legal wrong is thereby committed for which the wrongdoer must be held responsible. Although the requirements

of each provision is different, these three (3) articles are all related to each other. As the eminent Civilist Senator Arturo Tolentino puts it: "With this article (Article 21), combined with articles 19 and 20, the scope of our law on civil wrongs has been very greatly broadened; it has become much more supple and adaptable than the Anglo-American law on torts. It is now difficult to conceive of any malevolent exercise of a right which could not be checked by the application of these articles." *(Tolentino, 1 Civil Code of the Philippines 72).*

There is however, no hard and fast rule which can be applied to determine whether or not the principle of abuse of rights may be invoked. The question of whether or not the principle of abuse of rights has been violated, resulting in damages under Articles 20 and 21 or other applicable provision of law, depends on the circumstances of each case. *(Globe Mackay Cable and Radio Corporation vs. Court of Appeals, 176 SCRA 778 [1989]).*

The elements of an abuse of right under Article 19 are the following: (1) There is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent of prejudicing or injuring another. Article 20 speaks of the general sanction for all other provisions of law which do not especially provide for their own sanction. *(Tolentino, supra, p. 71).* Thus, anyone who, whether willfully or negligently, in the exercise of his legal right or duty, causes damage to another, shall indemnify his victim for injuries suffered thereby. Article 21 deals with acts *contra bonus mores*, and has the following elements: 1) There is an act which is legal; 2) but which is contrary to morals, good custom, public order, or public policy; 3) and it is done with intent to injure.

Thus, under any of these three (3) provisions of law, an act which causes injury to another may be made the basis for an award of damages.

There is a common element under Articles 19 and 21, and that is, the act must be intentional. However, Article 20 does not distinguish: the act may be done either "willfully," or "negligently." *(Albenson Enterprises vs. Court of Appeals, supra).*

In another case, the Supreme Court offered the following explanation as to the nature of what Judge Sanco calls "catch-all" provisions:

"This article (Art. 19), known to contain what is commonly referred to as the principle of abuse of rights, sets certain standards which must be observed not only in the exercise of one's rights but also in the performance of one's duties. These standards are the following: to act with justice; to give everyone his due; and to observe honesty and good faith. The law, therefore,

recognizes a primordial limitation on all rights; that in their exercise, the norms of human conduct set forth in Article 19 must be observed. A right, though by itself legal because recognized or granted by law as such, may nevertheless become the source of some illegality. When a light is exercised in a manner which does not conform with the norms enshrined in Article 19 and results in damage to another, a legal wrong is thereby committed for which the wrongdoer must be held responsible. But while Article 19 lays down a rule of conduct for the government of human relations and for the maintenance of social order, it does not provide a remedy for its violation. Generally, an action for damages under either Article 20 or Article 21 would be proper.

x x x

This article (Art. 21), adopted to remedy the "countless gaps in the statutes, which leave so many victims of moral wrongs helpless, even though they have actually suffered material and moral injury" *(Id.)* should "vouchsafe adequate legal remedy for that untold number of moral wrongs which it is impossible for human foresight to provide for specifically in the statutes" *(Id., at p. 40; See also PNB vs. CA, G.R. No. L-27155, May 18, 1978, 83 SCRA 237, 247).*

In determining whether or not the principle of abuse of rights may be invoked, there is no rigid test which can be applied. While the Court has not hesitated to apply Article 19 whether the legal and factual circumstances called for its application (See for *e.g., Velayo vs. Shell Co. of the Phil., Ltd., 100 Phil. 186 (1956); PNB vs. CA, supra; Grand Union Supermarket, Inc. vs. Espino, Jr., G.R. No. L-48250, December 28, 1979, 94 SCRA 953; PAL vs. CA, G.R. No. L-46558, July 31, 1981, 106 SCRA 391; United General Industries, Inc. vs. Paler, G.R. No. L-30205, March 15, 1982, 112 SCRA 404; Rubio vs. CA, G.R. No. 50911, August 21, 1987, 153 SCRA 183)* the question of whether or not the principle of abuse of rights has been violated resulting in damages under Article 20 or Article 21 or other applicable provision of law, depends on the circumstances of each case. *(Globe Mackay Cable and Radio Corporation vs. Court of Appeals, 176 SCRA 778 [1989]).*

Under Article 21, damages are recoverable even though no positive law was violated *(Report, p. 26).* There are innumerable instances of this kind which cannot be the subject of specific statutory provisions in view of the impossibility of foreseeing every sort of human misconduct. *(ibid.).* The article was further explained in this wise:

"Thus at one stroke, the legislator, if the foregoing rule is approved, would vouchsafe adequate legal remedy for that untold number of moral wrongs which it is impossible for human

foresight to provide for specifically in the statutes.

But, it may be asked, would not this proposed article obliterate the boundary line between morality and the law? The answer is that, in the last analysis, every good law draws its breath of life from morals, from those principles which are written with the words of fire in the conscience of man. If this premise is admitted, then the proposed rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all wrongs which cause damage. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its moorings, one can not but feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules, thus imparting to every legal system that enduring quality which ought to be one of its superlative attributes.

Furthermore, there is no belief of more baneful consequences upon the social order than that a person may with impunity cause damage to his fellowmen so long as he does not break any law of the State, though he may be defying the most sacred postulates of morality. What is more, the victim loses faith in the ability of the government to afford him protection or relief.

A provision similar to the one under consideration is embodied in Article 826 of the German Civil Code.

The same observations may be made concerning injurious acts that are contrary to public policy but are not forbidden by statute. There are countless acts of such character, but have not been foreseen by the lawmakers. Among these are many business practices that are unfair or oppressive, and certain acts of landholders and employers affecting their tenants and employees which contravene the public policy of social justice." *(Report, pp. 40-41).*

B. DAMAGE.

It should be emphasized, however, that an action can only prosper when damage, material or otherwise, was suffered by the plaintiff. An action based on Articles 19, 20 and 21 will be dismissed if the plaintiff merely seeks "recognition." Thus, a complaint will be dismissed if the plaintiffs filed an action to be merely recognized as architects of a building. *(Enrique J. L. Ruiz, et al. vs. The Secretary of National Defense, G.R. No. L-15526, December 28, 1963).* The Supreme Court observed in *Ruiz* that:

"x x x The sole object of the appeal is only to secure for them a recognition, that they were allegedly the co-architects

> of Panlilio, in the construction of the hospital, so as to enhance their professional prestige and not to impair their standing. If this is the goal of appellants, a judicial declaration to that effect would seem unnecessary. Let us ponder over the thought that a brilliant professional enjoys the respect and esteem of his fellowmen, even without any court declaration of such fact, and that an incompetent one may summon all the tribunals in the world, to proclaim his genius in vain.
>
> But appellants invoke Article 21 of the Civil Code, which states —
>
> "Any person who wilfully cause loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damages." contending that the word "injury" in the said article, refers not only to any indeterminate right or property, but also to honor or credit. *(I Tolentino Civ. Code, p. 67).* It may be added, however, that this article also envisions a situation where a person has a legal right, and such right is violated by another in a manner contrary to morals, good customs or public policy; it presupposes losses or injuries, material or otherwise, which one may suffer as a result of said violation. The pleadings do not show that damages were ever asked or alleged in connection with this case, predicted upon the article aforecited. And under the facts and circumstances obtaining in this case, one cannot plausibly sustain the contention that the failure or refusal to extend the recognition, was an act contrary to morals, good customs or public policy."

Interestingly, the Supreme Court likewise ruled that the defendant may likewise be guilty of tort under Articles 19 and 21 even if he acted in good faith. *(Grand Union Supermarket vs. Jose J. Espino, Jr., G.R. No. L-48250, December 28, 1979).* In those cases, liability to pay moral damages may not be imposed on the defendant who acted in good faith. *(Llorente vs. Court of Appeals, 202 SCRA 309 [1991]).*

3. ABUSE OF RIGHT

A. ELEMENTS.

> *ART. 19. Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.*

The decision in *Albenson* (cited in *BPI Express Card Corp. vs. Court of Appeals*, *296 SCRA 260 [1998]*) enumerates the elements of an abuse of right under Article 19 to wit: (1) There is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent of

prejudicing or injuring another. On the other hand, the Supreme Court of Spain cites the following elements: (1) the exercise of a right which is objective and apparently legal; (2) damage or injury to an interest not specifically protected by a legal precept; and (3) immorality or anti-social character of the damage or injury caused either with intent to injure or without serious or legitimate purpose. *(5 Caguioa 28-29).*

The rule is a departure from the traditional view that a person is not liable for damages resulting from the exercise of one's right – *qui iure suo utitur neminem laedit. (5 Caguioa 26; 5 Tolentino 60).* It is practically a restatement of the Roman Law principle of *honeste vivere, alterum non laedere, jus suum cuique tribuere. (5 Caguioa 27, citing I-II Castan, 8th ed., pp. 52-53).*

B. EXAMPLES.

a. Cases when there is abuse.

An example of abuse of right is a case where a creditor — taking advantage of his knowledge that insolvency proceedings were to be instituted by the debtor if the creditors did not come to an understanding as to the manner of distribution of the insolvent's asset among them, and believing it most probable that they would not arrive at such understanding — schemed and transferred its credit to a sister company in the United States which, in turn, secured a writ of attachment in the court therein thereby gaining control over the said plane. As a consequence, the other creditors were deprived of their lawful share thereto and the assignee that was later appointed was deprived of his right to recover said plane. *(Velayo, etc. vs. Shell Co., of the Phils., et al., supra).*

Another example of abuse of right is when a bank twice disapproved a proposed lease of a sugar quota by its debtor. The debtor previously mortgaged the sugar quota to the bank. The bank later disapproved the application of the debtor to obtain possession of the sugar quota so that said debtor can lease the same to a third person. The disapproval was made even if responsible officers of the bank already informed the debtor and the prospective lessee that the bank will approve the lease if the consideration therefor was increased from P2.50 to P2.80 per picul. The disapproval was made by the Board of Directors because it wanted to raise the consideration for the lease to P3.00 per picul. The Supreme Court ruled that there was abuse of right because the disapproval was unreasonable. The disapproval was made knowing that the agricultural year was about to expire,

at which time the mortgagor would not be able to utilize the sugar quota. The mortgagor was not able to use the sugar quota although the difference between the price demanded by the board and the proposed lease was only a small amount. *(Philippine National Bank vs. Court of Appeals, 83 SCRA 237).*

There is also abuse of right if the principal unreasonably terminated an agency agreement for selfish reasons. *(Arturo P. Valenzuela, et al. vs. The Hon. Court of Appeals, 190 SCRA 1, G.R. No. 83122, October 19, 1990; Sevilla vs. Court of Appeals, 160 SCRA 171).* Even if the agency can be terminated at will, termination should not be done with bad faith or abuse of right.

Abuse of right was likewise established in *Llorente vs. Court of Appeals, et al.* (202 SCRA 309 [1991]). The person sought to be held liable in said case was a public officer who had authority to approve clearances of resigning employees. Since he had authority to approve clearances he also had the right to disapprove the same if the employee has pending accountabilities. The absence of accountability was a condition imposed by the rules for the issuance of a clearance. However, if the practice in the office is to disregard the condition and to clear resigning employees subject to deduction of accountabilities from his gratuity benefits, the officer who withheld action on the clearance of the employee is liable for damages for abuse of right. There is such abuse if he did not issue a clearance to the plaintiff but issued the same to all other employees who were similarly situated as the plaintiff.

In *Sergio Amonoy v. Sps. Jose Gutierrez (G.R. No. 140420, February 15, 2001, 351 SCRA 731)* the petitioners commenced the demolition of the house of the private respondents under the authority of a writ of demolition which was issued by the trial court. A temporary restraining order was issued by the Court of Appeals against the writ of demolition but the petitioners still pursued the demolition. There was abuse of right in this case and the fact that the writ was not subsequently annulled is of no moment. The principle of *damnum absque injuria* is not applicable because the principle is premised on the valid exercise of a right. Anything less or beyond such exercise will not give rise to the legal protection that that principle accords. And when damage or prejudice to another is occasioned thereby, liability ensues.

In *Jose Arlequi v. Hon. Court of Appeals (G.R. No. 126437, March 6, 2002),* the tenants of an apartment building formed an association to represent them in the negotiation with the owner for the purchase

of their respective units. Josue Arlegui and Mateo Tan were the Vice President and Auditor, respectively, of the association. Later, the members were surprised to learn that Mr. Tan surreptitiously purchased the building and later sold one unit to Mr. Arlegui. There was abuse of right on the part of Mr. Arlegui and Mr. Tan because they violated the trust reposed on them as officers and negotiators in behalf of the tenants.

There was also abuse of right in *Petrophil Corporation v. Court of Appeals, et al. (G.R. No. 122796, December 10, 2001)* when the petitioner terminated its hauling contract with private respondent Cruz (whereby the latter supplied trucks for the hauling of the products of the petitioner) because the latter sympathized with the picketing workers of the petitioner. The Supreme Court explained:

> On the first issue, we agree with petitioner that the contract clearly provided for two ways of terminating the contract, and, one mode does not exclude the other. Although the contract provided for causes for termination, it also stated in paragraph 11 that the contract was for an indefinite term subject to the right of Petrophil to terminate it any time after a written notice of 30 days. When the language of a contract is clear, it requires no interpretation. Thus, the finding that the termination of the contract was "for cause", is immaterial. When petitioner terminated the contract "without cause", it was required only to give Dr. Cruz a 30-day prior written notice, which it did in this case.
>
> However, we differ with petitioner on the second issue. Recall that before Petrophil terminated the contract on May 25, 1987, there was a strike of its employees at the Pandacan terminal. Dr. Cruz and her husband were seen at the picket line and were reported to have instructed their truck drivers not to load petroleum products. At the resumption of the operation in Pandacan terminal, Dr. Cruz's contract was suspended for one week and eventually terminated. Based on these circumstances, the Court of Appeals like the trial court concluded that Petrophil terminated the contract because of Dr. Cruz's refusal to load petroleum products during the strike. In respondent court's view, the termination appeared as a retaliation or punishment for her sympathizing with the striking employees. Nowhere in the record do we find that petitioner asked her to explain her actions. Petrophil simply terminated her contract. These factual findings are binding and conclusive on us, especially in the absence of any allegation that said findings are unsupported by the evidence, or that the appellate and trial courts misapprehended these facts. 16 In terminating the hauling contract of Dr. Cruz without hearing her side on the factual context above described, a petitioner opened itself to a charge of bad faith. While Petrophil had the

> right to terminate the contract, petitioner could not act purposely to injure private respondents. In BPI Express Card Corporation vs. CA, 296 SCRA 260, 272 (1998), we held that there is abuse of a right under Article 19 if the following elements are present: 1) there is a legal right or duty; 2) which is exercised in bad faith; 3) for the sole purpose of prejudicing or injuring another. We find all these three elements present in the instant case. Hence, we are convinced that the termination by petitioner of the contract with Dr. Cruz calls for appropriate sanctions by way of damages.

b. When abuse is absent.

However, the Supreme Court ruled in *Mita Pardo de Tavera vs. Philippine Tuberculosis Society, et al.* (G.R. No. L-48928, February 25, 1982) that there was no actionable wrong where the defendants acted strictly in accordance with the Constitution and By-laws of an association or with a contract. In said case, the petitioner was removed as executive director by the board of the society in accordance with the constitution and by-laws. The Supreme Court observed that:

> "While these provisions present some basic principles that are to be observed for the rightful relationship between human beings and the stability of social order, these are merely guides for human conduct in the absence of specific legal provisions and definite contractual stipulations. In the case at bar, the Code of By-Laws of the Society contains a specific provision governing the term of office of petitioner. The same necessarily limits her rights under the New Civil Code and the New Constitution upon acceptance of the appointment.
>
> Moreover, the act of the Board in declaring her position as vacant is not only in accordance with the Code of By-Laws of the Society but also meets the exacting standards of honesty and good faith. The meeting of May 29, 1974, at which petitioner's position was declared vacant, was called specifically to take up the unfinished business of the Reorganizational Meeting of the Board of April 30, 1974. Hence, said act cannot be said to impart a dishonest purpose or some moral-obliquity and conscious doing to wrong but rather emanates from the desire of the Board to reorganize itself."

There is also no abuse of right when an owner of a lot which adjoins the highway fenced his property. No abuse of right was committed although the tenants in the inner lot can no longer pass through his property. In the absence of an easement of right of way, the owner is free to enclose his property even if damage to another will result. *(Custodio vs. Court of Appeals, supra).* It is a case of damage without injury.

Likewise, the Department Head, the Assistant Division Superintendent and the Principal of a high school are not guilty of abuse of right when a teacher was placed in the list of excess teacher when the action was not motivated by undue motives *(Virginia M. Andrade v. Court of Appeals, G.R. No. 127932, December 7, 2001).*

Abuse of right is also absent if a school did not confer upon the plaintiff a degree with honors because it merely exercised its discretion in accordance with the rules. *(University of San Carlos, et al. vs. Court of Appeals, G.R. No. L-79237, October 18, 1988).* However, if there was already an order from a superior officer to allow the plaintiff to graduate with honors, the officer who failed to implement the order is liable for damages not on account of abuse of right but neglect of duty. The reason is that the officer did not have any right to withhold the implementation of the order of the superior officer to allow the plaintiff to graduate with honors. *(Ledesma vs. Court of Appeals).*

Similarly, there is no abuse of right if the defendants were legitimately exercising their constitutional rights. In *Garciano, et al. vs. Hon. Court of Appeals* (212 SCRA 436 [1992]), the majority of the directors of a school reinstated a teacher who was previously terminated from service. Later, the President, Vice-President, Secretary and three board members resigned because of such action. Earlier, the school principal and some teachers allegedly threatened to resign *en masse* if the petitioner teacher would be reinstated. The petitioner sued the defendants for damages under Articles 19, 20 and 21 but the Supreme Court rejected the claim explaining, *inter alia:*

> "The Court of Appeals was correct in finding that petitioner's discontinuance from teaching was her own choice. While respondents admittedly wanted her service terminated, they actually did nothing to physically prevent her from reassuming her post, as ordered by the school's Board of Directors. That the school principal and Fr. Wiertz disagreed with Board's decision to retain her, and some teachers allegedly threatened to resign *en masse*, even if true, did not make them liable to her for damages. They were simply exercising their right to free speech or their right to dissent from the Board's decision. Their acts were not contrary to law, morals, good customs or public policy. x x x"

The Supreme Court likewise rejected the allegation that there was abuse of right in *Baron's Marketing Corporation vs. Court of Appeals (*286 SCRA 98 [1998]). The plaintiff in said case filed a complaint for the recovery of the price of the goods that were delivered to the defendant. In its answer, the defendant claimed that the plaintiff abused its right when it previously rejected defendant's offer of set-

tlement and subsequently filed an action for collection. It argued that if there was an offer by the debtor to pay its debt or obligation supported by post-dated checks and with provision for interest, the normal response of the creditor would be to accept the offer of compromise. The Supreme Court rejected such argument and explained:

> Both parties agree that to constitute an abuse of rights under Article 19 the defendant must act with bad faith or intent to prejudice the plaintiff. They cite the following comments of Tolentino as their authority:
>
> *Test of Abuse of Right.* — Modern jurisprudence does not permit acts which, although not unlawful, are anti-social. There is undoubtedly an abuse of right when it is exercised for the only purpose of prejudicing or injuring another. When the objective of the actor is illegitimate, the illicit act cannot be concealed under the guise of exercising a right. The principle does not permit acts which, without utility or legitimate purpose cause damage to another, because they violate the concept of social solidarity which considers law as rational and just. Hence, every abnormal exercise of a right, contrary to its socio-economic purpose, is an abuse that will give rise to liability. The exercise of a right must be in accordance with the purpose for which it was established, and must not be excessive or unduly harsh; there must be no intention to injure another. Ultimately, however, and in practice, courts, in the sound exercise of their discretion, will have to determine all the facts and circumstances when the exercise of a right is unjust, or when there has been an abuse of right.
>
> The question, therefore, is whether private respondent intended to prejudice or injure petitioner when it rejected petitioner's offer and filed the action for collection.
>
> We hold in the negative. It is an elementary rule in this jurisdiction that good faith is presumed and that the burden of proving bad faith rests upon the party alleging the same. In the case at bar, petitioner has failed to prove bad faith on the part of private respondent. Petitioner's allegation that private respondent was motivated by a desire to terminate its agency relationship with petitioner so that private respondent itself may deal directly with Meralco is simply not supported by the evidence. At most, such supposition is merely speculative.
>
> Moreover, we find that private respondent was driven by very legitimate reasons for rejecting petitioner's offer and instituting the action for collection before the trial court. As pointed out by private respondent, the corporation had its own "cash position to protect in order for it to pay its own obligations." This is not such "a lame and poor rationalization" as petitioner purports it to be. For if private respondent were to be required to

accept petitioner's offer, there would be no reason for the latter to reject similar offers from its other debtors. Clearly, this would be inimical to the interests of any enterprise, especially a profit-oriented one like private respondent. It is plain to see that what we have here is a mere exercise of rights, not an abuse thereof. Under these circumstances, we do not deem private respondent to have acted in a manner contrary to morals, good customs or public policy as to violate the provisions of Article 21 of the Civil Code.

CASES:

UNIVERSITY OF THE EAST vs. ROMEO A. JADER
G.R. No. 132344, February 17, 2000

May an educational institution be held liable for damages for misleading a student into believing that the latter had satisfied all the requirements for graduation when such is not the case? This is the issue in the instant petition for review premised on the following undisputed facts as summarized by the trial court and adopted by the Court of Appeals (CA), to wit:

"Plaintiff was enrolled in the defendants' College of Law from 1984 up to 1988. In the first semester of his last year (School year 1987-1988), he failed to take the regular final examination in Practice Court I for which he was given an incomplete grade (Exhibits '2,' also Exhibit 'H'). He enrolled for the second semester as fourth year law student (Exhibit 'A') and on February 1, 1988 he filed an application for the removal of the incomplete grade given him by Professor Carlos Ortega (Exhibits 'H-2,' also Exhibit '2') which was approved by Dean Celedonio Tiongson after payment of the required fee. He took the examination on March 28, 1988. On May 30, 1988, Professor Carlos Ortega submitted his grade. It was a grade of five (5). (Exhibits 'H-4,' also Exhibits '2-L,' '2-N').

"In the meantime, the Dean and the Faculty Members of the College of Law met to deliberate on who among the fourth year students should be allowed to graduate. The plaintiff's name appeared in the Tentative List of Candidates for graduation for the Degree of Bachelor of Laws (LL.B.) as of Second Semester (1987-1988) with the following annotation:

"JADER ROMEO A.

Def. Conflict of Laws — x-1-87-88, Practice Court I — Inc., 1-87-88. C-1 to submit transcript with S.O. (Exhibits '3,' '3-C-1,' '3-C-2')."

"The 35th Investitures and Commencement Ceremonies for the candidates of Bachelor of Laws was scheduled on the 16th of April 1988 at 3:00 o'clock in the afternoon, and in the invitation for that occasion the name of the plaintiff appeared as one of the candidates. (Exhibits 'B,' 'B-6,' 'B-6-A').

At the foot of the list of the names of the candidates there appeared however the following annotation:

'This is a tentative list. Degrees will be conferred upon these candidates who satisfactorily complete requirements as stated in the University Bulletin and as approved of the Department of Education, Culture and Sports. (Exhibit 'B-7-A').

"The plaintiff attended the investiture ceremonies at F. dela Cruz Quadrangle, U.E., Recto Campus, during the program of which he went up the stage when his name was called, escorted by her (sic) mother and his eldest brother who assisted in placing the Hood, and his Tassel was turned from left to right, and he was thereafter handed by Dean Celedonio a rolled white sheet of paper symbolical of the Law Diploma. His relatives took pictures of the occasion. (Exhibits 'C' to 'C-6', 'D-3' to 'D-11').

"He tendered a blow-out that evening which was attended by neighbors, friends and relatives who wished him good luck in the forthcoming bar examination. There were pictures taken too during the blow-out (Exhibits 'D' to 'D-1').

"He thereafter prepared himself for the bar examination. He took a leave of absence without pay from his job from April 20, 1988 to September 30, 1988 (Exhibit 'G') and enrolled at the pre-bar review class in Far Eastern University (Exhibits 'F' to 'F-2'). Having learned of the deficiency he dropped his review class and was not able to take the bar examination."

Consequently, respondent sued petitioner for damages alleging that he suffered moral shock, mental anguish, serious anxiety, besmirched reputation, wounded feelings and sleepless nights when he was not able to take the 1988 bar examinations arising from the latter's negligence. He prayed for an award of moral and exemplary damages, unrealized income, attorney's fees, and costs of suit.

In its answer with counterclaim, petitioner denied liability arguing mainly that it never led respondent to believe that he completed the requirements for a Bachelor of Laws degree when his name was included in the tentative list of graduating students. x x x

[After trial, the lower court rendered judgment in favor of the plaintiff ordering the defendant to pay damages. On appeal by both parties, the decision was affirmed by the Court of Appeals (CA) with modification as to the amount of damages. Petitioner school elevated the case to the Supreme Court arguing that it has no liability to respondent Romeo A. Jader, considering that the proximate and immediate cause of the alleged damages incurred by the latter arose out of his own negligence in not verifying from the professor concerned the result of his removal exam. The argument of the petitioner was, however, rejected.]

When a student is enrolled in any educational or learning institution, a contract of education is entered into between said institution and the student.

The professors, teachers or instructors hired by the school are considered merely as agents and administrators tasked to perform the school's commitment under the contract. Since the contracting parties are the school and the student, the latter is not duty-bound to deal with the former's agents, such as the professors with respect to the status or result of his grades, although nothing prevents either professors or students from sharing with each other such information. The Court takes judicial notice of the traditional practice in educational institutions wherein the professor directly furnishes his/her students their grades. It is the contractual obligation of the school to timely inform and furnish sufficient notice and information to each and every student as to whether he or she had already complied with all the requirements for the conferment of a degree or whether they would be included among those who will graduate. Although commencement exercises are but a formal ceremony, it nonetheless is not an ordinary occasion, since such ceremony is the educational institution's way of announcing to the whole world that the students included in the list are those who will be conferred a degree during the baccalaureate ceremony have satisfied all the requirements for such degree. Prior or subsequent to the ceremony, the school has the obligation to promptly inform the student of any problem involving the latter's grades and performance and also most importantly, of the procedures for remedying the same.

Petitioner, in belatedly informing respondent of the result of the removal examination, particularly at a time when he had already commenced preparing for the bar exams, cannot be said to have acted in good faith. Absence of good faith must be sufficiently established for a successful prosecution by the aggrieved party in a suit for abuse of right under Article 19 of the Civil Code. Good faith connotes an honest intention to abstain from taking undue advantage of another, even though the forms and technicalities of the law, together with the absence of all information or belief of facts, would render the transaction unconscientious. It is the school that has access to those information and it is only the school that can compel its professors to act and comply with its rules, regulations and policies with respect to the computation and the prompt submission of grades. Students do not exercise control, much less influence, over the way an educational institution should run its affairs, particularly in disciplining its professors and teachers and ensuring their compliance with the school's rules and orders. Being the party that hired them, it is the school that exercises general supervision and exclusive control over the professors with respect to the submission of reports involving the students' standing. Exclusive control means that no other person or entity had any control over the instrumentality which caused the damage or injury.

The college dean is the senior officer responsible for the operation of an academic program, enforcement of rules and regulations, and the supervision of faculty and student services. He must see to it that his own professors and teachers, regardless of their status or position outside of the university, must comply with the rules set by the latter. The negligent act of a professor who fails to observe the rules of the school, for instance by not promptly submit-

ting a student's grade, is not only imputable to the professor but is an act of the school, being his employer.

Considering further, that the institution of learning involved herein is a university which is engaged in legal education, it should have practiced what it inculcates in its students, more specifically the principle of good dealings enshrined in Articles 19 and 20 of the Civil Code which states:

x x x

Article 19 was intended to expand the concept of torts by granting adequate legal remedy for the untold number of moral wrongs which is impossible for human foresight to provide specifically in statutory law. In civilized society, men must be able to assume that others will do them no intended injury — that others will commit no internal aggressions upon them; that their fellowmen, when they act affirmatively will do so with due care which the ordinary understanding and moral sense of the community exacts and that those with whom they deal in the general course of society will act in good faith. The ultimate thing in the theory of liability is justifiable reliance under conditions of civilized society. Schools and professors cannot just take students for granted and be indifferent to them, for without the latter, the former are useless.

Educational institutions are duty-bound to inform the students of their academic status and not wait for the latter to inquire from the former. The conscious indifference of a person to the rights or welfare of the person/persons who may be affected by his act or omission can support a claim for damages. Want of care to the conscious disregard of civil obligations coupled with a conscious knowledge of the cause naturally calculated to produce them would make the erring party liable. Petitioner ought to have known that time was of the essence in the performance of its obligation to inform respondent of his grade. It cannot feign ignorance that respondent will not prepare himself for the bar exams since that is precisely the immediate concern after graduation of an LL.B. graduate. It failed to act seasonably. Petitioner cannot just give out its student's grades at any time because a student has to comply with certain deadlines set by the Supreme Court on the submission of requirements for taking the bar. Petitioner's liability arose from its failure to promptly inform respondent of the result of an examination and in misleading the latter into believing that he had satisfied all requirements for the course. Worth quoting is the following disquisition of the respondent court:

"It is apparent from the testimony of Dean Tiongson that defendant-appellee University had been informed during the deliberation that the professor in Practice Court I gave plaintiff-appellant a failing grade. Yet, defendant-appellee still did not inform plaintiff-appellant of his failure to complete the requirements for the degree nor did they remove his name from the tentative list of candidates for graduation. Worse, defendant-appellee university, despite the knowledge that plaintiff-appellant failed in Practice Court I, again included plaintiff-appellant's name in the "tentative" list of

candidates for graduation which was prepared after the deliberation and which became the basis for the commencement rites program. Dean Tiongson reasons out that plaintiff-appellant's name was allowed to remain in the tentative list of candidates for graduation in the hope that the latter would still be able to remedy the situation in the remaining few days before graduation day. Dean Tiongson, however, did not explain how plaintiff-appellant Jader could have done something to complete his deficiency if defendant-appellee university did not exert any effort to inform plaintiff-appellant of his failing grade in Practice Court I."

Petitioner cannot pass on its blame to the professors to justify its own negligence that led to the delayed relay of information to respondent. When one of two innocent parties must suffer, he through whose agency the loss occurred must bear it. The modern tendency is to grant indemnity for damages in cases where there is abuse of right, even when the act is not illicit. If mere fault or negligence in one's acts can make him liable for damages for injury caused thereby, with more reason should abuse or bad faith make him liable. A person should be protected only when he acts in the legitimate exercise of his right, that is, when he acts with prudence and in good faith, but not when he acts with negligence or abuse.

However, while petitioner was guilty of negligence and thus liable to respondent for the latter's actual damages, we hold that respondent should not have been awarded moral damages. We do not agree with the Court of Appeals' findings that respondent suffered shock, trauma and pain when he was informed that he could not graduate and will not be allowed to take the bar examinations. At the very least, it behooved on respondent to verify for himself whether he has completed all necessary requirements to be eligible for the bar examinations. As a senior law student, respondent should have been responsible enough to ensure that all his affairs, specifically those pertaining to his academic achievement, are in order. Given these considerations, we fail to see how respondent could have suffered untold embarrassment in attending the graduation rites, enrolling in the bar review classes and not being able to take the bar exams. If respondent was indeed humiliated by his failure to take the bar, he brought this upon himself by not verifying if he has satisfied all the requirements including his school records, before preparing himself for the bar examination. Certainly, taking the bar examinations does not only entail a mental preparation on the subjects thereof; there are also prerequisites of documentation and submission of requirements which the prospective examinee must meet.

ARTURO P. VALENZUELA, et al. vs. THE HONORABLE COURT OF APPEALS, et al.
G.R. No. 83122, October 19, 1990

The antecedent facts of the case are as follows:

Petitioner Arturo P. Valenzuela (Valenzuela for short) is a General Agent of private respondent Philippine American General Insurance Com-

pany, Inc. (Philamgen for short) since 1965. As such, he was authorized to solicit and sell in behalf of Philamgen all kinds of non-life insurance, and in consideration of services rendered was entitled to receive the full agent's commission of 32.5% from Philamgen under the scheduled commission rates (Exhibits "A" and "1"). From 1973 to 1975, Valenzuela solicited marine insurance from one of his clients, the Delta Motors, Inc. (Division of Electronics Airconditioning and Refrigeration) in the amount of P4.4 Million from which he was entitled to a commission of 32% (Exhibit "B"). However, Valenzuela did not receive his full commission which amounted to P1.6 Million from the P4.4 Million insurance coverage of the Delta Motors. During the period 1976 to 1978, premium payments amounting to P1,946,886.00 were paid directly to Philamgen and Valenzuela's commission to which he is entitled amounted to P632,737.00.

In 1977, Philamgen started to become interested in and expressed its intent to share in the commission due Valenzuela (Exhibits "III" and "III-1") on a fifty-fifty basis (Exhibit "C"). Valenzuela refused (Exhibit "D").

On February 8, 1978 Philamgen and its President, Bienvenido M. Aragon insisted on the sharing of the commission with Valenzuela (Exhibit E). This was followed by another sharing proposal dated June 1, 1978. On June 16, 1978, Valenzuela firmly reiterated his objection to the proposals of respondents stating that: "It is with great reluctance that I have to decline upon request to signify my conformity to your alternative proposal regarding the payment of the commission due me. However, I have no choice for to do otherwise would be violative of the Agency Agreement executed between our goodselves." (Exhibit B-1)

Because of the refusal of Valenzuela, Philamgen and its officers, namely: Bienvenido Aragon, Carlos Catolico and Robert E. Parnell took drastic action against Valenzuela. They: (a) reversed the commission due him by not crediting in his account the commission earned from the Delta Motors, Inc. insurance (Exhibit "J" and "2"); (b) placed agency transactions on a cash-and-carry basis; (c) threatened the cancellation of policies issued by his agency (Exhibits "H" to "H-2"); and (d) started to leak out news that Valenzuela has a substantial account with Philamgen. All of these acts resulted in the decline of his business as insurance agent (Exhibits "N," "O," "K" and "K-8"). Then on December 27, 1978, Philamgen terminated the General Agency Agreement of Valenzuela (Exhibit "J," pp. 1-3, Decision Trial Court dated June 23, 1986, Civil Case No. 121126, Annex I, Petition).

x x x

After a painstaking review of the entire records of the case and the findings of facts of both the court *a quo* and respondent appellate court, we are constrained to affirm the trial court's findings and rule for the petitioners.

We agree with the court *a quo* that the principal cause of the termination of Valenzuela as General Agent of Philamgen arose from his refusal to share his Delta commission. The records sustain the conclusions of the trial court on the apparent bad faith of the private respondents in terminating the

General Agency Agreement of petitioners. It is axiomatic that the findings of fact of a trial judge are entitled to great weight *(People vs. Atanacio, 128 SCRA 22 [1984])* and should not be disturbed on appeal unless for strong and cogent reasons because the trial court is in a better position to examine the evidence as well as to observe the demeanor of the witnesses while testifying. *(Chase vs. Buencamino, Sr., 136 SCRA 365 [1985]; People vs. Pimentel, 147 SCRA 25 [1987]*; and *Baliwag Trans., Inc. vs. Court of Appeals, 147 SCRA 82 [1987])*. In the case at bar, the records show that the findings and conclusions of the trial court are supported by substantial evidence and there appears to be no cogent reason to disturb them. *(Mendoza vs. Court of Appeals, 156 SCRA 597 [1987])*.

As early as September 30, 1977, Philamgen told the petitioners of its desire to share the Delta Commission with them. It stated that should Delta back out from the agreement, the petitioners would be charged interests through a reduced commission after full payment by Delta.

On January 23, 1978 Philamgen proposed reducing the petitioners' commissions by 50% thus giving them an agent's commission of 16.25%. On February 8, 1978, Philamgen insisted on the reduction scheme followed on June 1, 1978 by still another insistence on reducing commissions and proposing two alternative schemes for reduction. There were other pressures. Demands to settle accounts, to confer and thresh out differences regarding the petitioners' income and the threat to terminate the agency followed. The petitioners were told that the Delta commissions would not be credited to their account (Exhibit "J"). They were informed that the Valenzuela agency would be placed on a cash and carry basis thus removing the 60-day credit for premiums due. (TSN, March 26, 1979, pp. 54-57). Existing policies were threatened to be cancelled. (Exhibits "H" and "14"; TSN, March 26, 1979, pp. 29-30). The Valenzuela business was threatened with diversion to other agencies. (Exhibit "NNN"). Rumors were also spread about alleged accounts of the Valenzuela agency. (TSN, January 25, 1980, p. 41). The petitioners consistently opposed the pressures to hand over the agency or half of their commissions and for a treatment of the Delta account distinct from other accounts. The pressures and demands, however, continued until the agency agreement itself was finally terminated.

It is also evident from the records that the agency involving petitioner and private respondent is one "coupled with an interest," and, therefore, should not be freely revocable at the unilateral will of the latter.

In the insurance business in the Philippines, the most difficult and frustrating period is the solicitation and persuasion of the prospective clients to buy insurance policies. Normally, agents would encounter much embarrassment, difficulties, and oftentimes frustrations in the solicitation and procurement of the insurance policies. To sell policies, an agent exerts great effort, patience, perseverance, ingenuity, tact, imagination, time and money. In the case of Valenzuela, he was able to build up an agency from scratch in 1965 to a highly productive enterprise with gross billings of about Two Million Five Hundred Thousand Pesos (P2,500,000.00) premiums per annum.

The records sustain the finding that the private respondent started to covet a share of the insurance business that Valenzuela had built up, developed and nurtured to profitability through over thirteen (13) years of patient work and perseverance. When Valenzuela refused to share his commission in the Delta account, the boom suddenly fell on him.

The private respondents by the simple expedient of terminating the General Agency Agreement appropriated the entire insurance business of Valenzuela. With the termination of the General Agency Agreement, Valenzuela would no longer be entitled to commission on the renewal of insurance policies of clients sourced from his agency. Worse, despite the termination of the agency, Philamgen continued to hold Valenzuela jointly and severally liable with the insured for unpaid premiums. Under these circumstances, it is clear that Valenzuela had an interest in the continuation of the agency when it was unceremoniously terminated not only because of the commissions he should continue to receive from the insurance business he has solicited and procured but also for the fact that by the very acts of the respondents, he was made liable to Philamgen in the event the insured fail to pay the premiums due. They are estopped by their own positive averments and claims for damages. Therefore, the respondents cannot state that the agency relationship between Valenzuela and Philamgen is not coupled with interest. "There may be cases in which an agent has been induced to assume a responsibility or incur a liability, in reliance upon the continuance of the authority under such circumstances that, if the authority be withdrawn, the agent will be exposed to personal loss or liability." *(See MEC 569 p. 406).*

Furthermore, there is an exception to the principle that an agency is revocable at will and that is when the agency has been given not only for the interest of the principal but for the interest of third persons or for the mutual interest of the principal and the agent. In these cases, it is evident that the agency ceases to be freely revocable by the sole will of the principal. *(See Padilla, Civil Code Annotated, 56 ed., Vol. IV, p. 350).*

x x x

At any rate, the question of whether or not the agency agreement is coupled with interest is helpful to the petitioners' cause but is not the primary and compelling reason. For the pivotal factor rendering Philamgen and the other private respondents liable in damages is that the termination by them of the General Agency Agreement was tainted with bad faith. Hence, if a principal acts in bad faith and with abuse of right in terminating the agency, then he is liable in damages. This is in accordance with the precepts in Human Relations enshrined in our Civil Code that 'every person must in the exercise of his rights and in the performance of his duties act with justice, give every one his due, and observe honesty and good faith (Art. 19, Civil Code), and every person who, contrary to law, wilfully or negligently causes damages to another, shall indemnify the latter for the same. *(Art. 20, id.).* 'Any person who wilfully causes loss or injury to another in a manner contrary to morals, good customs and public policy shall compensate the latter for the damages.' *(Art. 21, id.)*"

4. ACTS CONTRA BONUS MORES

> *"Art. 21. Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for damages."*

A. GENERAL CONCEPTS.

The cases cited in the preceding section involving abuse of right likewise involve acts *contra bonus mores* under Article 21 of the Civil Code. The *Albenson Enterprises* case cites the following elements of acts *contra bonus mores*: 1) There is an act which is legal; 2) but which is contrary to morals, good custom, public order, or public policy; 3) and it is done with intent to injure. These elements are present in the cases presented hereunder.

B. BREACH OF PROMISE TO MARRY.

As a general rule, breach of promise to marry by itself is not actionable. However, it becomes actionable if there are additional circumstances which make it fall within the purview of Articles 19, 20, 21 or 2176 of the New Civil Code. In such cases, there is another act independent of the breach of promise to marry which gives rise to liability. These include cases where (1) there was financial damage, (2) social humiliation was caused to one of the parties, and (3) where there was moral seduction.

Thus, an action can be maintained if the plaintiff incurred expenses for the wedding and other incidents thereof. *(De Jesus vs. Syquia, 58 Phil. 866).* An action is also warranted if the defendant and the plaintiff formally set the wedding and went through all the preparations and publicity but the defendant walked out of it when the matrimony was about to be solemnized. *(Wassmer vs. Velez, 12 SCRA 648 [1964]).*

A civil case for damages may also prosper if there is seduction. *(Gashem Shookat Baksh vs. Court of Appeals, et al., February 19, 1993).* Seduction may be criminal or mere moral seduction. Moral seduction, although not punishable, connotes essentially the idea of deceit, enticement, superior power or abuse of confidence on the part of the seducer to which the woman has yielded. *(ibid.*, citing *U.S. vs. Buenaventura, 27 Phil. 121; U.S. vs. Arlante, 9 Phil. 595).*

Additionally, the action may prosper if the breach was done in such a manner which is clearly contrary to good morals. The Supreme Court sustained the liability of the defendant in *Bunag, Jr. vs. Court of Appeals (211 SCRA 441, 448-449 [1992])* explaining that:

> "It is true that in this jurisdiction, we adhere to the time-honored rule that an action for breach of promise to marry has no standing in the civil law, apart from the right to recover money or property advanced by the plaintiff upon the faith of such promise. Generally, therefore, a breach of promise to marry *per se* is not actionable, except where the plaintiff has actually incurred expenses for the wedding and the necessary incidents thereof.
>
> However, the award of moral damages is allowed in cases specified in or analogous to those provided in Article 2219 of the Civil Code. Correlatively, under Article 21 of said Code, in relation to paragraph 10 of said Article 2219, any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for moral damages. Article 21 was adopted to remedy the countless gaps in the statutes which leave so many victims of moral wrongs helpless even though they have actually suffered material and moral injury, and is intended to vouchsafe adequate legal remedy for that untold number of moral wrongs which is impossible for human foresight to specifically provide for in the statutes.
>
> Under the circumstances obtaining in the case at bar, the acts or petitioner in forcibly abducting private respondent and having carnal knowledge with her against her will, and thereafter promising to marry her in order to escape criminal liability, only to thereafter renege on such promise after cohabiting with her for twenty-one days, irremissibly constitutes acts contrary to morals and good customs. These are grossly insensate and reprehensible transgressions which indisputably warrant and abundantly justify the award of moral and exemplary damages, pursuant to Article 21, in relation to paragraphs 3 and 10, Article 2219, and Articles 2229 and 2234 of the Civil Code."

On the other hand, the Supreme Court rejected the claim for damages in *Constantino vs. Mendez* (G.R. No. 57227, May 14, 1992.) because there appeared to be no moral seduction. The Supreme Court ruled that:

> "As regards Amelita's claim for damages which is based on Articles 193 and 214 of the Civil Code on the theory that through Ivan's promise of marriage, she surrendered her virginity, we cannot but agree with the Court of Appeals that mere sexual intercourse is not by itself a basis for recovery. Damages

could only be awarded if sexual intercourse is not a product of voluntariness and mutual desire. At the time she met Ivan at Tony's Restaurant, Amelita was already 28 years old and she admitted that she was attracted to Ivan. *(TSN, December 8, 1975, p. 83)*. Her attraction to Ivan is the reason why she surrendered her womanhood. Had she been induced or deceived because of a promise of marriage, she could have immediately severed her relation with Ivan when she was informed after their first sexual contact sometime in August, 1974, that he was a married man. Her declaration that in the months of September, October and November, 1974, they repeated their sexual intercourse only indicates that passion and not the alleged promise of marriage was the moving force that made her submit herself to Ivan."

CASES:

APOLONIO TANJANCO vs. HON. COURT OF APPEALS and ARACELI SANTOS G.R. No. L-18630, December 17, 1966

The essential allegations of the complaint are to the effect that, from December, 1957, the defendant (appellee herein), Apolonio Tanjanco, courted the plaintiff, Araceli Santos, both being of adult age; that "defendant expressed and professed his undying love and affection for plaintiff who also in due time, reciprocated the tender feelings"; that in consideration of defendant's promises of marriage plaintiff consented and acceded to defendant's pleas for carnal knowledge; that regularly until December 1959, through his protestations of love and promises of marriage, defendant succeeded in having carnal access to plaintiff, as a result of which the latter conceived a child; that due to her pregnant condition, to avoid embarrassment and social humiliation, plaintiff had to resign her job as secretary in IBM Philippines, Inc., where she was receiving P230.00 a month; that thereby plaintiff became unable to support herself and her baby; that due to defendant's refusal to marry plaintiff, as promised, the latter suffered mental anguish, besmirched reputation, wounded feelings, moral shock, and social humiliation. The prayer was for a decree compelling the defendant to recognize the unborn child that plaintiff was bearing; to pay her not less than P430.00 a month for her support and that of her baby, plus P100,000.00 in moral and exemplary damages, plus P10,000.00 attorney's fees.

[The trial court dismissed the complaint for failure to state a cause of action. The plaintiff appealed to the Court of Appeals, and the latter ultimately decided the case, holding with the lower court that no cause of action was shown to compel recognition of a child as yet unborn, nor for its support, but decreed that the complaint did state a cause of action for damages, premised on Article 21 of the Civil Code of the Philippines.]

x x x

In holding that the complaint stated a cause of action for damages, under Article 21 above mentioned, the Court of Appeals relied upon and quoted from the memorandum submitted by the Code Commission to the Legislature in 1949 to support the original draft of the Civil Code. Referring to Article 23 of the draft (now Article 21 of the Code), the Commission stated:

"But the Code Commission has gone farther than the sphere of wrongs defined or determined by positive law. Fully sensible that there are countless gaps in the statutes, which leave so many victims of moral wrongs helpless, even though they have actually suffered material and moral injury, the Commission has deemed it necessary, in the interest of justice, to incorporate in the proposed Civil Code the following rule:

'ART. 23. Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for damage.'

"An example will illustrate the purview of the foregoing norm: 'A' seduces the nineteen year-old daughter of 'X.' A promise of marriage either has not been made, or can not be proved. The girl becomes pregnant. Under the present laws, there is no crime, as the girl is above eighteen years of age. Neither can any civil action for breach of promise of marriage be filed. Therefore, though the grievous moral wrong has been committed, and though the girl and her family have suffered incalculable moral damage, she and her parents cannot bring any action for damages. But under the proposed article, she and her parents would have such a right of action."

The Court of Appeals seems to have overlooked that the example set forth in the Code Commission's memorandum refers to a tort upon a minor who has been seduced. The essential feature is seduction, that in law is more than mere sexual intercourse, or a breach of a promise of marriage; it connotes essentially the idea of deceit, enticement, superior power or abuse of confidence on the part of the seducer to which the woman has yielded. *(U.S. vs. Buenaventura, 27 Phil. 121; U.S. vs. Arlante, 9 Phil. 595).*

It has been ruled in the *Buenaventura* case *(supra)* that —

"To constitute seduction there must in all cases be some sufficient promise or inducement and the woman must yield because of the promise or other inducement. If she consents merely from carnal lust and the intercourse is from mutual desire, there is no seduction. *(43 Cent Dig. tit. Seduction, par. 56).* She must be induced to depart from the path of virtue by the use of some species of arts, persuasions and wiles, which are calculated to have and do have that effect, and which result in her ultimately submitting her person to the sexual embraces of her seducer." *(27 Phil. 123).*

And in American Jurisprudence we find:

"On the other hand, in an action by the woman, the enticement, persuasion or deception is the essence of the injury; and a mere proof of intercourse

is insufficient to warrant a recovery.

Accordingly, it is not seduction where the willingness arises out of sexual desire or curiosity of the female, and the defendant merely affords her the needed opportunity for the commission of the act. It has been emphasized that to allow a recovery in all such cases would tend to the demoralization of the female sex, and would be a reward for unchastity by which a class of adventuresses would be swift to profit." *(47 Am. Jur. 662)*

Bearing these principles in mind, let us examine the complaint. The material allegations there are as follows:

"I. That the plaintiff is of legal age, single, and residing at 56 South E. Diliman, Quezon City, while defendant is also of legal age, single, and residing at 525 Padre Faura, Manila, where he may be served with summons;

II. That the plaintiff and the defendant became acquainted with each other sometime in December, 1957 and soon thereafter, the defendant started visiting and courting the plaintiff;

III. That the defendant's visits were regular and frequent and in due time the defendant expressed and professed his undying love and affection for the plaintiff who also in due time reciprocated the tender feelings;

IV. That in the course of their engagement, the plaintiff and the defendant as are wont of young people in love had frequent outings and dates, became very close and intimate to each other and sometime in July, 1958, in consideration of the defendant's promises of marriage, the plaintiff consented and acceded to the former's earnest and repeated pleas to have carnal knowledge with him;

V. That subsequent thereto and regularly until about July, 1959 except for a short period in December, 1958 when the defendant was out of the country, the defendant through his protestations, of love and promises of marriage succeeded in having carnal knowledge with plaintiff;

VI. That as a result of their intimate relationship, the plaintiff started conceiving which was confirmed by a doctor sometime in July, 1959;

VII. That upon being certain of her pregnant condition, the plaintiff informed the defendant and pleaded with him to make good his promises of marriage, but instead of honoring his promises and righting his wrong, the defendant stopped and refrained from seeing the plaintiff, since about July, 1959 has not visited the plaintiff and to all intents and purposes has broken their engagement and his promises."

Over and above the partisan allegations, the facts stand out that for one whole year, from 1958 to 1959, the plaintiff-appellee, a woman of adult age, maintained intimate sexual relations with appellant, with repeated acts of intercourse. Such conduct is incompatible with the idea of seduction. Plainly, there is here voluntariness and mutual passion; for had the appellant been deceived, had she surrendered exclusively because of the deceit, artful

persuasions and wiles of the defendant, she would not have again yielded to his embraces, much less for one year, without exacting early fulfillment of the alleged promises of marriage, and would have cut short all sexual relations upon finding that defendant did not intend to fulfill his promises. Hence, we conclude that no case is made under Article 21 of the Civil Code, and no other cause of action being alleged, no error was committed by the Court of First Instance in dismissing the complaint.

Of course, the dismissal must be understood as without prejudice to whatever actions may correspond to the child of the plaintiff against the defendant-appellant, if any. On that point, this Court makes no pronouncement, since the child's own rights are not here involved.

GASHEM SHOOKAT BAKSH vs. HON. COURT OF APPEALS and MARILOU T. GONZALES
G.R. No. 97336, February 19, 1993

The antecedents of this case are not complicated:

On 27 October 1987, private respondent, without the assistance of counsel, filed with the aforesaid trial court a complaint for damages against the petitioner for the alleged violation of their agreement to get married. She alleges in said complaint that: she is twenty-two (22) years old, single, Filipino and a pretty lass of good moral character and reputation duly respected in her community; petitioner, on the other hand, is an Iranian citizen residing at the Lozano Apartments, Guilig, Dagupan City, and is an exchange student taking a medical course at the Lyceum Northwestern Colleges in Dagupan City; before 20 August 1987, the latter courted and proposed to marry her; she accepted his love on the condition that they would get married; they therefore agreed to get married after the end of the school semester, which was in October of that year; petitioner then visited the private respondent's parents in Bañaga, Bugallon, Pangasinan to secure their approval to the marriage; sometime in 20 August 1987, the petitioner forced her to live with him in the Lozano Apartments; she was a virgin before she began living with him; a week before the filing of the complaint, petitioner's attitude towards her started to change; he maltreated and threatened to kill her; as a result of such maltreatment, she sustained injuries, during a confrontation with a representative of the barangay captain of Guilig a day before the filing of the complaint, petitioner repudiated their marriage agreement and asked her not to live with him anymore and; the petitioner is already married to someone living in Bacolod City. Private respondent then prayed for judgment ordering the petitioner to pay her damages in the amount of not less than P45,000.00, reimbursement for actual expenses amounting to P600.00, attorney's fees and costs, and granting her such other relief and remedies as may be just and equitable. The complaint was docketed as Civil Case No 16503.

In his Answer with Counterclaim, petitioner admitted only the personal

circumstances of the parties as averred in the complaint and denied the rest of the allegations either for lack of knowledge or information sufficient to form a belief as to the truth thereof or because the true facts are those alleged as his Special and Affirmative Defenses. He thus claimed that he never proposed marriage to or agreed to be married with the private respondent; he neither sought the consent and approval of her parents nor forced her to live in his apartment; he did not maltreat her, but only told her to stop coming to his place because he discovered that she had deceived him by stealing his money and passport; and finally, no confrontation took place with a representative of the barangay captain. Insisting, in his Counterclaim, that the complaint is baseless and unfounded and that as a result thereof, he was unnecessarily dragged into court and compelled to incur expenses, and has suffered mental anxiety and a besmirched reputation, he prayed for an award of P5,000.00 for miscellaneous expenses and P25,000.00 as moral damages.

After conducting a pre-trial on 25 January 1988, the trial court issued a Pre-Trial Order embodying the stipulated facts which the parties had agreed upon, to wit:

"1. That the plaintiff is single and resident (sic) of Bañaga, Bugallon, Pangasinan, while the defendant is single, Iranian citizen and resident (sic) of Lozano Apartment, Guilig, Dagupan City since September 1, 1987 up to the present;

2. That the defendant is presently studying at Lyceum-Northwestern, Dagupan City, College of Medicine, second year medicine proper.

3. That the plaintiff is (sic) an employee at Mabuhay Luncheonette, Fernandez Avenue, Dagupan City since July, 1986 up to the present and a (sic) high school graduate;

4. That the parties happened to know each other when the Manager of the Mabuhay Luncheonette, Johnny Rabino introduced the defendant to the plaintiff on August 3, 1986."

[The trial court ordered the petitioner to pay the latter damages and attorney's fees.]

x x x

The decision is anchored on the trial court's findings and conclusions that (a) petitioner and private respondent were lovers, (b) private respondent is not a woman of loose morals or questionable virtue who readily submits to sexual advances, (c) petitioner, through machinations, deceit and false pretenses, promised to marry private respondent, (d) because of his persuasive promise to marry her, she allowed herself to be deflowered by him, (e) by reason of that deceitful promise, private respondent and her parents — in accordance with Filipino customs and traditions — made some preparations for the wedding, that was to be held at the end of October 1987, by looking for pigs and chickens, inviting friends and relatives and contracting sponsors, (f) petitioner did not fulfill his promise to marry her and (g) such acts of the

petitioner, who is a foreigner and who has abused Philippine hospitality, have offended our sense of morality, good customs, culture and traditions. The trial court gave full credit to the private respondent's testimony because, *inter alia*, she would not have had the temerity and courage to come to court and expose her honor and reputation to public scrutiny and ridicule if her claim was false.

The above findings and conclusions were culled from the detailed summary of the evidence for the private respondent in the foregoing decision, digested by the respondent Court as follows:

"According to plaintiff, who claimed that she was a virgin at the time and that she never had a boyfriend before, defendant started courting her just a few days after they first met. He later proposed marriage to her several times and she accepted his love as well as his proposal of marriage on August 20, 1987, on which same day he went with her to her hometown of Banaga, Bugallon, Pangasinan, as he wanted to meet her parents and inform them of their relationship and their intention to get married. The photographs Exhs. "A" to "E" (and their submarkings) of defendant with members of plaintiff's family or with plaintiff, were taken that day. Also on that occasion, defendant told plaintiff's parents and brothers and sisters that he intended to marry her during the semestral break in October, 1987, and because plaintiff's parents thought he was good and trusted him, they agreed to his proposal for him to marry their daughter, and they likewise allowed him to stay in their house and sleep with plaintiff during the few days that they were in Bugallon. When plaintiff and defendant later returned to Dagupan City, they continued to live together in defendant's apartment. However, in the early days of October, 1987, defendant would tie plaintiff's hands and feet while he went to school, and he even gave her medicine at 4 o'clock in the morning that made her sleep the whole day and night until the following day. As a result of this live-in relationship, plaintiff became pregnant, but defendant gave her some medicine to abort the foetus. Still plaintiff continued to live with defendant and kept reminding him of his promise to marry her until he told her that he could not do so because he was already married to a girl in Bacolod City. That was the time plaintiff left defendant, went home to her parents, and thereafter consulted a lawyer who accompanied her to the barangay captain in Dagupan City. Plaintiff, her lawyer, her godmother, and a barangay tanod sent by the barangay captain went to talk to defendant to still convince him to marry plaintiff, but defendant insisted that he could not do so because he was already married to a girl in Bacolod City, although the truth, as stipulated by the parties at the pre-trial, is that defendant is still single.

Plaintiff's father, a tricycle driver, also claimed that after defendant had informed them of his desire to marry Marilou, he already looked for sponsors for the wedding, started preparing for the reception by looking for pigs and chickens, and even already invited many relatives and friends to the forthcoming wedding."

Petitioner appealed the trial court's decision to the respondent Court

of Appeals which docketed the case as CA-G.R. CV No. 24256. In his Brief, he contended that the trial court erred (a) in not dismissing the case for lack of factual and legal basis and (b) in ordering him to pay moral damages, attorney's fees, litigation expenses and costs.

On 18 February 1991, respondent Court promulgated the challenged decision affirming *in toto* the trial court's ruling of 16 October 1989. In sustaining the trial court's findings of fact, respondent Court made the following analysis:

"First of all, plaintiff, then only 21 years old when she met defendant who was already 23 years old at the time, does not appear to be a girl of loose morals. It is uncontradicted that she was a virgin prior to her unfortunate experience with defendant and never had a boyfriend. She is, as described by the lower court, a barrio lass 'not used and accustomed to the trend of modern urban life,' and certainly would (sic) not have allowed 'herself to be deflowered by the defendant if there was no persuasive promise made by the defendant to marry her.' In fact, we agree with the lower court that plaintiff and defendant must have been sweethearts or so the plaintiff must have thought because of the deception of defendant, for otherwise, she would not have allowed herself to be photographed with defendant in public in so (sic) loving and tender poses as those depicted in the pictures Exhs. "D" and "E." We cannot believe, therefore, defendant's pretense that plaintiff was a nobody to him except a waitress at the restaurant where he usually ate. Defendant in fact admitted that he went to plaintiff's hometown of Banaga, Bugallon, Pangasinan, at least thrice; at (sic) the town fiesta on February 27, 1987 (p. 54, tsn May 18, 1988), at (sic) a beach party together with the manager and employees of the Mabuhay Luncheonette on March 3, 1987 (p. 50, tsn, *id*.), and on April 1, 1987 when he allegedly talked to plaintiff's mother who told him to marry her daughter (pp. 55-56, tsn, *id*.). Would defendant have left Dagupan City where he was involved in the serious study of medicine to go to plaintiff's hometown in Banaga, Bugallon, unless there was (sic) some kind of special relationship between them? And this special relationship must indeed have led to defendant's insincere proposal of marriage to plaintiff, communicated not only to her but also to her parents, and (sic) Marites Rabino, the owner of the restaurant where plaintiff was working and where defendant first proposed marriage to her, also knew of this love affair and defendant's proposal of marriage to plaintiff, which she declared was the reason why plaintiff resigned from her job at the restaurant after she had accepted defendant's proposal. (pp. 6-7, tsn, March 7, 1988).

Upon the other hand, appellant does not appear to be a man of good moral character and must think so low and have so little respect and regard for Filipino women that he openly admitted that when he studied in Bacolod City for several years where he finished his B.S. Biology before he came to Dagupan City to study medicine, he had a common-law wife in Bacolod City. In other words, he also lived with another woman in Bacolod City but did not marry that woman, just like what he did to plaintiff. It is not surprising, then, that he felt so little compunction or remorse in pretending to love and

promising to marry plaintiff, a young, innocent, trustful country girl, in order to satisfy his lust on her."

And then concluded:

"In sum, we are strongly convinced and so hold that it was defendant-appellant's fraudulent and deceptive protestations of love for and promise to marry plaintiff that made her surrender her virtue and womanhood to him and to live with him on the honest and sincere belief that he would keep said promise, and it was likewise these (sic) fraud and deception on appellant's part that made plaintiff's parents agree to their daughter's living-in with him preparatory to their supposed marriage. And as these acts of appellant are palpably and undoubtedly against morals, good customs, and public policy, and are even gravely and deeply derogatory and insulting to our women, coming as they do from a foreigner who has been enjoying the hospitality of our people and taking advantage of the opportunity to study in one of our institutions of learning, defendant-appellant should indeed be made, under Art. 21 of the Civil Code of the Philippines, to compensate for the moral damages and injury that he had caused plaintiff, as the lower court ordered him to do in its decision in this case."

Unfazed by his second defeat, petitioner filed the instant petition on 26 March 1991; he raises therein the single issue of whether or not Article 21 of the Civil Code applies to the case at bar.

It is petitioner's thesis that said Article 21 is not applicable because he had not committed any moral wrong or injury or violated any good custom or public policy; he has not professed love or proposed marriage to the private respondent; and he has never maltreated her. He criticizes the trial court for liberally invoking Filipino customs, traditions and culture, and ignoring the fact that since he is a foreigner, he is not conversant with such Filipino customs, traditions and culture. As an Iranian Moslem, he is not familiar with Catholic and Christian ways. He stresses that even if he had made a promise to marry, the subsequent failure to fulfill the same is excusable or tolerable because of his Moslem upbringing; he then alludes to the Muslim Code which purportedly allows a Muslim to take four (4) wives and concludes that on the basis thereof, the trial court erred in ruling that he does not possess good moral character. Moreover, his controversial "common law wife" is now his legal wife as their marriage had been solemnized in civil ceremonies in the Iranian Embassy. As to his unlawful cohabitation with the private respondent, petitioner claims that even if responsibility could be pinned on him for the live-in relationship, the private respondent should also be faulted for consenting to an illicit arrangement. Finally, petitioner asseverates that even if it was to be assumed *arguendo* that he had professed his love to the private respondent and had also promised to marry her, such acts would not be actionable in view of the special circumstances of the case. The mere breach of promise is not actionable.

On 26 August 1991, after the private respondent had filed her Comment

to the petition and the petitioner had filed his Reply thereto, this Court gave due course to the petition and required the parties to submit their respective Memoranda, which they subsequently complied with.

As may be gleaned from the foregoing summation of the petitioner's arguments in support of his thesis, it is clear that questions of fact, which boil down to the issue of the credibility of witnesses, are also raised. It is the rule in this jurisdiction that appellate courts will not disturb the trial court's findings as to the credibility of witnesses, the latter court having heard the witnesses and having had the opportunity to observe closely their deportment and manner of testifying, unless the trial court had plainly overlooked facts of substance or value which, if considered, might affect the result of the case.

Petitioner has miserably failed to convince Us that both the appellate and trial courts had overlooked any fact of substance or value which could alter the result of the case.

x x x

The existing rule is that a breach of promise to marry *per se* is not an actionable wrong. Congress deliberately eliminated from the draft of the New Civil Code the provisions that would have made it so. The reason therefor is set forth in the report of the Senate Committee on the Proposed Civil Code, from which We quote:

"The elimination of this chapter is proposed. That breach of promise to marry is not actionable has been definitely decided in the case of *De Jesus vs. Syquia*. The history of breach of promise suits in the United States and in England has shown that no other action lends itself more readily to abuse by designing women and unscrupulous men. It is this experience which has led to the abolition of rights of action in the so-called Heart Balm suits in many of the American states."

This notwithstanding, the said Code contains a provision, Article 21, which is designed to expand the concept of torts or quasi-delict in this jurisdiction by granting adequate legal remedy for the untold number of moral wrongs which is impossible for human foresight to specifically enumerate and punish in the statute books.

x x x

In the light of the above laudable purpose of Article 21, We are of the opinion, and so hold, that where a man's promise to marry is in fact the proximate cause of the acceptance of his love by a woman and his representation to fulfill that promise thereafter becomes the proximate cause of the giving of herself unto him in a sexual congress, proof that he had, in reality, no intention of marrying her and that the promise was only a subtle scheme or deceptive device to entice or inveigle her to accept him and to obtain her consent to the sexual act, could justify the award of damages pursuant to Article 21 not because of such promise to marry but because of the fraud and deceit behind it and the willful injury to her honor and reputation which fol-

lowed thereafter. It is essential, however, that such injury should have been committed in a manner contrary to morals, good customs or public policy.

In the instant case, respondent Court found that it was the petitioner's "fraudulent and deceptive protestations of love for and promise to marry plaintiff that made her surrender her virtue and womanhood to him and to live with him on the honest and sincere belief that he would keep said promise, and it was likewise these fraud and deception on appellant's part that made plaintiff's parents agree to their daughter's living-in with him preparatory to their supposed marriage." In short, the private respondent surrendered her virginity, the cherished possession of every single Filipina, not because of lust but because of moral seduction — the kind illustrated by the Code Commission in its example earlier adverted to. The petitioner could not be held liable for criminal seduction punished under either Article 337 or Article 338 of the Revised Penal Code because the private respondent was above eighteen (18) years of age at the time of the seduction.

Prior decisions of this Court clearly suggest that Article 21 may be applied in a breach of promise to marry where the woman is a victim of moral seduction. Thus, in *Hermosisima vs. Court of Appeals*, this Court denied recovery of damages to the woman because:

> " . . . we find ourselves unable to say that petitioner is morally guilty of seduction, not only because he is approximately ten (10) years younger than the complainant — who was around thirty-six (36) years of age, and as highly enlightened as a former high school teacher and a life insurance agent are supposed to be — when she became intimate with petitioner, then a mere apprentice pilot, but, also, because the Court of First Instance found that, complainant 'surrendered herself' to petitioner because, 'overwhelmed by her love' for him, she 'wanted to bind' him 'by having a fruit of their engagement even before they had the benefit of clergy.'"

In *Tanjanco vs. Court of Appeals,* while this Court likewise hinted at possible recovery if there had been moral seduction, recovery was eventually denied because We were not convinced that such seduction existed.

x x x

In his annotations on the Civil Code, Associate Justice Edgardo L. Paras, who recently retired from this Court, opined that in a breach of promise to marry where there had been carnal knowledge, moral damages may be recovered:

> " . . . if there be criminal or moral seduction, but not if the intercourse was due to mutual lust. *(Hermosisima vs. Court of Appeals, L-14628, Sept. 30, 1960; Estopa vs. Piansay, Jr., L-14733, Sept. 30, 1960; Batarra vs. Marcos, 7 Phil. 56 (sic); Beatriz Galang vs. Court of Appeals, et al., L-17248, Jan. 29, 1962).* (In other words, if the CAUSE be the promise to marry, and the EFFECT be the carnal knowledge,

there is a chance that there was criminal or moral seduction, hence, recovery of moral damages will prosper. If it be the other way around, there can be no recovery of moral damages, because here, mutual lust has intervened). . . . ." together with "ACTUAL damages, should there be any, such as the expenses for the wedding preparations. (See *Domalagon vs. Bolifer*, *33 Phil. 471*)."

Senator Arturo M. Tolentino is also of the same persuasion:

> "It is submitted that the rule in *Batarra vs. Marcos*, still subsists, notwithstanding the incorporation of the present article 31 in the Code. The example given by the Code Commission is correct, if there was seduction, not necessarily in the legal sense, but in the vulgar sense of deception. But when the sexual act is accomplished without any deceit or qualifying circumstance of abuse of authority or influence, but the woman, already of age, has knowingly given herself to a man, it cannot be said that there is an injury which can be the basis for indemnity.

But so long as there is fraud, which is characterized by wilfullness (sic), the action lies. The court, however, must weigh the degree of fraud, if it is sufficient to deceive the woman under the circumstances, because an act which would deceive a girl sixteen years of age may not constitute deceit as to an experienced woman thirty years of age. But so long as there is a wrongful act and a resulting injury, there should be civil liability, even if the act is not punishable under the criminal law and there should have been an acquittal or dismissal of the criminal case for that reason."

We are unable to agree with the petitioner's alternative proposition to the effect that granting, for argument's sake, that he did promise to marry the private respondent, the latter is nevertheless also at fault. According to him, both parties are in *pari delicto*; hence, pursuant to Article 1412(1) of the Civil Code and the doctrine laid down in *Batarra vs. Marcos*, the private respondent cannot recover damages from the petitioner. The latter even goes as far as stating that if the private respondent had "sustained any injury or damage in their relationship, it is primarily because of her own doing," for:

> " . . . She is also interested in the petitioner as the latter will become a doctor sooner or later. Take notice that she is a plain high school graduate and a mere employee . . (Annex C) or a waitress (TSN, p. 51, January 25, 1988) in a luncheonette and without doubt, is in need of a man who can give her economic security. Her family is in dire need of financial assistance. (TSN, pp. 51-53, May 18, 1988). And this predicament prompted her to accept a proposition that may have been offered by the petitioner."

These statements reveal the true character and motive of the petitioner. It is clear that he harbors a condescending, if not sarcastic, regard for the private respondent on account of the latter's ignoble birth, inferior educational background, poverty and, as perceived by him, dishonorable employment. Obviously then, from the very beginning, he was not at all moved by good

faith and an honest motive. Marrying with a woman so circumstanced could not have even remotely occurred to him. Thus, his profession of love and promise to marry were empty words directly intended to fool, dupe, entice, beguile and deceive the poor woman into believing that indeed, he loved her and would want her to be his life's partner. His was nothing but pure lust which he wanted satisfied by a Filipina who honestly believed that by accepting his proffer of love and proposal of marriage, she would be able to enjoy a life of ease and security. Petitioner clearly violated the Filipino's concept of morality and so brazenly defied the traditional respect Filipinos have for their women. It can even be said that the petitioner committed such deplorable acts in blatant disregard of Article 19 of the Civil Code which directs every person to act with justice, give everyone his due and observe honesty and good faith in the exercise of his rights and in the performance of his obligations.

No foreigner must be allowed to make a mockery of our laws, customs and traditions.

The *pari delicto* rule does not apply in this case for while indeed, the private respondent may not have been impelled by the purest of intentions, she eventually submitted to the petitioner in sexual congress not out of lust, but because of moral seduction. In fact, it is apparent that she had qualms of conscience about the entire episode for as soon as she found out that the petitioner was not going to marry her after all, she left him. She is not, therefore, in *pari delicto* with the petitioner. *Pari delicto* means "in equal fault; in a similar offense or crime; equal in guilt or in legal fault." At most, it could be conceded that she is merely in *delicto*.

"Equity often interferes for the relief of the less guilty of the parties, where his transgression has been brought about by the imposition or undue influence of the party on whom the burden of the original wrong principally rests, or where his consent to the transaction was itself procured by fraud."

In *Mangayao vs. Lasud,* We declared:

"Appellants likewise stress that both parties being at fault, there should be no action by one against the other (Art. 1412, New Civil Code). This rule, however, has been interpreted as applicable only where the fault on both sides is, more or less, equivalent. It does not apply where one party is literate or intelligent and the other one is not. *(c.f. Bough vs. Cantiveros, 40 Phil. 209)*."

We should stress, however, that while We find for the private respondent, let it not be said that this Court condones the deplorable behavior of her parents in letting her and the petitioner stay together in the same room in their house after giving approval to their marriage. It is the solemn duty of parents to protect the honor of their daughters and infuse upon them the higher values of morality and dignity.

C. SEDUCTION AND SEXUAL ASSAULT.

Seduction, by itself, without breach of promise to marry is also an act which is contrary to morals, good customs and public policy. The defendant is liable if he employed deceit, enticement, superior power or abuse of confidence in successfully having sexual intercourse with another. He is liable even if he satisfied his lust without promising to marry the offended party. It may not even matter that the plaintiff and the defendant are of the same gender.

The defendant would be liable for all forms of sexual assault. These include the crimes defined under the Revised Penal Code as rape, acts of lasciviousness and seduction. Thus, liability may be imposed under Article 21 of the Civil Code if a married man forced a woman not his wife to yield to his lust. *(Quimiguing vs. Icao, 34 SCRA 132, 135 [1970]).*

CASE:

CECILIO PE, et al. vs. ALFONSO PE
G.R. No. L-17396, May 30, 1962

The facts as found by the trial court are: Plaintiffs are the parents, brothers and sisters of one Lolita Pe. At the time of her disappearance on April 14, 1957, Lolita was 24 years old and unmarried. Defendant is a married man and works as agent of the La Perla Cigar and Cigarette Factory. He used to stay in the town of Gasan, Marinduque, in connection with his aforesaid occupation. Lolita was staying with her parents in the same town. Defendant was an adopted son of a Chinaman named Pe Beco, a collateral relative of Lolita's father. Because of such fact and the similarity in their family name, defendant became close to the plaintiffs who regarded him as a member of their family. Sometime in 1952, defendant frequented the house of Lolita on the pretext that he wanted her to teach him how to pray the rosary. The two eventually fell in love with each other and conducted clandestine trysts not only in the town of Gasan but also in Boac where Lolita used to teach in a barrio school. They exchanged love notes with each other the contents of which reveal not only their infatuation for each other but also the extent to which they had carried their relationship. The rumors about their love affair reached the ears of Lolita's parents sometime in 1955, and since then defendant was forbidden from going to their house and from further seeing Lolita. The plaintiffs even filed deportation proceedings against defendant who is a Chinese national. The affair between defendant and Lolita continued nonetheless.

Sometime in April, 1957, Lolita was staying with her brothers and sisters at their residence at 54-B España Extension, Quezon City. On April 14, 1957, Lolita disappeared from said house. After she left, her brothers and sisters checked up her things and found that Lolita's clothes were gone.

However, plaintiffs found a note on a crumpled piece of paper inside Lolita's aparador. Said note, written on a small slip of paper approximately 4" by 3" in size, was in a handwriting recognized to be that of defendant. In English it reads:

"Honey, suppose I leave here on Sunday night, and that's 13th of this month and we will have a date on the 14th, that's Monday morning at 10 a.m.

Reply

Love"

The disappearance of Lolita was reported to the police authorities and the NBI but up to the present, there is no news or trace of her whereabouts.

The present action is based on Article 21 of the new Civil Code which provides:

"Any person who wilfully causes loss or injury to another in a manner which is contrary to morals, good customs or public policy shall compensate the latter for the damage."

There is no doubt that the claim of plaintiffs for damages is based on the fact that defendant, being a married man, carried on a love affair with Lolita Pe thereby causing plaintiffs injury in a manner contrary to morals, good customs and public policy. But in spite of the fact that plaintiffs have clearly established that an illicit affair was carried on between defendant and Lolita which caused great damage to the name and reputation of plaintiffs who are her parents, brothers and sisters, the trial court considered their complaint not actionable for the reason that they failed to prove that defendant deliberately and in bad faith tried to win Lolita's affection. Thus, the trial court said: "In the absence of proof on this point, the court may not presume that it was the defendant who deliberately induced such relationship. We cannot be unmindful of the uncertainties and sometimes inexplicable mysteries of the human emotions. It is a possibility that the defendant and Lolita simply fell in love with each other, not only without any desire on their part, but also against their better judgment and in full consciousness of the disastrous consequences that such an affair would naturally bring on both of them. This is specially so with respect to Lolita, being an unmarried woman, falling in love with defendant who is a married man."

We disagree with this view. The circumstances under which defendant tried to win Lolita's affection cannot lead to any other conclusion than that it was he who, thru an ingenious scheme or trickery, seduced the latter to the extent of making her fall in love with him. This is shown by the fact that defendant frequented the house of Lolita on the pretext that he wanted her to teach him how to pray the rosary. Because of the frequency of his visits to the latter's family who was allowed free access because he was a collateral relative and was considered as a member of her family, the two eventually fell in love with each other and conducted clandestine love affairs not only in Gasan but in Boac where Lolita used to teach in a barrio school. When

the rumors about their illicit affair reached the knowledge of her parents, defendant was forbidden from going to their house and even from seeing Lolita. Plaintiffs even filed deportation proceedings against defendant who is a Chinese national. Nevertheless, defendant continued his love affairs with Lolita until she disappeared from the parental home. Indeed, no other conclusion can be drawn from this chain of events than that defendant not only deliberately, but through a clever strategy, succeeded in winning the affection and love of Lolita to the extent of having illicit relations with her. The wrong he has caused her and her family is indeed immeasurable considering the fact that he is a married man. Verily, he has committed an injury to Lolita's family in a manner contrary to morals, good customs and public policy as contemplated in Article 21 of the new Civil Code."

D. DESERTION BY A SPOUSE.

A spouse has a legal obligation to live with his or her spouse. If a spouse does not perform his or her duty to the other, he may be held liable for damages for such omission because the same is contrary to law, morals and good customs.

Thus, in *Pastor B. Tenchaves vs. Vicenta F. Escaño, et al.* (G.R. No. L-19671, July 26, 1966), moral damages against Vicenta Escaño were awarded because of her refusal to perform her wifely duties, her denial of consortium and desertion of her husband. The acts of Vicenta (up to and including her divorce, for grounds not countenanced by our law) constitute a willful infliction to injury upon plaintiff's feelings in a manner contrary to morals, good customs or public policy (Civ. Code, Art. 21) for which Article 2219(10) authorizes an award of moral damages.

E. TRESPASS AND DEPRIVATION OF PROPERTY.

Examples of different forms of trespass will be discussed in this section. Other deprivations of both real and personal properties or attempt to do so that result in liability under Article 21 of the New Civil Code, though not considered trespass in common law, shall likewise be demonstrated.

a. Trespass to and/or Deprivation of Real Property.

Trespass to real property is a tort that is committed when a person unlawfully invades the real property of another.

The Revised Penal Code punishes different forms of trespass. On the other hand, the Civil Code provides that damages may be awarded to the real owner if he suffered such damages because he was deprived of possession of his property by a possessor in bad faith or by a person who does not have any right whatsoever over the prop-

erty. *(Articles 451).* Anybody who builds, plants or sows on the land of another knowing full well that there is a defect in his title is liable for damages. The liability is in addition to the right of the landowner in good faith to appropriate what was built, planted or sown or to remove the same.

Liability for damages under the above-cited provisions of the Revised Penal Code and the New Civil Code requires intent or bad faith. There is authority for the view, however, that the tort of trespass may be committed even in good faith. Chief Justice Concepcion observed in one case that the common law concept of trespass is applicable in this jurisdiction. He believes that trespass may even be committed in good faith. Thus, he observed in his dissenting opinion in *Republic of the Philippines, et al. vs. Hon. Jaime de los Angeles, et al.* (G.R. No. L-26112, October 4, 1971):

> "In other words, they performed an unlawful invasion of the public domain, which is a tort, commonly known as trespass, for which mistake, honest belief or professional neglect is no defense. The Common Law furnishes abundant authority to the effect that bad faith is not necessary for liability arising from tort to attach. In fact, good faith on the part of the tortfeasor does not exempt him from liability for his act.
>
> The rule is postulated in the Restatement in the following language:
>
> 'In order to be liable for a trespass on land . . . it is necessary only that the actor intentionally be upon any part of the land in question. It is not necessary that he intend to invade the possessor's interest in the exclusive possession of his land and, therefore, that he know his entry to be an intrusion. If the actor is and intends to be upon the particular piece of land in question, it is immaterial that he honestly and reasonably believes that he has the consent of the lawful possessor to enter, or, indeed, that he himself is its Possessor. Unless the actor's mistake was induced by the conduct of the possessor, it is immaterial that the mistake is one such as a reasonable man knowing all the circumstances which the actor knows or could have discovered by the most careful of investigations would have made. One who enters any piece of land takes the risk of the existence of such facts as would give him a right or privilege to enter. So too, the actor cannot escape liability by showing that his mistaken belief in the validity of his title is due to the advise of the most eminent of counsel. Indeed, even though a statute expressly confers title upon him, he takes the risk that the statute may thereafter be declared unconstitutional.'
>
> Other statements of the rule are set forth at the margin. To illustrate, Restatement gives the following examples:

> "A employs a surveyor of recognized ability to make a survey of his land. The survey shows that a particular strip of land is within his boundaries. In consequence, A clears this land of timber and prepares it for cultivation. In fact, the survey is mistaken and the strip in question is part of the tract owned by his neighbor, B. A is subject to liability to B."
>
> "A, who is entitled to possession of Blackacre, reasonably mistaking for Whiteacre, enters Whiteacre. A is subject to liability for trespass."
>
> "A mines coal from B's land having mistaken the location of the boundary line. A is subject to liability to B although the mistake is reasonable one."

It is believed, however, that Article 448 of the Civil Code in relation to Article 456, does not permit an action for damages where the builder, planter or sower acted in good faith. The landowner is limited only to the options given to him under Article 448, that is, to appropriate whatever was built or planted or to compel the builder or planter to purchase the portion of the lot encroached upon. The law does not allow recovery of damages in either case. This is consistent with the basic rule in *accession continua* that a person in good faith is not liable but responsible. In other words, the builder, planter or sower in good faith may be subject to certain obligations but he must not be penalized with the imposition of damages. *(*See *2 Tolentino 114-115, citing Gongon vs. Tianco, CA 36 O.G. 822).*

There is only liability if the builder in good faith acted negligently in which case liability may be premised on Art. 2176. (Art. 456).

b. Trespass to or Deprivation of Personal Property.

With respect to personal property, the commission of the crimes of theft or robbery is obviously trespass. In the field of tort, however, trespass extends to all cases where a person is deprived of his personal property even in the absence of criminal liability.

Trespass may then include cases covered by *accession continua* with respect to movable property where the person who took possession of the property of another was in bad faith.

It may also cover cases where the defendant deprived the plaintiff of personal property for the purpose of obtaining possession of a real property. In *Magbanua vs. IAC* (137 SCRA 329; see also *Del Valle vs. Fernandez, 34 SCRA 352*), the Supreme Court sustained the finding of liability against the defendant because the latter, who

was landlord, deprived the plaintiffs, his tenants, of water in order to force the said tenants to vacate the lot that they were cultivating.

The case of *Cogeo-Cubao Operators and Drivers Association vs. Court of Appeals* (G.R. No. 100727, March 18, 1992) is also an example of the tort of trespass that is contrary to moral and good customs under Article 21. The petitioner, in this case (a group of drivers) took over all jeepneys of a transportation company, *Lungsod Corporation*, as well as the operation of the service in the company's route without authority from the Public Service Commission. The Supreme Court declared that the act was in violation of Article 21 and declared that the constitutional right of the drivers to redress their grievances with the company should not undermine public peace and order nor should it violate the legal rights of other persons.

c. Disconnection of Electricity or Gas Service.

A usual form of deprivation of access to property is the unjustified disconnection of electricity service. An electric company certainly has the right to disconnect the electricity service of a customer if the latter unreasonably fails to pay his bills. However, the right to disconnect and deprive the customer of electricity should be exercised in accordance with law and rules. For instance, if the company disconnect the electricity service without prior notice as required by the rules promulgated by duly authorized government agency, the company commits a tort under Article 21. *(Manila Electric Company, et al. vs. The Hon. Court of Appeals, G.R. No. L-39019, January 22, 1988).*

CASE:

MANILA GAS CORPORATION vs. COURT OF APPEALS
G.R. No. L-44190, October 30, 1980

On the second cause of action which is based on the illegal disconnection of respondent Ongsip's gas service constituting breach of contract, the trial court awarded P30,000.00 as moral damages and P5,000.00 as exemplary damages.

Petitioner contends that the disconnection was on account of respondent Ongsip's failure to pay his gas consumptions for more than three months. While private respondent admits having accounts with petitioner, he denies having been notified thereof or having received any warning of the disconnection. In determining the propriety of the award, it is material to establish that prior notice or warning had been given to respondent Ongsip before the gas service was disconnected, in accordance with the terms of the contract. In this regard,

We find the trial court's observation in its decision to be well-founded, to quote:

"Defendant would insist that the household helpers inside Plaintiff's premises refused to receive notices or to sign them. Defendant has not given the Court any plausible reason why these persons would refuse to receive, or sign for, notices of demands for payments or warnings of threatened disconnection of the service. The very evidence of Defendants indicates that Plaintiff had long been a customer of Defendant. Plaintiff has been paying his bills. Plaintiff had not suffered any financial reverses. As a matter of fact, upon the suggestion of the Court, Plaintiff readily made payment of his account with Defendant. He made payment not because the service would be restored. When he made the payment the Court had already issued a mandatory preliminary injunction, ordering Defendant to restore gas service in the premises of Plaintiff. Plaintiff made the payment to comply with the suggestion of the Court because the Court rather than enforce its order, would like the parties to settle the case amicably.

"What is peculiar in the stand of Defendant is that while it would insist on the giving of notices and warnings, it did not have any competent and sufficient evidence to prove the same. Demands in open were made by Plaintiff's counsel whether Defendant could show any written evidence showing that notices and warnings were sent to Plaintiff. Not a single piece of evidence was produced. Normally, if a notice is refused, then the original and its copies would still be in the hands of the public utility concerned. In the instant case, it has to he repeated, not a single copy, original or duplicate, triplicate, etc. of any notice to pay or warning of disconnection was produced in court. The court cannot believe that Defendant, as what the testimonies of its witnesses would like to impress upon this Court, conducts its business that way. Defendant is a big business concern and it cannot be said that it treats its business as a joke. Its personnel should realize this, for only with such an awareness can they respond faithfully to their responsibilities as members of a big business enterprise imbued with public interest over which the Philippine Government is concerned."

Quite obviously, petitioner's act in disconnecting respondent Ongsip's gas service without prior notice constitutes breach of contract amounting to an independent tort. The prematurity of the action is indicative of an intent to cause additional mental and moral suffering to private respondent. This is a clear violation of Article 21 of the Civil Code which provides that "any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for damages." This is reiterated by paragraph 10 of Article 2219 of the Code. Moreover, the award of moral damages is sanctioned by Article 2220 which provides that "willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith." (emphasis supplied).

WE are not unmindful of the fact that at the time the gas service was

disconnected, respondent Ongsip admitted having been in default of at least three months' bills. WE have established however that no notice to that effect has been served on him. It must be pointed out that respondent Ongsip is an old man involved in a number of business and social undertakings. It is quite natural and understandable that at times he forgets some minor obligations and details of his concern. This is the time when reminders and friendly notices become indispensable. The rudiments of procedural due process dictate that he should have been notified of any back accounts. In the past, respondent Ongsip had not been remiss in the payment of his bills. Petitioner should have at least accorded him the courtesy, if not the right, as per contract, of being notified before effecting disconnection so that he could take steps or initiate measures to avoid such embarrassment. Apparently, such misconduct or omission on the part of petitioner formed part of a malevolent scheme to harass and humiliate private respondent, exposing him to further ignominy and greater mental torture. Respondent Ongsip's default in payment cannot be utilized by petitioner to defeat or nullify the claim for damages. At most, this circumstance can be considered as a mitigating factor in ascertaining the amount of damages to which respondent Ongsip is entitled. In consequence thereof, We reduce the amount of moral damages to P15,000.00. The award of P5,000.00 as exemplary damages, on the other hand, is sustained, being similarly warranted by Article 2234 of the Civil Code aforequoted as complemented by Article 2220.

F. ABORTION AND WRONGFUL DEATH.

In *Geluz vs. Court of Appeals* (2 SCRA 802 [1961]), the Supreme Court recognized the right to recover damages against a physician who caused an abortion. Damages are available to both spouses if the abortion was caused through the physician's negligence. Both spouses may also recover damages if the abortion was done intentionally without their consent.

In *Geluz*, the question was whether the husband of a woman, who voluntarily procured her abortion could recover damages from the physician who caused the same. The Supreme Court recognized such possibility on account of distress and anguish attendant to the loss of the unborn child and the disappointment of his parental expectations. However, the Court found no basis to award such damages in *Geluz* because the husband was not able to show factual basis for the award of moral damages such as distress or anguish.

It should be recalled that a doctor who performs an illegal abortion is criminally liable under Article 259 of the Revised Penal Code. It imposes imprisonment upon any physician or midwife who, taking advantage of their scientific knowledge or skill, shall cause an abortion or assent in causing the same. Even parents may be criminally liable for such offense. *(Article 258, Revised Penal Code).* In fact, criminal

and civil liability will also result even if the abortion is unintentional. *(Art. 257; United States vs. Jeffrey, 15 Phil. 391; People vs. Genoves, 61 Phil. 382; People vs. Salufrania, 159 SCRA 401).*

CASE:

ANTONIO GELUZ vs. THE HON. COURT OF APPEALS and OSCAR LAZO
G.R. No. L-16439, July 20, 1961

This petition for *certiorari* brings up for review the question whether the husband of a woman, who voluntarily procured her abortion, could recover damages from the physician who caused the same.

The litigation was commenced in the Court of First Instance of Manila by respondent Oscar Lazo, the husband of Nita Villanueva, against petitioner Antonio Geluz, a physician. Convinced of the merits of the complaint upon the evidence adduced, the trial court rendered judgment in favor of plaintiff Lazo and against defendant Geluz ordering the latter to pay P3,000 as damages, P700 as attorney's fees and the costs of the suit. On appeal, the Court of Appeals, in a special division of five, sustained the award by a majority vote of three justices as against two, who rendered a separate dissenting opinion.

The facts are set forth in the majority opinion as follows:

"Nita Villanueva came to know the defendant (Antonio Geluz) for the first time in 1948 — through her aunt Paula Yambot. In 1950, she became pregnant by her present husband before they were legally married. Desiring to conceal her pregnancy from her parent, and acting on the advice of her aunt, she had herself aborted by the defendant. After her marriage with the plaintiff, she again became pregnant. As she was then employed in the Commission on Elections and her pregnancy proved to be inconvenient, she had herself aborted again by the defendant in October 1953. Less than two years later, she again became pregnant. On February 21, 1955, accompanied by her sister Purificacion and the latter's daughter Lucida, she again repaired to the defendant's clinic on Carriedo and P. Gomez streets in Manila, where the three met the defendant and his wife. Nita was again aborted, of a two-month old foetus, in consideration of the sum of fifty pesos, Philippine currency. The plaintiff was at this time in the province of Cagayan, campaigning for his election to the provincial board; he did not know of, nor gave his consent to, the abortion."

It is the third and last abortion that constitutes plaintiff's basis in filing this action and award of damages. Upon application of the defendant *Geluz*, we granted *certiorari*.

The Court of Appeals and the trial court predicated the award of damages in the sum of P3,000.00 upon the provisions of the initial paragraph of Article 2206 of the Civil Code of the Philippines. This we believe to be error,

for the said article, in fixing a minimum award of P3,000 for the death of a person, does not cover the case of an unborn foetus that is not endowed with personality. Under the system of our Civil Code, *"la criatura abortiva no alcanza la categoria de persona natural y en consecuencia es un ser no nacido a la vida del Derecho" (Casso-Cervera, "Diccionario de Derecho Privado," Vol. 1, p. 49)*, being incapable of having rights and obligations.

Since an action for pecuniary damages on account of personal injury or death pertains primarily to the one injured, it is easy to see that if no action for such damages could be instituted on behalf of the unborn child on account of the injuries it received, no such right of action could derivatively accrue to its parents or heirs. In fact, even if a cause of action did accrue on behalf of the unborn child, the same was extinguished by its pre-natal death, since no transmission to anyone can take place from one that lacked juridical personality (or juridical capacity, as distinguished from capacity to act). It is no answer to invoke the provisional personality of a conceived child *(conceptus pro nato habetur)* under Article 40 of the Civil Code, because that same article expressly limits such provisional personality by imposing the condition that the child should be subsequently born alive: "provided it be born later with the conditions specified in the following article." In the present case, there is no dispute that the child was dead when separated from its mother's womb.

The prevailing American jurisprudence is to the same effect; and is generally held that recovery can not be had for the death of an unborn child. *(Stafford vs. Roadway Transit Co., 70 F. Supp. 555; Dietrich vs. Northhampton, 52 Am. Rep. 242; and numerous cases collated in the editorial note, 10 ALR [2d] 639).*

This is not to say that the parents are not entitled to collect any damages at all. But such damages must be those inflicted directly upon them, as distinguished from the injury or violation of the rights of the deceased, his right to life and physical integrity. Because the parents can not expect either help, support or services from an unborn child, they would normally be limited to moral damages for the illegal arrest of the normal development of the *spes hominis* that was the foetus, *i.e.,* on account of distress and anguish attendant to its loss, and the disappointment of their parental expectations (Civ. Code, Art. 2217), as well as to exemplary damages, if the circumstances should warrant them. (Art. 2230). But in the case before us, both the trial court and the Court of Appeals have not found any basis for an award of moral damages, evidently because the appellee's indifference to the previous abortions of his wife, also caused by the appellant herein, clearly indicates that he was unconcerned with the frustration of his parental hopes and affections. The lower court expressly found, and the majority opinion of the Court of Appeals did not contradict it, that the appellee was aware of the second abortion; and the probabilities are that he was likewise aware of the first. Yet, despite the suspicious repetition of the event, he appeared to have taken no steps to investigate or pinpoint the causes thereof, and secure the punishment of the responsible practitioner. Even after learning of the third abortion, the appellee does not seem to have taken interest in the administrative and criminal cases against the appellant. His only concern appears

to have been directed at obtaining from the doctor a large money payment, since he sued for P50,000 damages and P3,000 attorney's fees, an "indemnity" claim that, under the circumstances of record, was clearly exaggerated.

The dissenting Justices of the Court of Appeals have aptly remarked that:

> "It seems to us that the normal reaction of a husband who righteously feels outraged by the abortion which his wife has deliberately sought at the hands of a physician would be high-minded rather than mercenary; and that his primary concern would be to see to it that the medical profession was purged of an unworthy member rather than turn his wife's indiscretion to personal profit, and with that idea in mind to press either the administrative or the criminal cases he had filed, or both, instead of abandoning them in favor of a civil action for damages of which not only he, but also his wife, would be the beneficiaries."

It is unquestionable that the appellant's act in provoking the abortion of appellee's wife, without medical necessity to warrant it, was a criminal and morally reprehensible act, that can not be too severely condemned; and the consent of the woman or that of her husband does not excuse it. But the immorality or illegality of the act does not justify an award of damages that, under the circumstances on record, have no factual or legal basis.

G. ILLEGAL DISMISSAL.

The sphere of application of Article 21, in relation to Article 19, includes cases where there is an employer-employee relationship. It is a basic rule that an employer has a right to dismiss an employee in the manner and on the grounds provided for under the Civil Code. For instance, dismissal is warranted if the employee is guilty of misconduct; his dismissal is consistent with the employer's right to protect its interest in seeing to it that its employees are performing their jobs with honesty, integrity and good faith. *(Marilyn Bernardo vs. NLRC, March 15, 1996).*

However, such exercise of the right to terminate must be consistent with the general principles provided for under Articles 19 and 21 of the New Civil Code. If there is non-compliance with Articles 19 and 21, the employer may be held liable for damages. The right of the defendant to dismiss an employee should not be confused with the manner in which the right is exercised and the effects flowing therefrom. If the dismissal is done anti-socially or oppressively then the employer should be deemed to have violated Article 1701 of the Civil Code (which prohibits acts of oppression by either capital or labor against the other) and Article 21. *(Quisaba vs. Sta. Ines-Melale Veneer and Plywood, Inc., August 30, 1974; Philippine Refining Co.*

vs. Garcia, L-21962, Sept. 27, 1966, 18 SCRA 107).

It follows that an employer may be held liable for damages if the manner of dismissing the complainant is contrary to morals, good customs and public policy. This may be done by false imputation of misdeed to justify dismissal or any similar manner of dismissal which is done abusively. *(Globe Mackay Cable & Radio Corp. vs. Court of Appeals, August 25, 1989; Quisaba vs. Sta. Ines-Melale Veneer Plywood, Inc., 58 SCRA 771 [1974]).*

The dismissal may also be considered as done with abuse of right if the ground relied upon is a figment of employer's imagination. Thus, in one case, it was ruled that there was abuse of right where the defendant dismissed the employee on the ground of serious losses although there were no such serious losses. *(AHSI 1 Phil. Employee's Union vs. NLRC, et al., March 30, 1987).*

CASE:

GLOBE MACKAY CABLE AND RADIO CORP., et al.
vs. THE HONORABLE COURT OF APPEALS, et al.
G.R. No. 81262, August 25, 1989

Private respondent Restituto M. Tobias was employed by petitioner Globe Mackay Cable and Radio Corporation (GLOBE MACKAY) in a dual capacity as a purchasing agent and administrative assistant to the engineering operations manager. In 1972, GLOBE MACKAY discovered fictitious purchases and other fraudulent transactions for which it lost several thousands of pesos.

According to private respondent it was he who actually discovered the anomalies and reported them on November 10, 1972 to his immediate superior Eduardo T. Ferraren and to petitioner Herbert C. Hendry who was then the Executive Vice-President and General Manager of GLOBE MACKAY.

On November 11, 1972, one day after private respondent Tobias made the report, petitioner Hendry confronted him by stating that he was the number one suspect, and ordered him to take a one week forced leave, not to communicate with the office, to leave his table drawers open, and to leave the office keys.

On November 20, 1972, when private respondent Tobias returned to work after the forced leave, petitioner Hendry went up to him and called him a "crook" and a "swindler." Tobias was then ordered to take a lie detector test. He was also instructed to submit specimen of his handwriting, signature, and initials for examination by the police investigators to determine his complicity in the anomalies.

On December 6, 1972, the Manila police investigators submitted a laboratory crime report (Exh. "A") clearing private respondent of participation in the anomalies.

Not satisfied with the police report, petitioners hired a private investigator, retired Col. Jose G. Fernandez, who on December 10, 1972, submitted a report (Exh. "2") finding Tobias guilty. This report however, expressly stated that further investigation was still to be conducted.

Nevertheless, on December 12, 1972, petitioner Hendry issued a memorandum suspending Tobias from work preparatory to the filing of criminal charges against him.

On December 19, 1972, *Lt. Dioscoro V. Tagle*, Metro Manila Police Chief Document Examiner, after investigating other documents pertaining to the alleged anomalous transactions, submitted a second laboratory crime report (Exh. "B") reiterating his previous finding that the handwritings, signatures, and initials appearing in the checks and other documents involved in the fraudulent transactions were not those of Tobias. The lie detector tests conducted on Tobias also yielded negative results.

Notwithstanding, the two police reports exculpating Tobias from the anomalies and the fact that the report of the private investigator, was, by its own terms, not yet complete, petitioners filed with the City Fiscal of Manila a complaint for estafa through falsification of commercial documents, later amended to just estafa. Subsequently, five other criminal complaints were filed against Tobias, four of which were for estafa through falsification of commercial document while the fifth was for violation of Article 290 of the Revised Penal Code (Discovering Secrets Through Seizure of Correspondence). Two of these complaints were refiled with the Judge Advocate General's Office, which however, remanded them to the fiscal's office. All of the six criminal complaints were dismissed by the fiscal. Petitioners appealed four of the fiscal's resolutions dismissing the criminal complaints with the Secretary of Justice, who, however, affirmed their dismissal.

In the meantime, on January 17, 1973, Tobias received a notice (Exh. "F") from petitioners that his employment has been terminated effective December 13, 1972. Whereupon, Tobias filed a complaint for illegal dismissal. The labor arbiter dismissed the complaint. On appeal, the National Labor Relations Commission (NLRC) reversed the labor arbiter's decision. However, the Secretary of Labor, acting on petitioners' appeal from the NLRC ruling, reinstated the labor arbiter's decision. Tobias appealed the Secretary of Labor's order with the Office of the President. During the pendency of the appeal with said office, petitioners and private respondent Tobias entered into a compromise agreement regarding the latter's complaint for illegal dismissal.

Unemployed, Tobias sought employment with the Republic Telephone Company (RETELCO). However, petitioner Hendry, without being asked by RETELCO, wrote a letter to the latter stating that Tobias was dismissed by GLOBE MACKAY due to dishonesty.

Private respondent Tobias filed a civil case for damages anchored on alleged unlawful, malicious, oppressive, and abusive acts of petitioners. Petitioner Hendry, claiming illness, did not testify during the hearings. The Regional Trial Court (RTC) of Manila, Branch IX, through Judge Manuel T. Reyes rendered judgment in favor of private respondent by ordering petitioners to pay him eighty thousand pesos (P80,000.00) as actual damages, two hundred thousand pesos (P200,000.00) as moral damages, twenty thousand pesos (P20,000.00) as exemplary damages, thirty thousand pesos (P30,000.00) as attorney's fees, and costs. Petitioners appealed the RTC decision to the Court of Appeals. On the other hand, Tobias appealed as to the amount of damages. However, the Court of Appeals, in a decision dated August 31, 1987, ** affirmed the RTC decision *in toto*. Petitioners' motion for reconsideration having been denied, the instant petition for review on *certiorari* was filed.

The main issue in this case is whether or not petitioners are liable for damages to private respondent.

Petitioners contend that they could not be made liable for damages in the lawful exercise of their right to dismiss private respondent.

On the other hand, private respondent contends that because of petitioners' abusive manner in dismissing him as well as for the inhuman treatment he got from them, the petitioners must indemnify him for the damage that he had suffered.

x x x

And in the instant case, the Court, after examining the record and considering certain significant circumstances, finds that petitioners have indeed abused the right that they invoke, causing damage to private respondent and for which the latter must now be indemnified.

The trial court made a finding that notwithstanding the fact that it was private respondent Tobias who reported the possible existence of anomalous transactions, petitioner Hendry "showed belligerence and told plaintiff (private respondent herein) that he was the number one suspect and to take a one week vacation leave, not to communicate with the office, to leave his table drawers open, and to leave his keys to said defendant (petitioner Hendry)" [RTC Decision, p. 2; *Rollo*, p. 232]. This, petitioners do not dispute. But regardless of whether or not it was private respondent Tobias who reported the anomalies to petitioners, the latter's reaction towards the former upon uncovering the anomalies was less than civil. An employer who harbors suspicions that an employee has committed dishonesty might be justified in taking the appropriate action such as ordering an investigation and directing the employee to go on a leave. Firmness and the resolve to uncover the truth would also be expected from such employer. But the high-handed treatment accorded Tobias by petitioners was certainly uncalled for. And this reprehensible attitude of petitioners was to continue when private respondent returned to work on November 20, 1972 after his one week forced leave. Upon reporting for work, Tobias was confronted by Hendry who said. "Tobby,

you are the crook and swindler in this company." Considering that the first report made by the police investigators was submitted only on December 10, 1972 [See Exh. "A"] the statement made by petitioner Hendry was baseless. The imputation of guilt without basis and the pattern of harassment during the investigations of Tobias transgress the standards of human conduct set forth in Article 19 of the Civil Code. The Court has already ruled that the right of the employer to dismiss an employee should not be confused with the manner in which the right is exercised and the effects flowing therefrom. If the dismissal is done abusively, then the employer is liable for damages to the employee. *(Quisaba vs. Sta. Ines-Melale Veneer and Plywood, Inc., G.R. No. L-38088, August 30, 1974, 58 SCRA 771; See also Philippine Refining Co., Inc. vs. Garcia, G.R. No. L-21871, September 27, 1966, 18 SCRA 107).* Under the circumstances of the instant case, the petitioners clearly failed to exercise in a legitimate manner their right to dismiss Tobias, giving the latter the right to recover damages under Article 19 in relation to Article 21 of the Civil Code.

[The Supreme Court went on to explain that the petitioners were not content with just dismissing Tobias. Several other tortious acts were also committed by the petitioners. Such other torts will be cited and discussed together with the topics where they appropriately belong.]

H. MALICIOUS PROSECUTION.

a. Definition and Statutory Basis.

A tort action for malicious prosecution has been defined as "an action for damages brought by one against another whom a criminal prosecution, civil suit, or other legal proceedings has been instituted maliciously and without probable cause, after the termination of such prosecution, suit or proceeding in favor of the defendant therein. The gist of the action is the putting of legal process in force, regularly, for the mere purpose of vexation or injury." *(Drilon vs. Court of Appeals, 270 SCRA 211, 220 [1997], citing Cabasaan vs. Anota, 14169-R, November 19, 1956).* The action which is terminated should be one begun in malice without probable cause to believe the charges can be sustained and is instituted with the intention of injuring another and which terminates in favor of the person prosecuted *(ibid., citing Black's Law Dictionary, Rev. 4th Ed., 1986, p. 1111).*

The statutory bases of the action are not only Articles 19, 20 and 21 of the New Civil Code but also Articles 26, 32, 33, 35, 2217 and 2219(8). *(ibid., citing Albenson Enterprises Corp. vs. Court of Appeals, 217 SCRA 16 [1993] and Ponce vs. Legaspi, 208 SCRA 377 [1992]).*

b. Elements.

In a long line of cases, the Supreme Court ruled that an action for malicious prosecution will prosper only if the following elements are present: (1) The fact of the prosecution and the further fact that the defendant was himself the prosecutor, and that the action was finally terminated with an acquittal; (2) That in bringing the action, the prosecutor acted without probable cause; (3) The prosecutor was actuated or impelled by legal malice. *(Ferrer vs. Vergara, 52 O.G. 291; Tolentino vs. Orfila, December 29, 1972; Herida vs. Rio, November 17, 1981; Lao vs. Court of Appeals, 199 SCRA 58 [1991]; Albenson Enterprises vs. Court of Appeals, supra; Drilon vs. Court of Appeals, supra, at p. 220; Ms. Violeta Yasona vs. Rodencio and Jovencio Ramos, No. 156339, Oct. 6, 2004).*

(1) Malice.

The prosecutor in the case is actuated by malice if he acted with "inexcusable intent to injure, oppress, vex, annoy or humiliate." *(Pro Line Sports Center, Inc. vs. Court of Appeals, G.R. No. 118192, October 23, 1997).*

The presence of probable cause signifies, as a legal consequence, the absence of malice. *(Drilon vs. Court of Appeals, supra).* Probable cause is the existence of such facts and circumstances as would excite the belief of the prosecutor, that the person charged is guilty of the crime for which he is prosecuted. *(Pro Line Sports Center, Inc. vs. Court of Appeals, supra).*

The absence of malice therefore involves good faith on the part of the defendant. This good faith may even be based on mistake of law. "A doubtful or difficult question of law may become the basis of good faith and, in this regard, the law always accords to public officials the presumption of good faith and regularity in the performance of official duties." *(Drilon vs. Court of Appeals, supra).* The presence of malice should therefore be established by going over the circumstances of each case.

(2) Acquittal.

The term "acquittal" presupposes that a criminal information is filed in court and final judgment is rendered dismissing the case against the accused. Hence, it is not enough that the plaintiff is discharged on a writ of *habeas corpus* and granted bail. Such discharge is not considered the termination of the action contemplated under Philippine jurisdiction to warrant the institution of a malicious prosecution suit against those responsible for the filing of the information against him. *(Drilon vs. Court of Appeals, supra).*

Nevertheless, it is believed that prior "acquittal" may include dismissal by the prosecutor after preliminary investigation. If the defendant repeatedly filed cases before the prosecutor and the cases were obviously unfounded, the plaintiff should be allowed to file a malicious prosecution case because he was also unduly vexed. This appears to be the implication of the rulings in *Globe Mackay and Radio Corporation vs. Court of Appeals (supra) and Manila Gas Corporation vs. Court of Appeals (supra)* both involving cases dismissed by the prosecutor.

CASES:

GLOBE MACKAY CABLE AND RADIO CORP.
vs. THE HON. COURT OF APPEALS
G.R. No. 81262, August 25, 1989

Finally, there is the matter of the filing by petitioners of six criminal complaints against Tobias. Petitioners contend that there is no case against them for malicious prosecution and that they cannot be "penalized for exercising their right and prerogative of seeking justice by filing criminal complaints against an employee who was their principal suspect in the commission of forgeries and in the perpetration of anomalous transactions which defrauded them of substantial sums of money." [Petition, p. 10, *Rollo*, p. 11].

While sound principles of justice and public policy dictate that persons shall have free resort to the courts for redress of wrongs and vindication of their rights *(Buenaventura vs. Sto. Domingo, 103 Phil. 239 [1958]),* the right to institute criminal prosecutions can not be exercised maliciously and in bad faith *(Ventura vs. Bernabe, G.R. No. L-26760, April 30, 1971, 38 SCRA 587)*. Hence, in *Yutuk vs. Manila Electric Co., G.R. No. L-13016, May 31, 1961, 2 SCRA 337*, the Court held that the right to file criminal complaints should not be used as a weapon to force an alleged debtor to pay an indebtedness. To do so would be a clear perversion of the function of the criminal processes and of the courts of justice. And in *Hawpia vs. CA, G.R. No. L-20047, June 30, 1967, 20 SCRA 536*, the Court upheld the judgment against the petitioner for actual and moral damages and attorney's fees after making a finding that petitioner, with persistence, filed at least six criminal complaints against respondent, all of which were dismissed.

To constitute malicious prosecution, there must be proof that the prosecution was prompted by a design to vex and humiliate a person and that it was initiated deliberately by the defendant knowing that the charges were false and groundless. *(Manila Gas Corporation vs. CA, G.R. No. L-44190, October 30, 1980, 100 SCRA 602)*. Concededly, the filing of a suit, by itself, does not render a person liable for malicious prosecution *(Inhelder Corporation vs. CA, G.R. No. 52358, May 30, 1983, 122 SCRA 576)*. The mere dismissal by the fiscal of the criminal complaint is not a ground for an award of dam-

ages for malicious prosecution if there is no competent evidence to show that the complainant had acted in bad faith. *(Sison vs. David, G.R. No. L-11268, January 28, 1961, 1 SCRA 60).*

In the instant case, however, the trial court made a finding that petitioners acted in bad faith in filing the criminal complaints against Tobias, observing that:

x x x x x x x x x

Defendants (petitioners herein) filed with the Fiscal's Office of Manila a total of six (6) criminal cases, five (5) of which were for estafa thru falsification of commercial document and one for violation of Art. 290 of the Revised Penal Code "discovering secrets thru seizure of correspondence," and all were dismissed for insufficiency or lack of evidence." The dismissal of four (4) of the cases was appealed to the Ministry of Justice, but said Ministry invariably sustained the dismissal of the cases. As above adverted to, two of these cases were refiled with the Judge Advocate General's Office of the Armed Forces of the Philippines to railroad plaintiffs arrest and detention in the military stockade, but this was frustrated by a presidential decree transferring criminal cases involving civilians to the civil courts.

x x x x x x x x x

To be sure, when despite the two (2) police reports embodying the findings of Lt. Dioscoro Tagle, Chief Document Examiner of the Manila Police Department, clearing plaintiff of participation or involvement in the fraudulent transactions complained of, despite the negative results of the lie detector tests which defendants compelled plaintiff to undergo, and although the police investigation was "still under follow-up and a supplementary report will be submitted after all the evidence has been gathered," defendants hastily filed six (6) criminal cases with the city Fiscal's Office of Manila, five (5) for estafa thru falsification of commercial document and one (1) for violation of Art. 290 of the Revised Penal Code, so much so that as was to be expected, all six (6) cases were dismissed, with one of the investigating fiscals, Asst. Fiscal de Guia, commenting in one case that, "Indeed, the haphazard way this case was investigated is evident. Evident likewise is the flurry and haste in the filing of this case against respondent Tobias," there can be no mistaking that defendants would not but be motivated by malicious and unlawful intent to harass, oppress, and cause damage to plaintiff.

x x x x x x x x x

[RTC Decision, pp. 5-6; Rollo, pp. 235-236].

In addition to the observations made by the trial court, the Court finds it significant that the criminal complaints were filed during the pendency of the illegal dismissal case filed by Tobias against petitioners. This explains the haste in which the complaints were filed, which the trial court earlier noted. But petitioners, to prove their good faith, point to the fact that only six complaints were filed against Tobias when they could have allegedly

filed one hundred cases, considering the number of anomalous transactions committed against GLOBE MACKAY. However, petitioners' good faith is belied by the threat made by Hendry after the filing of the first complaint that one hundred more cases would be filed against Tobias. In effect, the possible filing of one hundred more cases was made to hang like the sword of Damocles over the head of Tobias. In fine, considering the haste in which the criminal complaints were filed, the fact that they were filed during the pendency of the illegal dismissal case against petitioners, the threat made by Hendry, the fact that the cases were filed notwithstanding the two police reports exculpating Tobias from involvement in the anomalies committed against GLOBE MACKAY, coupled by the eventual dismissal of all the cases, the Court is led into no other conclusion than that petitioners were motivated by malicious intent in filing the six criminal complaints against Tobias.

DRILON vs. COURT OF APPEALS
270 SCRA 211 [1997]

The facts are not in dispute.

In a letter-complaint to then Secretary of Justice Franklin Drilon dated March 20, 1990, General Renato de Villa, who was then the Chief of Staff of the Armed Forces of the Philippines, requested the Department of Justice to order the investigation of several individuals named therein, including herein private respondent Homobono Adaza, for their alleged participation in the failed December 1989 *coup d'etat*. The letter-complaint was based on the affidavit of Brigadier General Alejandro Galido, Captain Oscarlito Mapalo, Colonel Juan Mamorno, Colonel Hernani Figueroa and Major Eduardo Sebastian.

Gen. de Villa's letter-complaint with its annexes was referred for preliminary inquiry to the Special Composite Team of Prosecutors created pursuant to Department of Justice Order No. 5 dated January 10, 1990. Petitioner then Assistant Chief State Prosecutor Aurelio Trampe, the Team Leader, finding sufficient basis to continue the inquiry, issued a subpoena to the individuals named in the letter-complaint, Adaza included, and assigned the case for preliminary investigation to a panel of investigators composed of prosecutors George Arizala, as Chairman, and Ferdinand Abesamis and Cesar Solis as members. The case was docketed as I.S. No. DOJ-SC-90-013.

On April 17, 1990, the panel released its findings, thru a Resolution, which reads:

> "PREMISES CONSIDERED, we find and so hold that there is probable cause to hold herein respondents for trial for the crime of REBELLION WITH MURDER AND FRUSTRATED MURDER. Hence, we respectfully recommend the filing of the corresponding information against them in court."

The above Resolution became the basis for the filing of an Information,

dated April 18, 1990, charging private respondent with the crime of rebellion with murder and frustrated murder before the Regional Trial Court of Quezon City, with no recommendation as to bail.

Feeling aggrieved by the institution of these proceedings against him, private respondent Adaza filed a complaint for damages, dated July 11, 1990, before Branch 100 of the Regional Trial Court of Quezon City. The complaint was docketed as Civil Case No. Q-90-6073 entitled, "Homobono Adaza, plaintiff versus Franklin Drilon, *et al.,* respondents." In his complaint, Adaza charged petitioners with engaging in a deliberate, willful and malicious experimentation by filing against him a charge of rebellion complexed with murder and frustrated murder when petitioners, according to Adaza, were fully aware of the non-existence of such crime in the statute books.

[The case was dismissed, hence, the same was elevated to the Court of Appeals on certiorari. The Court of Appeals dismissed the petition for lack of merit.]

x x x

The petition has merit.

In his Comment, dated March 23, 1993, respondent Adaza maintains that his claim before the trial court was merely a suit for damages based on tort by reason of petitioners' various malfeasance, misfeasance and non-feasance in office, as well as for violation by the petitioners of Section 3 (e) of Republic Act No. 3019, otherwise known as the Anti-Graft and Corrupt Practices Act. It was not a suit for malicious prosecution.

Private respondent is taking us for a ride. A cursory perusal of the complaint filed by Adaza before respondent Judge George Macli-ing reveals that it is one for malicious prosecution against the petitioners for the latter's filing of the charge against him of rebellion with murder and frustrated murder. An examination of the records would show that this latest posture as to the nature of his cause of action is only being raised for the first time on appeal. Nowhere in his complaint filed with the trial court did respondent Adaza allege that his action is one based on tort or on Section 3(e) of Republic Act No. 3019. Such a change of theory cannot be allowed. When a party adopts a certain theory in the court below, he will not be permitted to change his theory on appeal, for to permit him to do so would not only be unfair to the other party but it would also be offensive to the basic rules of fair play, justice and due process. Any member of the Bar, even if not too schooled in the art of litigation, would easily discern that Adaza's complaint is no doubt a suit for damages for malicious prosecution against the herein petitioners. Unfortunately, however, his complaint filed with the trial court suffers from a fatal infirmity — that of failure to state a cause of action — and should have been dismissed right from the start. We shall show why.

x x x

Judging from the face of the complaint itself filed by Adaza against the herein petitioners, none of the foregoing requisites have been alleged therein, thus, rendering the complaint dismissible on the ground of failure to state a

cause of action under Section 1(g), Rule 16 of the Revised Rules of Court.

There is nothing in the records which shows, and the complaint does not allege, that Criminal Case No. Q-90-11855, filed by the petitioners against respondent Adaza for Rebellion with Murder and Frustrated Murder, has been finally terminated and therein accused Adaza acquitted of the charge. Not even Adaza himself, thru counsel, makes any positive asseveration on this aspect that would establish his acquittal. Insofar as Criminal Case No. Q-90-11855 is concerned, what appears clear from the records only is that respondent has been discharged on a writ of *habeas corpus* and granted bail. This is not however, considered the termination of the action contemplated under Philippine jurisdiction to warrant the institution of a malicious prosecution suit against those responsible for the filing of the information against him.

The complaint likewise does not make any allegation that the prosecution acted without probable cause in filing the criminal information dated April 18, 1990 for rebellion with murder and frustrated murder. Elementarily defined, probable cause is the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted. It is well-settled that one cannot be held liable for maliciously instituting a prosecution where one has acted with probable cause. Elsewise stated, a suit for malicious prosecution will lie only in cases where a legal prosecution has been carried on without probable cause. The reason for this rule is that it would be a very great discouragement to public justice, if prosecutors, who had tolerable ground of suspicion, were liable to be sued at law when their indictment miscarried.

In the case under consideration, the decision of the Special Team of Prosecutors to file the information for rebellion with murder and frustrated murder against respondent Adaza, among others, cannot be dismissed as the mere product of whim or caprice on the part of the prosecutors who conducted the preliminary investigation. Said decision was fully justified in an eighteen (18)-page Resolution dated April 17, 1990. While it is true that the petitioners were fully aware of the prevailing jurisprudence enunciated in *People vs. Hernandez*, which proscribes the complexing of murder and other common crimes with rebellion, petitioners were of the honest conviction that the Hernandez Case can be differentiated from the present case. The petitioners thus argued:

"Of course we are aware of the ruling in *People vs. Hernandez, 99 Phil. 515*, which held that common crimes like murder, arson, etc. are absorbed by rebellion. However, the Hernandez case is different from the present case before us. In the *Hernandez* case, the common crimes of murder, arson, etc. were found by the fiscal to have been committed as a necessary means to commit rebellion, or in furtherance thereof. Thus, the fiscal filed an information for rebellion alleging those common crimes as a necessary means of committing the offense charged under the second part of Article 48, RPC.

We, however, find no occasion to apply the Hernandez ruling since as intimated above, the crimes of murder and frustrated murder in this case were absolutely unnecessary to commit rebellion although they were the natural consequences of the unlawful bombing. Hence, the applicable provision is the first part of Article 48 of the RPC."

While the Supreme Court in the case of *Enrile vs. Salazar*, addressing the issue of whether or not the Hernandez doctrine is still good law, in a 10-3 vote, did not sustain the position espoused by the herein petitioners on the matter, three justices felt the need to re-study the Hernandez ruling in light of present-day developments, among whom was then Chief Justice Marcelo Fernan who wrote a dissenting opinion in this wise:

"I am constrained to write this separate opinion on what seems to be a rigid adherence to the 1956 ruling of the Court. The numerous challenges to the doctrine enunciated in the case of *People vs. Hernandez, 99 Phil. 515 (1956)*, should at once demonstrate the need to redefine the applicability of said doctrine so as to make it conformable with accepted and well-settled principles of criminal law and jurisprudence.

To my mind, the Hernandez doctrine should not be interpreted as an all-embracing authority for the rule that all common crimes committed on the occasion, or in furtherance of, or in connection with, rebellion are absorbed by the latter. To that extent, I cannot go along with the view of the majority in the instant case that 'Hernandez remains binding doctrine operating to prohibit the complexing of rebellion with any other offense committed on the occasion thereof, either as a means necessary to its commission or as an unintended effect of an activity that constitutes rebellion.' *(p. 9, Decision).*

The Hernandez doctrine has served the purpose for which it was applied by the Court in 1956 during the communist-inspired rebellion of the Huks. The changes in our society in the span of 34 years since then have far-reaching effects on the all-embracing applicability of the doctrine considering the emergence of alternative modes of seizing the powers of the duly-constituted Government not contemplated in Articles 134 and 135 of the Revised Penal Code and their consequent effects on the lives of our people. The doctrine was good law then, but I believe that there is a certain aspect of the Hernandez doctrine that needs clarification."

Apparently, not even the Supreme Court then was of one mind in debunking the theory being advanced by the petitioners in this case, some of whom were also the petitioners in the Enrile case. Nevertheless, we held in Enrile that the Information filed therein properly charged an offense — that of simple rebellion — and thereupon ordered the remand of the case to the trial court for the prosecution of the named accused in the Information therein. Following this lead, the Information against Adaza in Criminal Case No. Q-90-11855 was not quashed, but was instead treated likewise as charging the crime of simple rebellion.

A doubtful or difficult question of law may become the basis of good faith

and, in this regard, the law always accords to public officials the presumption of good faith and regularity in the performance of official duties. Any person who seeks to establish otherwise has the burden of proving bad faith or ill-motive. Here, since the petitioners were of the honest conviction that there was probable cause to hold respondent Adaza for trial for the crime of rebellion with murder and frustrated murder, and since Adaza himself, through counsel, did not allege in his complaint lack of probable cause, we find that the petitioners cannot be held liable for malicious prosecution. Needless to say, probable cause was not wanting in the institution of Criminal Case No. Q-90-11855 against Adaza.

As to the requirement that the prosecutor must be impelled by malice in bringing the unfounded action, suffice it to state that the presence of probable cause signifies, as a legal consequence, the absence of malice. At the risk of being repetitious, it is evident in this case that petitioners were not motivated by malicious intent or by a sinister design to unduly harass private respondent, but only by a well-founded belief that respondent Adaza can be held for trial for the crime alleged in the information.

All told, the complaint, dated July 11, 1990, filed by Adaza before Branch 100 of the Regional Trial Court against the petitioners does not allege facts sufficient to constitute a cause of action for malicious prosecution. Lack of cause of action, as a ground for a motion to dismiss under Section 1(g), Rule 16 of the Revised Rules of Court, must appear on the face of the complaint itself, meaning that it must be determined from the allegations of the complaint and from none other.

MANILA GAS CORPORATION vs. COURT OF APPEALS, et al.
G.R. No. L-44190, October 30, 1980

Manila Gas Corporation, the petitioner herein, is a public utility company duly authorized to conduct and operate the gainful business of servicing and supplying gas in the City of Manila and its suburbs for public necessity and convenience while private respondent, Isidro M. Ongsip, is a businessman holding responsible positions in a number of business firms and associations in the Philippines.

On May 20, 1964, respondent Ongsip applied for gas service connection with petitioner Manila Gas Corporation. A 1 x 4 burner gas was installed by petitioner's employees in respondent's kitchen at his residence at 2685 Park Avenue, Pasay City.

On July 27, 1965, respondent Ongsip requested petitioner to install additional appliances as well as additional gas service connections in his 46-door Reyno Apartment located also in the same compound. In compliance with said request, petitioner installed two 20-gallon capacity water storage heaters and two heavy-duty gas burners and replaced the original gas meter with a bigger 50-light capacity gas meter. The installations and connections were all done solely by petitioner's employees. There was no significant change in the meter reading despite additional installations.

In May and June of 1966 no gas consumption was registered in the meter, prompting petitioner to issue a 'meter order' with instructions to change the gas meter in respondent's residence.

On August 17, 1966, at around 1 o'clock in the afternoon, petitioner's employee led by Mariano Coronel, the then Chief of the Distribution Department, went to Ongsip's place. After identifying themselves to the houseboy therein that they are from the Manila Gas Corporation, but without notifying or informing respondent Ongsip, they changed the gas meter and installed new tube connections. At the time the work was being undertaken, private respondent was taking a nap but he was informed afterwards of what had taken place by his houseboy.

On that same afternoon, at about 5 o'clock, petitioner's employees returned with a photographer who took pictures of the premises. Respondent Ongsip inquired from Coronel why they were taking pictures but the latter simply gave him a calling card with instructions to go to his (Coronel's) office. There, he was informed about the existence of a by-pass valve or "jumper" in the gas connection and that unless he gave Coronel P3,000.00, he would be deported. Respondent Ongsip refused to give the money, saying that he was not afraid as he had committed no wrong and that he could not be deported because he is already a Filipino citizen. By the end of August, a reading was made on the new meter and expectedly, it registered a sudden increase in gas consumption.

Thereafter, in October, 1966, a complaint for qualified theft was filed by petitioner against respondent Ongsip in the Pasay City Fiscal's Office docketed as I.S. No. 51441. (p. 3, Folder of Exhibits).

In February, 1967, pending investigation of the criminal complaint, petitioner disconnected respondent's gas service for alleged failure and/or refusal to pay his gas consumptions from July, 1965 to January, 1967 in violation of petitioner's regulation agreed upon in the 'Application for Gas Service' xxx.

Subsequently, the complaint was dismissed by the city fiscal of Pasay City in a resolution dated May 29, 1967, on the ground that —

> ". . . there is no evidence to establish the fact that there is an illegal installation or jumper in the premises of Isidro Ongsip and this is sustained by the fact that the prosecution witnesses did not attempt to excavate the premises of Isidro Ongsip in order to determine with certainty that there is an illegal installation. Without excavating the premises of Isidro Ongsip it is impossible to conclude with reasonable certainty that there is a jumper or illegal installation because illegal installation or jumper must not only proceed from an assumption but must be based from actual facts as proved." (pp. 4-6 Folder of Exhibits).

On July 14, 1967, following the dismissal by the investigating fiscal of the complaint for qualified theft and the disconnection by petitioner of his gas service, respondent Ongsip filed a complaint with the Court of First Instance

of Rizal, Pasay City Branch VII for moral and exemplary damages against petitioner Manila Gas Corporation based on two causes of action, firstly: the malicious, oppressive and malevolent filing of the criminal complaint as a result of which "plaintiff has suffered mental anguish, serious anxiety, social humiliation, ridicule, embarrassment and degradation in the eyes of his business associates, friends, relatives and the general public"; and, secondly: the illegal closure of respondent Ongsip's gas service connection without court order and without notice of warning purely "to further harass, humiliate and ridicule plaintiff, thereby again exposing unjustly, cruelly and oppressively the plaintiff, as well as his family, to social humiliation and degradation, to public contempt and ridicule, to personal discredit and dishonor and thus causing the plaintiff and the members of his family irreparable injuries consisting of business and social humiliation, personal dishonor, mental anguish, serious anxieties, wounded feelings and besmirched reputation." In addition to attorney's fees and costs of litigation, respondent Ongsip likewise prayed that "pending final determination of the case that a writ of preliminary mandatory injunction forthwith issue, commanding the defendant corporation, its agents and employees to reconnect the gas service and supply at the residence and apartment of plaintiff at 2685 Park Avenue, Pasay City." *(pp. 1-11, ROA).*

x x x

WE are thus constricted to a single issue in this case: whether or not the amount of moral and exemplary damages awarded by the trial court and affirmed by the Court of Appeals is excessive.

Article 2217 of the Civil Code states that "moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission." On the other hand, Article 2229 provides that "exemplary or corrective damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages." (emphasis supplied).

The first cause of action, for which respondent Ongsip was awarded moral and exemplary damages in the amount of P50,000.00 and P10,000.00, respectively, is predicated on Article 2219 of the Civil Code which states that "moral damages may be recovered in the following and analogous cases: . . . (8) malicious prosecution; . . . ."

To constitute malicious prosecution, there must be proof that the prosecution was prompted by a sinister design to vex and humiliate a person that it was initiated deliberately by the defendant knowing that his charges were false and groundless. Concededly, the mere act of submitting a case to the authorities for prosecution does not make one liable for malicious prosecution. *(Salao vs. Salao, 70 SCRA 65 [March 16, 1976]; Ramos vs. Ramos, 61 SCRA 284 [December 3, 1974]; Solis & Yarisantos vs. Salvador, 14 SCRA 887, August 14, 1965; Buenaventura, et al. vs. Sto. Domingo, et al., 103 Phil.*

239 [1958]; Barreto vs. Arevalo, 99 Phil. 771 [1956]).

In the instant case, however, there is reason to believe that there was malicious intent in the filing of the complaint for qualified theft. This intent is traceable to that early afternoon of August 17, 1966, when petitioner's employees, upon being ordered, came to private respondent's residence and changed the defective gas meter and tube connections without notice. In other words, respondent Ongsip had no opportunity to observe the works. Nonetheless, if indeed he had installed an illegal by-pass tube or jumper, he could have easily asked for its immediate removal soon alter his houseboy told him what petitioner's employees did. As established by the facts, he had not even attempted to refuse entrance to petitioner's employees headed by Mariano Coronel nor to question their authority upon their return later that same afternoon with a photographer. Little did he realize that the pictures of the premises that were being taken would be used as evidence against him. Surprisingly, when respondent Ongsip asked Coronel why they were taking pictures, Coronel just gave him a calling card and instructed him to go to his office. It was quite an unusual gesture. Obviously, Coronel had something in mind. As correctly observed by the trial court in its decision —

"A significant fact brought about by the testimony of Coronel himself is the total absence of immediate accusation against Plaintiff right at the very moment when the by-pass valve was allegedly discovered. Right then and there Coronel should have told Plaintiff that he was using a by-pass valve and in effect stealing gas from Defendant. There would have been nothing wrong with that. The circumstance was familiar to that of catching a thief *in flagrante delicto*. But the truth is that when Coronel and his men entered Plaintiff's compound and made changes therein, Plaintiff was sleeping. He had no knowledge of what was then going on. Coronel and his men told the 'boy' of Plaintiff that the changes were being made so that the consumption of gas could be decreased. So that when Plaintiff woke up at four o'clock in the afternoon, Coronel and his men had already made the changes and had already gone. They returned however at five o'clock, this time with a photographer. This was the time when Plaintiff met Coronel. Here was then the opportunity for Coronel to confront Plaintiff with the allegedly discovered 'by-pass valve' and bluntly, even brutally, tell him that there was thievery of gas. This, Coronel did not do. . . . ."

It bears noting that when he was informed as to the existence of a 'jumper' in his gas connection, respondent Ongsip did not show any sign of fear or remorse and did not yield to the threatening demand of Coronel. Experience tells us that this is not the attitude of a guilty person. On the contrary, this is the attitude of someone who knows how to take a firm stand where his principles and rights are concerned. To prove his innocence, he was even willing to have his place excavated but petitioner would not dare take the consequences. Besides, Delfin Custodio, petitioner's own mechanical engineer, testified that the second gas meter was replaced as being defective because "some of its parts were worn out and that it was not properly registering."

Evidently, petitioner Manila Gas Corporation, in failing to recover its lost revenue caused by the gas meter's incorrect recording, sought to

vindicate its financial loss by filing the complaint for qualified theft against respondent Ongsip knowing it to be false. It was actually intended to vex and humiliate private respondent and to blacken his reputation not only as a businessman but also as a person. Qualified theft is a serious offense indicating moral depravity in an individual. To be accused of such crime without basis is shocking and libelous. It stigmatized private respondent causing him emotional depression and social degradation. Petitioner should have realized that what is believed to be a vindication of a proprietary right is no justification for subjecting one's name to indignity and dishonor. One can thus imagine the anguish, anxiety, shock and humiliation suffered by respondent Ongsip. The fact that the complaint for qualified theft was dismissed by the Pasay City fiscal is no consolation. The damage had been done. Necessarily, indemnification had to be made.

I. PUBLIC HUMILIATION.

The Supreme Court likewise sustained award for damages in cases when the plaintiff suffered humiliation through the positive acts of the defendant directed against the plaintiff.

For example, the defendant was held liable for damages under Article 21 for slapping the plaintiff in public. *(Patricio vs. Hon. Oscar Leviste, G.R. No. 51832, April 26, 1989).* The rule was also applied in *Maria Ford vs. Court of Appeals* (G.R. Nos. 51171-72, June 4, 1990). The plaintiff in the case was a public school teacher who was performing her functions as deputy of the Commission on Elections in the conduct of a referendum. She was performing such function when she was slapped in the face by the defendant. The Supreme Court explained why the defendant was made liable:

> "The decision of the trial court proceeds from misapprehensions and patently erroneous conclusions of fact. A slap on the face is an unlawful aggression. The face personifies one's dignity and slapping it is a serious personal affront. It is a physical assault coupled with a willful disregard of the integrity of one's person. This is especially true if the aggrieved party is a school teacher who, in penal law, is a person in authority. Respect for a teacher is required of all, if we are to uphold and enhance the dignity of the teaching profession. The demeaning act of respondent Ford is virtually inexpiable when done, as in this case, in the presence of the public inside a polling precinct during an electoral exercise. This certainly is one of the extreme circumstances under which ridicule, discredit and contempt could be cast upon the aggrieved party in the community where she performs her functions as a mentor of their children.
>
> As discerningly observed by respondent court, consider-

> ing the position of private respondent, nothing but shame, humiliation and dishonor could have been heaped upon her by the indignities she had to suffer at the hands of petitioner Ford. Furthermore, there is ample reason to believe that said petitioner's displeasure over the rumor that private respondent was campaigning for "No" votes was sufficient motive for her to deliberately confront private respondent and maltreat the latter.
>
> The act of petitioner Ford in slapping private respondent on the face in public is contrary to morals and good customs and under the circumstances, could not but have caused the latter mental anguish, moral shock, wounded feelings and social humiliation. Full responsibility attached to said act of the late petitioner Ford and the corresponding sanctions should be imposed. Her excuse that she was prompted by her desire to calm down private respondent and prevent her from becoming hysterical is too lame a subterfuge upon which to premise a plea for exoneration. We are not persuaded by such pretense. Private respondent was in the performance of her duty when the incident took place and she had every right to stay in her post. On the other hand, petitioner Ford had no legitimate business inside the polling precinct. Definitely, she barged into the premises in response to the report and importuning of petitioner Uy.
>
> The award of moral damages is allowed in cases specified or analogous to those provided in Article 2219 of the Civil Code. Under Article 21 of said Code, in relation to Paragraph (10), Article 2219 thereof, any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for moral damages. By way of example or correction for the public good, exemplary damages may also be awarded. Attorney's fees are also recoverable.

The Revised Penal Code punishes similar acts known as slander by deed. This crime is committed by any person who performs an act that costs dishonor, discredit or contempt upon the offended party in the presence of other person or persons. *(Article 359).* For example, the accused was convicted of the crime of slander by deed when he slapped a priest before a large congregation while the priest was officiating a religious ceremony. *(People vs. Nosce, 60 Phil. 895).*

Similarly, the defendant may be held liable if he was unduly accosted in a supermarket and was accused of shoplifting. Damages under Article 21 of the Civil Code may be awarded if the suspected shoplifter was detained and subjected to verbal abuse in front of other customers. *(Grand Union Supermarket, Inc. vs. Jose J. Espino, Jr., G.R. No. L-48250, December 28, 1979).*

CASES:

RAFAEL PATRICIO vs. THE HONORABLE OSCAR LEVISTE
G.R. No. 51832, April 26, 1989

Petitioner Rafael Patricio, an ordained Catholic priest, and actively engaged in social and civic affairs in Pilar, Capiz, where he is residing, was appointed Director General of the 1976 Religious and Municipal Town Fiesta of Pilar, Capiz.

On 16 May 1976 at about 10:00 o'clock in the evening, while a benefit dance was on-going in connection with the celebration of the town fiesta, petitioner together with two (2) policemen were posted near the gate of the public auditorium to check on the assigned watchers of the gate. Private respondent Bienvenido Bacalocos, President of the Association of Barangay Captains of Pilar, Capiz and a member of the Sangguniang Bayan, who was in a state of drunkenness and standing near the same gate together with his companions, struck a bottle of beer on the table causing an injury on his hand which started to bleed. Then, he approached petitioner in a hostile manner and asked the latter if he had seen his wounded hand, and before petitioner could respond, private respondent, without provocation, hit petitioner's face with his bloodied hand. As a consequence, a commotion ensued and private respondent was brought by the policemen to the municipal building.

As a result of the incident, a criminal complaint for "Slander by Deed" was filed by petitioner with the Municipal Trial Court of Pilar, Capiz, docketed as Criminal Case No. 2228, but the same was dismissed. Subsequently, a complaint for damages was filed by petitioner with the court *a quo*. In a decision, dated 18 April 1978, the court ruled in favor of herein petitioner (as complainant), holding private respondent liable to the former for moral damages as a result of the physical suffering, moral shock and social humiliation caused by private respondent's act of hitting petitioner on the face in public.

x x x

Private respondent's contention that there was no bad faith on his part in slapping petitioner on the face and that the incident was merely accidental is not tenable. It was established before the court *a quo* that there was an existing feud between the families of both petitioner and private respondent and that private respondent slapped the petitioner without provocation in the presence of several persons.

The act of private respondent in hitting petitioner on the face is contrary to morals and good customs and caused the petitioner mental anguish, moral shock, wounded feelings and social humiliation. Private respondent has to take full responsibility for his act and his claim that he was unaware of what he had done to petitioner because of drunkenness is definitely no excuse and

does not relieve him of his liability to the latter.

Pursuant to Art. 21 of the Civil Code in relation to par. (10) of Art. 2219 of the same Code, "any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage."

The fact that no actual or compensatory damage was proven before the trial court, does not adversely affect petitioner's right to recover moral damages. Moral damages may be awarded in appropriate cases referred to in the chapter on human relations of the Civil Code (Articles 19 to 36), without need of proof that the wrongful act complained of had caused any physical injury upon the complainant. It is clear from the report of the Code Commission that the reason underlying an award of damages under Art. 21 of the Civil Code is to compensate the injured party for the moral injury caused upon his person, thus x x x.

x x x

GRAND UNION SUPERMARKET, INC. vs. JOSE J. ESPINO, JR.
G.R. No. L-48250, December 28, 1979

The facts of the case are as stated in the decision of the respondent court, to wit:

"Upon the evidence, and from the findings of the lower court, it appears that in the morning of August 22, 1970, plaintiff Jose J. Espino, Jr., a civil engineer and an executive of Procter and Gamble Philippines, Inc., and his wife and their two daughters went to shop at the defendants' South Supermarket in Makati. While his wife was shopping at the groceries section, plaintiff browsed around the other parts of the market. Finding a cylindrical "rat tail" file which he needed in his hobby and had been wanting to buy, plaintiff picked up that item from one of the shelves. He held it in his hand thinking that it might be lost, because of its tiny size, if he put it in his wife's grocery cart. In the course of their shopping, plaintiff and his wife saw the maid of plaintiff's aunt. While talking to this maid, plaintiff stuck the file into the front breast pocket of his shirt with a good part of the merchandise exposed.

"At the check-out counter, the plaintiff paid for his wife's purchases which amounted to P77.00, but he forgot to pay for the file. As he was leaving by the exit of the supermarket on his way to his car, carrying two bags of groceries and accompanied by his wife and two daughters, plaintiff was approached by a uniformed guard of the supermarket who said: "Excuse me, Mr., I think you have something in your pocket which you have not paid for" (p. 5, tsn, Aug. 13, 1971), pointing to his left front breast pocket. Suddenly reminded of the file, plaintiff apologized thus: "I am sorry," and he turned back toward the cashier to pay for the file. But the guard stopped him and led him instead toward the rear of the supermarket. The plaintiff protested but the guard was firm saying: "No, Mr., please come with me. It is the pro-

cedure of the supermarket to bring people that we apprehend to the back of the supermarket." (p. 8, *ibid*.). The time was between 9 and 10 o'clock. A crowd of customers on their way into the supermarket saw the plaintiff being stopped and led by a uniformed guard toward the rear of the supermarket. Plaintiff acquiesced and signaled to his wife and daughters to wait.

"Into a cubicle which was immediately adjacent to the area where deliveries to the supermarket were being made, the plaintiff was ushered. The guard directed him to a table and gave the file to the man seated at the desk. Another man stood beside the plaintiff. The man at the desk looked at the plaintiff and the latter immediately explained the circumstances that led to the finding of the file in his possession. The man at the desk pulled out a sheet of paper and began to ask plaintiff's name, age, residence and other personal data. Plaintiff was asked to make a brief statement, and on the sheet of paper or "Incident Report" he wrote down the following: "While talking to my aunt's maid with my wife, I put this item in my shirt pocket. I forgot to check it out with my wife's items." (Exhibit A). Meanwhile, the plaintiff's wife joined him and asked what had taken him so long.

"The guard who had accosted plaintiff took him back inside the supermarket in the company of his wife. Plaintiff and his wife were directed across the main entrance to the shopping area, down the line of check-out counters, to a desk beside the first check-out counter. To the woman seated at the desk, who turned out to be defendant Nelia Santos-Fandino, the guard presented the incident report and the file, Exhibit B. Defendant Fandino read the report and addressing the guard remarked: *"Ano, nakaw na naman ito"* (p. 22, *Id*.). Plaintiff explained and narrated the incident that led to the finding of the file in his pocket, telling Fandino that he was going to pay for the file because he needed it. But this defendant replied: "That is all they say, the people whom we caught not paying for the goods say . . . They all intended to pay for the things that are found to them." (p. 23, *Id*.). Plaintiff objected and said that he was a regular customer of the supermarket.

"Extracting a P5.00 bill from his pocket, plaintiff told Fandino that he was paying for the file whose cost was P3.85. Fandino reached over and took the P5.00 bill from plaintiff with these words: "We are fining you P5.00. That is your fine." Plaintiff was shocked. He and his wife objected vigorously that he was not a common criminal, and they wanted to get back the P5.00. But Fandino told them that the money would be given as an incentive to the guards who apprehend pilferers. People were milling around them and staring at the plaintiff. Plaintiff gave up the discussion. He drew a P50.00 bill and took back the file. Fandino directed him to the nearest check-out counter where he had to fall in line. The people who heard the exchange of words between Fandino and plaintiff continued to stare at him. At the trial, plaintiff expressed his embarrassment and humiliation thus: "I felt as though I wanted to disappear into a hole on the ground." (p. 34, *id*.). After paying for the file, plaintiff and his wife walked as fast as they could out of the supermarket. His first instruct was to go back to the supermarket that night to throw rocks at its glass windows. But reason prevailed over passion

and he thought that justice should take its due course.

"Plaintiff was certain during the trial that he signed the incident report, Exhibit A, inside the cubicle at the back of the supermarket only his brief statement of the facts (Exhibit A-2), aside from his name and personal circumstances, was written thereon. He swore the following were not in the incident report at the time he signed it:

Exhibit A-1 which says opposite the stenciled word SUBJECT: "Shoplifting."

Exhibit A-3 which says opposite the stenciled words Action Taken: Released by Mrs. Fandino after paying the item."

Exhibit A-4 which says opposite the stenciled words Remarks Noted: "Grd. Ebreo requested Grd. Paunil to apprehend subject shoplifter."

Private respondent's complaint filed on October 8, 1970 is founded on Article 21 in relation to Article 2219 of the New Civil Code and prays for moral damages, exemplary damages, attorney's fees and expenses of litigation, costs of the suit and the return of the P5.00 fine. After trial, the Court of First Instance of Pasig, Rizal, Branch XIX dismissed the complaint. Interposing the appeal to the Court of Appeals, the latter reversed and set aside the appealed judgment, granting damages as earlier stated.

x x x

We agree with the holding of the respondent appellate court that "the evidence sustains the court's finding that the plaintiff had absolutely no intention to steal the file." The totality of the facts and circumstances as found by the Court of Appeals unerringly points to the conclusion that private respondent did not intend to steal the file and that his act of picking up the file from the open shelf was not criminal nor done with malice or criminal intent for on the contrary, he took the item with the intention of buying and paying for it.

This Court needs only to stress the following undisputed facts which strongly and convincingly uphold the conclusion that private respondent was not "shoplifting." Thus, the facts that private respondent after picking the cylindrical "rat-tail" file costing P3.85 had placed it inside his left front breast pocket with a good portion of the item exposed to view and that he did not conceal it in his person or hid it from sight as well as the fact that he paid the purchases of his wife amounting to P77.00 at the check-out counter of the Supermarket, showed that he was not acting suspiciously or furtively. And the circumstance that he was with his family consisting of his wife, Mrs. Caridad Jayme Espino, and their two daughters at the time negated any criminal intent on his part to steal. Moreover, when private respondent was approached by the guard of the Supermarket as he was leaving by the exit to his car who told him, "Excuse me, Mr., I think you have something in your pocket which you have not paid for," Espino immediately apologized and answered, "I am sorry," which indicated his sincere apology or regrets. He turned back towards the cashier to pay for the file which proved his

honesty, sincerity and good faith in buying the item, and not to shoplift the same. His brief statement on the sheet of paper called the Incident Report where private respondent wrote the following: "While talking to my aunt's maid with my wife, I put this item in my shirt pocket. I forgot to check it out with my wife's items," was an instant and contemporaneous explanation of the incident.

Considering further the personal circumstances of the private respondent, his education, position and character showing that he is a graduate of Mechanical Engineer from U.P. Class 1950, employed as an executive of Proctor & Gamble Phils., Inc., a corporate manager in charge of motoring and warehousing therein; honorably discharged from the Philippine Army in 1946; a Philippine government *pensionado* of the United States for six months; member of the Philippine Veterans Legion; author of articles published in the Manila Sunday Times and Philippines Free Press; member of the Knights of Columbus, Council No. 3713; son of the late Jose Maria Espino, retired Minister, Department of Foreign Affairs at the Philippine Embassy, Washington, We are fully convinced, as the trial and appellate courts were, that private respondent did not intend to steal the article costing P3.85. Nothing in the records intimates or hints whatsoever that private respondent has had any police record of any sort much less suspicion of stealing or shoplifting.

We do not lay down here any hard-and-fast rule as to what act or combination of acts constitute the crime of shoplifting for it must be stressed that each case must be considered and adjudged on a case-to-case basis and that in the determination of whether a person suspected of shoplifting has in truth and in fact committed the same, all the attendant facts and circumstances should be considered in their entirety and not from any single fact or circumstance from which to impute the stigma of shoplifting on any person suspected and apprehended therefor.

We likewise concur with the Court of Appeals that "(u)pon the facts and under the law, plaintiff has clearly made the cause of action for damages against the defendants. Defendants wilfully caused loss or injury to plaintiff in a manner that was contrary to morals, good customs or Public policy, making them amenable to damages under Articles 19 and 21 in relation to Article 2219 of the Civil Code."

That private respondent was falsely accused of shoplifting is evident. The Incident Report (Exhibit A) with the entries thereon under Exhibit A-1 which says opposite the stenciled word SUBJECT: "Shoplifting," Exhibit A-3 which says opposite the stenciled words Action Taken: "Released by Mrs. Fandino after paying the item," Exhibit A-4 which says opposite the stenciled words Remarks Noted: "Grd. Ebreo requested Grd. Paunil to apprehend subject shoplifter," established the opinion, judgment or thinking of the management of petitioner's supermarket upon private respondent's act of picking up the file. In plain words, private respondent was regarded and pronounced a shoplifter and had committed "shoplifting."

We also affirm the Court of Appeals' finding that petitioner Nelia

Santos Fandino, after reading the incident report, remarked the following: *"Ano, nakaw na naman ito?"* Such a remark made in the presence of private respondent and with reference to the incident report with its entries, was offensive to private respondent's dignity and defamatory to his character and honesty. When Espino explained that he was going to pay the file but simply forgot to do so, Fandino doubted the explanation, saying: "That is all what they say, the people whom we caught not paying for the goods say . . . they all intended to pay for the things that are found to them." Private respondent objected and said that he was a regular customer of the Supermarket.

The admission of Fandino that she required private respondent to pay a fine of P5.00 and did in fact take the P5.00 bill of private respondent tendered by the latter to pay for the file, as a fine which would be given as an incentive to the guards who apprehend pilferers clearly proved that Fandino branded private respondent as a thief which was not right nor justified.

The testimony of the guard that management instructed them to bring the suspected customers to the public area for the people to see those kind of customers in order that they may be embarrassed (p. 26, tsn, Sept. 30, 1971); that management wanted "the customers to be embarrassed in public so that they will not repeat the stealing again" (p. 2, tsn, Dec. 10, 1971); that the management asked the guards "to bring these customers to different cashiers in order that they will know that they are pilferers" (p. 2, *ibid*.) may indicate the manner or pattern whereby a confirmed or self-confessed shoplifter is treated by the Supermarket management but in the case at bar, there is no showing that such procedure was taken in the case of the private respondent who denied strongly and vehemently the charge of shoplifting.

SOLEDAD CARPIO vs. LEONORA A. VALMONTE,
G.R. No. 151866 September 9, 2004

TINGA, J.:

Respondent Leonora Valmonte is a wedding coordinator. Michelle del Rosario and Jon Sierra engaged her services for their church wedding on 10 October 1996. At about 4:30 p.m. on that day, Valmonte went to the Manila Hotel where the bride and her family were billeted. When she arrived at Suite 326-A, several persons were already there including the bride, the bride's parents and relatives, the make-up artist and his assistant, the official photographers, and the fashion designer. Among those present was petitioner Soledad Carpio, an aunt of the bride who was preparing to dress up for the occasion.

After reporting to the bride, Valmonte went out of the suite carrying the items needed for the wedding rites and the gifts from the principal sponsors. She proceeded to the Maynila Restaurant where the reception was to be held. She paid the suppliers, gave the meal allowance to the band, and went back to the suite. Upon entering the suite, Valmonte noticed the people

staring at her. It was at this juncture that petitioner allegedly uttered the following words to Valmonte: "Ikaw lang ang lumabas ng kwarto, nasaan ang dala mong bag? Saan ka pumunta? Ikaw lang and lumabas ng kwarto, ikaw ang kumuha." Petitioner then ordered one of the ladies to search Valmonte's bag. It turned out that after Valmonte left the room to attend to her duties, petitioner discovered that the pieces of jewelry which she placed inside the comfort room in a paper bag were lost. The jewelry pieces consist of two (2) diamond rings, one (1) set of diamond earrings, bracelet and necklace with a total value of about one million pesos. The hotel security was called in to help in the search. The bags and personal belongings of all the people inside the room were searched. Valmonte was allegedly bodily searched, interrogated and trailed by a security guard throughout the evening. Later, police officers arrived and interviewed all persons who had access to the suite and fingerprinted them including Valmonte. During all the time Valmonte was being interrogated by the police officers, petitioner kept on saying the words "Siya lang ang lumabas ng kwarto." Valmonte's car which was parked at the hotel premises was also searched but the search yielded nothing.

A few days after the incident, petitioner received a letter from Valmonte demanding a formal letter of apology which she wanted to be circulated to the newlyweds' relatives and guests to redeem her smeared reputation as a result of petitioner's imputations against her. Petitioner did not respond to the letter. Thus, on 20 February 1997, Valmonte filed a suit for damages against her before the Regional Trial Court (RTC) of Pasig City, Branch 268. In her complaint, Valmonte prayed that petitioner be ordered to pay actual, moral and exemplary damages, as well as attorney's fees.

Responding to the complaint, petitioner denied having uttered words or done any act to confront or single out Valmonte during the investigation and claimed that everything that transpired after the theft incident was purely a police matter in which she had no participation. Petitioner prayed for the dismissal of the complaint and for the court to adjudge Valmonte liable on her counterclaim.

The trial court rendered its Decision on 21 August 2000, dismissing Valmonte's complaint for damages. It ruled that when petitioner sought investigation for the loss of her jewelry, she was merely exercising her right and if damage results from a person exercising his legal right, it is damnum absque injuria. It added that no proof was presented by Valmonte to show that petitioner acted maliciously and in bad faith in pointing to her as the culprit. The court said that Valmonte failed to show that she suffered serious anxiety, moral shock, social humiliation, or that her reputation was besmirched due to petitioner's wrongful act.

Respondent appealed to the Court of Appeals alleging that the trial court erred in finding that petitioner did not slander her good name and reputation and in disregarding the evidence she presented.

The Court of Appeals ruled differently. It opined that Valmonte has clearly established that she was singled out by petitioner as the one respon-

sible for the loss of her jewelry. It cited the testimony of Serena Manding, corroborating Valmonte's claim that petitioner confronted her and uttered words to the effect that she was the only one who went out of the room and that she was the one who took the jewelry. The appellate court held that Valmonte's claim for damages is not predicated on the fact that she was subjected to body search and interrogation by the police but rather petitioner's act of publicly accusing her of taking the missing jewelry. It categorized petitioner's utterance defamatory considering that it imputed upon Valmonte the crime of theft. The court concluded that petitioner's verbal assault upon Valmonte was done with malice and in bad faith since it was made in the presence of many people without any solid proof except petitioner's suspicion. Such unfounded accusation entitles Valmonte to an award of moral damages in the amount of P100,000.00 for she was publicly humiliated, deeply insulted, and embarrassed. However, the court found no sufficient evidence to justify the award of actual damages.

Hence, this petition.

Petitioner contends that the appellate court's conclusion that she publicly humiliated respondent does not conform to the evidence presented. She adds that even on the assumption that she uttered the words complained of, it was not shown that she did so with malice and in bad faith.

In essence, petitioner would want this Court to review the factual conclusions reached by the appellate court. The cardinal rule adhered to in this jurisdiction is that a petition for review must raise only questions of law,[3] and judicial review under Rule 45 does not extend to an evaluation of the sufficiency of evidence unless there is a showing that the findings complained of are totally devoid of support in the record or that they are so glaringly erroneous as to constitute serious abuse of discretion.[4] This Court, while not a trier of facts, may review the evidence in order to arrive at the correct factual conclusion based on the record especially so when the findings of fact of the Court of Appeals are at variance with those of the trial court, or when the inference drawn by the Court of Appeals from the facts is manifestly mistaken.[5]

Contrary to the trial court's finding, we find sufficient evidence on record tending to prove that petitioner's imputations against respondent was made with malice and in bad faith.

Petitioner's testimony was shorn of substance and consists mainly of denials. She claimed not to have uttered the words imputing the crime of theft to respondent or to have mentioned the latter's name to the authorities as the one responsible for the loss of her jewelry. Well-settled is the rule that denials, if unsubstantiated by clear and convincing evidence, are negative and self-serving which merit no weight in law and cannot be given greater evidentiary value over the testimony of credible witnesses who testify on affirmative matters.

Respondent, however, has successfully refuted petitioner's testimony.

Quite credibly, she has narrated in great detail her distressing experience on that fateful day. She testified as to how rudely she was treated by petitioner right after she returned to the room. Petitioner immediately confronted her and uttered the words: "Ikaw lang ang lumabas ng kwarto. Nasaan ang dala mong bag? Saan ka pumunta? Ikaw ang kumuha." Thereafter, her body was searched including her bag and her car. Worse, during the reception, she was once more asked by the hotel security to go to the ladies room and she was again bodily searched.

Sereña Manding, a make-up artist, corroborated respondent's testimony. She testified that petitioner confronted respondent in the presence of all the people inside the suite accusing her of being the only one who went out of the comfort room before the loss of the jewelry. Manding added that respondent was embarrassed because everybody else in the room thought she was a thief. If only to debunk petitioner's assertion that she did not utter the accusatory remarks in question publicly and with malice, Manding's testimony on the point deserves to be reproduced. Thus,

Q After that what did she do?

A Then Leo came out from the other room she said, she is (sic) the one I only saw from the comfort room.

Q Now, what exact word (sic) were said by Mrs. Carpio on that matter?

A She said "siya lang yung nakita kong galing sa C.R."

Q And who was Mrs. Carpio or the defendant referring to?

A Leo Valmonte.

Q Did she say anything else, the defendant?

A Her jewelry were lost and Leo was the only one she saw in the C.R. After that she get (sic) the paper bag then the jewelry were already gone.

Q Did she confront the plaintiff Mrs. Valmonte regarding that fact?

A Yes.

Q What did the defendant Mrs. Carpio tell the plaintiff, Mrs. Valmonte?

A "Ikaw yung nakita ko sa C.R. nawawala yung alahas ko."

Q When the defendant Mrs. Carpio said that to plaintiff Mrs. Valmonte were there other people inside the room?

A Yes, sir.

Q Were they able to hear what Mrs. Carpio said to Mrs. Valmonte?

A Yes, sir.

Q What was your thinking at that time that Mrs. Carpio said that to Mrs. Valmonte?

A "Nakakahiya kasi akala ng iba doon na talagang magnanakaw siya. Kasi marami na kaming nandodoon, dumating na yung couturier pati yung video man and we sir.

Q Who was the person you [were] alleging "na nakakahiya" whose (sic) being accused or being somebody who stole those item of jewelry?

A "Nakakahiya para kay Leo kasi pinagbibintangan siya. Sa dami namin doon siya yung napagbintangan."

Q And who is Leo, what is her full name?

A Leo Valmonte.

Q Did the defendant tell this matter to other people inside the room?

A Yes, the mother of the bride.

Q And who else did she talk to?

A The father of the bride also.

Q And what did the defendant tell the mother regarding this matter?

A "Nawawala yung alahas ko." Sabi naman nung mother baka naman hindi mo dala tignan mo munang mabuti.

Q Who was that other person that she talked to?

A Father of the bride.

Significantly, petitioner's counsel elected not to pursue her cross-examination of the witness on this point following her terse and firm declaration that she remembered petitioner's exact defamatory words in answer to the counsel's question.

Jaime Papio, Security Supervisor at Manila Hotel, likewise contradicted petitioner's allegation that she did not suspect or mention the name of respondent as her suspect in the loss of the jewelry.

To warrant recovery of damages, there must be both a right of action, for a wrong inflicted by the defendant, and the damage resulting therefrom to the plaintiff. Wrong without damage, or damage without wrong, does not constitute a cause of action.

In the sphere of our law on human relations, the victim of a wrongful act or omission, whether done willfully or negligently, is not left without any remedy or recourse to obtain relief for the damage or injury he sustained. Incorporated into our civil law are not only principles of equity but also universal moral precepts which are designed to indicate certain norms that

spring from the fountain of good conscience and which are meant to serve as guides for human conduct. First of these fundamental precepts is the principle commonly known as "abuse of rights" under Article 19 of the Civil Code. It provides that "Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due and observe honesty and good faith." To find the existence of an abuse of right, the following elements must be present: (1) there is a legal right or duty; (2) which is exercised in bad faith; (3) for the sole intent or prejudicing or injuring another. When a right is exercised in a manner which discards these norms resulting in damage to another, a legal wrong is committed for which the actor can be held accountable. One is not allowed to exercise his right in a manner which would cause unnecessary prejudice to another or if he would thereby offend morals or good customs. Thus, a person should be protected only when he acts in the legitimate exercise of his right, that is when he acts with prudence and good faith; but not when he acts with negligence or abuse.

Complementing the principle of abuse of rights are the provisions of Articles 20 and 21 of the Civil Code which read, thus:

x x x

The foregoing rules provide the legal bedrock for the award of damages to a party who suffers damage whenever one commits an act in violation of some legal provision, or an act which though not constituting a transgression of positive law, nevertheless violates certain rudimentary rights of the party aggrieved.

In the case at bar, petitioner's verbal reproach against respondent was certainly uncalled for considering that by her own account nobody knew that she brought such kind and amount of jewelry inside the paper bag. This being the case, she had no right to attack respondent with her innuendos which were not merely inquisitive but outrightly accusatory. By openly accusing respondent as the only person who went out of the room before the loss of the jewelry in the presence of all the guests therein, and ordering that she be immediately bodily searched, petitioner virtually branded respondent as the thief. True, petitioner had the right to ascertain the identity of the malefactor, but to malign respondent without an iota of proof that she was the one who actually stole the jewelry is an act which, by any standard or principle of law is impermissible. Petitioner had willfully caused injury to respondent in a manner which is contrary to morals and good customs. Her firmness and resolve to find her missing jewelry cannot justify her acts toward respondent. She did not act with justice and good faith for apparently, she had no other purpose in mind but to prejudice respondent. Certainly, petitioner transgressed the provisions of Article 19 in relation to Article 21 for which she should be held accountable.

[The Court ruled however that the claim for actual damages was not substantiated. Nevertheless, it concluded that the respondent is clearly entitled to an award of moral damages.]

CHAPTER 7

HUMAN DIGNITY

In this Chapter, we will examine the torts that involve the right of a person to dignity, personality, privacy and peace of mind. Primarily, we will discuss the torts defined under Article 26 of the New Civil Code. Article 26 provides that:

> "ART. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and other similar acts, though they may not constitute a criminal offense shall produce a cause of action for damages, prevention and other relief:
>
> (1) Prying into the privacy of another's residence;
>
> (2) Meddling with or disturbing the private life or family relations of another;
>
> (3) Intriguing to cause another to be alienated from his friends;
>
> (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition."

The Report of the Code Commission contains the following explanation of the foregoing statutory provision:

> "The sacredness of human personality is a concomitant of every plan for human amelioration. The touchstone of every system of laws, of the culture and civilization of every country, is how far it dignifies man. If in legislation, inadequate regard is observed for human life and safety; if the laws do not sufficiently forestall human suffering or do not try effectively to curb those factors or influences that wound the noblest sentiments; if the statutes insufficiently protect persons from being unjustly humiliated, in short, if human personality is not properly exalted – then the laws are indeed defective. Sad to say, such is to some degree the present state of legislation in the Philippines. To remedy this grave fault in the laws is one of the principal aims of the Project

of Civil Code. Instances will now be specified.

The present laws, criminal and civil, do not adequately cope with the interferences and vexations mentioned in Article 28.

The privacy of one's home is an inviolable right. Yet, the laws in force do not squarely and effectively protect this right.

1. PRIVACY

A. CONSTITUTIONAL RIGHT TO PRIVACY.

a. Scope of Protection.

In the sphere of Constitutional Law, the right to privacy is protected by the due process clause of the Constitution. Its protection is also included in the protection of the right against unreasonable searches and seizures, the right to privacy of one's communication and correspondence, and the right against self-incrimination. Facets of the right to privacy are likewise protected in other provisions of the Bill of Rights, including:

> Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.
>
> Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.
>
> Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
>
> x x x x x x x x x
>
> Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law.
>
> x x x x x x x x x
>
> Sec. 8. The right of the people, including those employed

in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged.

Sec. 17. No person shall be compelled to be a witness against himself."

The United States Supreme Court has also fashioned a limited constitutional right in the bedroom. *(Kent Middleton and Bill F. Chaberlin, The Law of Public Communication, 1994 Ed., p. 159)*. The Court has acknowledged that the rights contained in the Bill of Rights imply a right for a citizen to be free from government intrusion into the most intimate family matters. *(ibid.*, citing *Griswold vs. Connecticut, 381 U.S. 479 [1965]; Roe vs. Wade, 410 U.S. 113 [1973]; Bowers vs. Hardwick, 478 US 186 [1986])*. It is widely accepted, however, that the tort law conception of privacy is distinct from the quasi-constitutional right to privacy the United States Supreme Court has recognized. "A person's interest in limiting the gathering and recording of his image does not amount to a right of constitutional magnitude, at least as applied against nonstate actors. Such a position would be difficult to reconcile with the Court's repeated assertion that the Constitution generally shields individuals from only governmental actions." *(Harvard Law Review, Vol. III, February, 1998, p. 1098)*.

In the Philippines, the right to be let alone is likewise a constitutional right. In a recent decision, the Supreme Court considered the right to privacy as one of the fundamental constitutional rights. In *Blas F. Ople vs. Ruben D. Torres, et al.* (G.R. No. 127685, July 23, 1998) the Supreme Court confirmed that the right is recognized and enshrined in Sections 1, 2, 3[1], 6, 8 and 17 of the 1987 Constitution. The Supreme Court observed that:

"Assuming, arguendo, that A.O. No. 308 need not be the subject of a law, still it cannot pass constitutional muster as an administrative legislation because facially it violates the right to privacy. The essence of privacy is the "right to be let alone." In the 1965 case of *Griswold vs. Connecticut,* the United States Supreme Court gave more substance to the right of privacy when it ruled that the right has a constitutional foundation. It held that there is a right of privacy which can be found within the penumbras of the First, Third, Fourth, Fifth and Ninth Amendments, *viz.*:

'Specific guarantees in the Bill of Rights have penumbras formed by emanations from these guarantees that help give them life and substance . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of

that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

In the 1968 case of *Morfe vs. Mutuc*, we adopted the *Griswold* ruling that there is a constitutional right to privacy. Speaking thru Mr. Justice, later Chief Justice, Enrique Fernando, we held:

"x x x x x x x x x

The *Griswold* case invalidated a Connecticut statute which made the use of contraceptives a criminal offense on the ground of its amounting to an unconstitutional invasion of the right of privacy of married persons; rightfully it stressed "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." It has wider implications though. The constitutional right to privacy has come into its own.

So, it is likewise in our jurisdiction. The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection. The language of Prof. Emerson is particularly apt: 'The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society.'"

The Court ruled that in passing laws and rules, adequate safeguards should be maintained regarding the people's reasonable expectation of privacy. "The reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether by his conduct, the

individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable. The factual circumstances of the case determine the reasonableness of the expectation. However, other factors, such as customs, physical surroundings and practices of a particular activity, may serve to create or diminish this expectation." *(ibid.)*.

The Court likewise noted that zones of privacy are recognized and protected in our laws. The Civil Code provides that "[e]very person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons" and punishes as actionable torts several acts by a person of meddling and prying into the privacy of another. It also holds a public officer or employee or any private individual liable for damages for any violation of the rights and liberties of another person, and recognizes the privacy of letters and other private communications. The Revised Penal Code makes a crime the violation of secrets by an officer, the revelation of trade and industrial secrets, and trespass to dwelling. Invasion of privacy is an offense in special laws like the Anti-Wiretapping Law, the Secrecy of Bank Deposits Act and the Intellectual Property Code. The Rules of Court provisions on privileged communication likewise recognize the privacy of certain information." *(ibid.)*.

In *Erlinda K. Ilusio vs. Erlinda I. Bildner* (G.R. Nos. 139789 and 139808, May 12, 2000), the Supreme Court expressed the view that the constitutional right of privacy may be violated if the court will force a person to let other people have access to him. A person who is not incapacitated — with full mental capacity and with the right of choice — may not be the subject of visitation rights even by his relatives against his free choice. Otherwise, there will be deprivation of his constitutional right.

b. Basis of Liability for Damages.

Violation of the constitutional right to privacy that causes damage to another makes the actor liable under Article 32 of the Civil Code. The claim for damages may be anchored on deprivation of due process, violation of the right against unreasonable searches and seizure or the privacy of communication and correspondence and other related rights specified in Article 32.

CASE:

BLAS OPLE vs. RUBEN TORRES
G.R. No. 127685, July 23, 1998

[The petitioner questioned the constitutionality of Administrative Order No. 308 entitled "Adoption of a National Computerized Identification Reference System" which was issued by President Fidel V. Ramos on December 12, 1996. One of the arguments raised by the petitioner is that A.O. No. 308 was an impermissible intrusion in the zone of privacy.]

x x x

"ADOPTION OF A NATIONAL COMPUTERIZED IDENTIFICATION REFERENCE SYSTEM

WHEREAS, there is a need to provide Filipino citizens and foreign residents with the facility to conveniently transact business with basic service and social security providers and other government instrumentalities;

WHEREAS, this will require a computerized system to properly and efficiently identify persons seeking basic services on social security and reduce, if not totally eradicate, fraudulent transactions and misrepresentations;

WHEREAS, a concerted and collaborative effort among the various basic services and social security providing agencies and other government instrumentalities is required to achieve such a system;

NOW, THEREFORE, I, FIDEL V. RAMOS, President of the Republic of the Philippines, by virtue of the powers vested in me by law, do hereby direct the following:

SEC. 1. *Establishment of a National Computerized Identification Reference System*. — A decentralized Identification Reference System among the key basic services and social security providers is hereby established.

SEC. 2. *Inter-Agency Coordinating Committee*. — An Inter-Agency Coordinating Committee (IACC) to draw-up the implementing guidelines and oversee the implementation of the System is hereby created, chaired by the Executive Secretary, with the following as members:

Head, Presidential Management Staff

Secretary, National Economic Development Authority

Secretary, Department of the Interior and Local Government

Secretary, Department of Health

Administrator, Government Service Insurance System,

Administrator, Social Security System,

Administrator, National Statistics Office

Managing Director, National Computer Center.

SEC. 3. *Secretariat*. — The National Computer Center (NCC) is hereby

designated as secretariat to the IACC and as such shall provide administrative and technical support to the IACC.

SEC. 4. *Linkage Among Agencies*. — The Population Reference Number (PRN) generated by the NSO shall serve as the common reference number to establish a linkage among concerned agencies. The IACC Secretariat shall coordinate with the different Social Security and Services Agencies to establish the standards in the use of Biometrics Technology and in computer application designs of their respective systems.

SEC. 5. *Conduct of Information Dissemination Campaign*. — The Office of the Press Secretary, in coordination with the National Statistics Office, the GSIS and SSS as lead agencies and other concerned agencies shall undertake a massive tri-media information dissemination campaign to educate and raise public awareness on the importance and use of the PRN and the Social Security Identification Reference.

SEC. 6. *Funding*. — The funds necessary for the implementation of the system shall be sourced from the respective budgets of the concerned agencies.

SEC. 7. *Submission of Regular Reports*. — The NSO, GSIS and SSS shall submit regular reports to the Office of the President, through the IACC, on the status of implementation of this undertaking.

SEC. 8. *Effectivity*. — This Administrative Order shall take effect immediately.

DONE in the City of Manila, this 12th day of December in the year of Our Lord, Nineteen Hundred and Ninety-Six.

(SGD.) FIDEL V. RAMOS"

x x x

Unlike the dissenters, we prescind from the premise that the right to privacy is a fundamental right guaranteed by the Constitution, hence, it is the burden of government to show that A.O. No. 308 is justified by some compelling state interest and that it is narrowly drawn. A.O. No. 308 is predicated on two considerations: (1) the need to provide our citizens and foreigners with the facility to conveniently transact business with basic service and social security providers and other government instrumentalities and (2) the need to reduce, if not totally eradicate, fraudulent transactions and misrepresentations by persons seeking basic services. It is debatable whether these interests are compelling enough to warrant the issuance of A.O. No. 308. But what is not arguable is the broadness, the vagueness, the overbreadth of A.O. No. 308 which if implemented will put our people's right to privacy in clear and present danger.

The heart of A.O. No. 308 lies in its Section 4 which provides for a Population Reference Number (PRN) as a "common reference number to es-

tablish a linkage among concerned agencies" through the use of "Biometrics Technology" and "computer application designs."

Biometry or biometrics is "the science of the application of statistical methods to biological facts; a mathematical analysis of biological data." The term "biometrics" has now evolved into a broad category of technologies which provide precise confirmation of an individual's identity through the use of the individual's own physiological and behavioral characteristics. A physiological characteristic is a relatively stable physical characteristic such as a fingerprint, retinal scan, hand geometry or facial features. A behavioral characteristic is influenced by the individual's personality and includes voice print, signature and keystroke. Most biometric identification systems use a card or personal identification number (PIN) for initial identification. The biometric measurement is used to verify that the individual holding the card or entering the PIN is the legitimate owner of the card or PIN.

A most common form of biological encoding is finger-scanning where technology scans a fingertip and turns the unique pattern therein into an individual number which is called a biocrypt. The biocrypt is stored in computer data banks and becomes a means of identifying an individual using a service. This technology requires one's fingertip to be scanned every time service or access is provided. Another method is the retinal scan. Retinal scan technology employs optical technology to map the capillary pattern of the retina of the eye. This technology produces a unique print similar to a finger print. Another biometric method is known as the "artificial nose." This device chemically analyzes the unique combination of substances excreted from the skin of people. The latest on the list of biometric achievements is the thermogram. Scientists have found that by taking pictures of a face using infrared cameras, a unique heat distribution pattern is seen. The different densities of bone, skin, fat and blood vessels all contribute to the individual's personal "heat signature."

In the last few decades, technology has progressed at a galloping rate. Some science fictions are now science facts. Today, biometrics is no longer limited to the use of fingerprint to identify an individual. It is a new science that uses various technologies in encoding any and all biological characteristics of an individual for identification. It is noteworthy that A.O. No. 308 does not state what specific biological characteristics and what particular biometrics technology shall be used to identify people who will seek its coverage. Considering the banquet of options available to the implementors of A.O. No. 308, the fear that it threatens the right to privacy of our people is not groundless.

A.O. No. 308 should also raise our antennas for a further look will show that it does not state whether encoding of data is limited to biological information alone for identification purposes. In fact, the Solicitor General claims that the adoption of the Identification Reference System will contribute to the "generation of population data for development planning." This is an admission that the PRN will not be used solely for identification but for the

generation of other data with remote relation to the avowed purposes of A.O. No. 308. Clearly, the indefiniteness of A.O. No. 308 can give the government the roving authority to store and retrieve information for a purpose other than the identification of the individual through his PRN.

The potential for misuse of the data to be gathered under A.O. No. 308 cannot be underplayed as the dissenters do. Pursuant to said administrative order, an individual must present his PRN everytime he deals with a government agency to avail of basic services and security. His transactions with the government agency will necessarily be recorded — whether it be in the computer or in the documentary file of the agency. The individual's file may include his transactions for loan availments, income tax returns, statement of assets and liabilities, reimbursements for medication, hospitalization, etc. The more frequent the use of the PRN, the better the chance of building a huge and formidable information base through the electronic linkage of the files. The data may be gathered for gainful and useful government purposes; but the existence of this vast reservoir of personal information constitutes a covert invitation to misuse, a temptation that may be too great for some of our authorities to resist.

We can even grant, arguendo, that the computer data file will be limited to the name, address and other basic personal information about the individual. Even that hospitable assumption will not save A.O. No. 308 from constitutional infirmity for again said order does not tell us in clear and categorical terms how these information gathered shall be handled. It does not provide who shall control and access the data, under what circumstances and for what purpose. These factors are essential to safeguard the privacy and guaranty the integrity of the information. Well to note, the computer linkage gives other government agencies access to the information. Yet, there are no controls to guard against leakage of information. When the access code of the control programs of the particular computer system is broken, an intruder, without fear of sanction or penalty, can make use of the data for whatever purpose, or worse, manipulate the data stored within the system.

It is plain and we hold that A.O. No. 308 falls short of assuring that personal information which will be gathered about our people will only be processed for unequivocally specified purposes. The lack of proper safeguards in this regard of A.O. No. 308 may interfere with the individual's liberty of abode and travel by enabling authorities to track down his movement; it may also enable unscrupulous persons to access confidential information and circumvent the right against self-incrimination; it may pave the way for "fishing expeditions" by government authorities and evade the right against unreasonable searches and seizures. The possibilities of abuse and misuse of the PRN, biometrics and computer technology are accentuated when we consider that the individual lacks control over what can be read or placed on his ID, much less verify the correctness of the data encoded. They threaten the very abuses that the Bill of Rights seeks to prevent.

The ability of a sophisticated data center to generate a comprehensive

cradle-to-grave dossier on an individual and transmit it over a national network is one of the most graphic threats of the computer revolution. The computer is capable of producing a comprehensive dossier on individuals out of information given at different times and for varied purposes. It can continue adding to the stored data and keeping the information up to date. Retrieval of stored data is simple. When information of a privileged character finds its way into the computer, it can be extracted together with other data on the subject. Once extracted, the information is putty in the hands of any person. The end of privacy begins.

Though A.O. No. 308 is undoubtedly not narrowly drawn, the dissenting opinions would dismiss its danger to the right to privacy as speculative and hypothetical. Again, we cannot countenance such a laidback posture. The Court will not be true to its role as the ultimate guardian of the people's liberty if it would not immediately smother the sparks that endanger their rights but would rather wait for the fire that could consume them.

We reject the argument of the Solicitor General that an individual has a reasonable expectation of privacy with regard to the National ID and the use of biometrics technology as it stands on quicksand. The reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable. The factual circumstances of the case determines the reasonableness of the expectation. However, other factors, such as customs, physical surroundings and practices of a particular activity, may serve to create or diminish this expectation. The use of biometrics and computer technology in A.O. No. 308 does not assure the individual of a reasonable expectation of privacy. As technology advances, the level of reasonably expected privacy decreases. The measure of protection granted by the reasonable expectation diminishes as relevant technology becomes more widely accepted. The security of the computer data file depends not only on the physical inaccessibility of the file but also on the advances in hardware and software computer technology. A.O. No. 308 is so widely drawn that a minimum standard for a reasonable expectation of privacy, regardless of technology used, cannot be inferred from its provisions.

The rules and regulations to be drawn by the IACC cannot remedy this fatal defect. Rules and regulations merely implement the policy of the law or order. On its face, A.O. No. 308 gives the IACC virtually unfettered discretion to determine the metes and bounds of the ID System.

Nor do our present laws provide adequate safeguards for a reasonable expectation of privacy. Commonwealth Act No. 591 penalizes the disclosure by any person of data furnished by the individual to the NSO with imprisonment and fine. Republic Act No. 1161 prohibits public disclosure of SSS employment records and reports. These laws, however, apply to records and data with the NSO and the SSS. It is not clear whether they may be applied to data with the other government agencies forming part of the National ID System. The need to clarify the penal aspect of A.O. No. 308 is another reason

why its enactment should be given to Congress.

Next, the Solicitor General urges us to validate A.O. No. 308's abridgment of the right of privacy by using the rational relationship test. He stressed that the purposes of A.O. No. 308 are: (1) to streamline and speed up the implementation of basic government services, (2) eradicate fraud by avoiding duplication of services, and (3) generate population data for development planning. He concludes that these purposes justify the incursions into the right to privacy for the means are rationally related to the end.

We are not impressed by the argument. In *Morfe vs. Mutuc*, we upheld the constitutionality of R.A. 3019, the Anti-Graft and Corrupt Practices Act, as a valid police power measure. We declared that the law, in compelling a public officer to make an annual report disclosing his assets and liabilities, his sources of income and expenses, did not infringe on the individual's right to privacy. The law was enacted to promote morality in public administration by curtailing and minimizing the opportunities for official corruption and maintaining a standard of honesty in the public service.

The same circumstances do not obtain in the case at bar. For one, R.A. 3019 is a statute, not an administrative order. Secondly, R.A. 3019 itself is sufficiently detailed. The law is clear on what practices were prohibited and penalized, and it was narrowly drawn to avoid abuses. In the case at bar, A.O. No. 308 may have been impelled by a worthy purpose, but, it cannot pass constitutional scrutiny for it is not narrowly drawn. And we now hold that when the integrity of a fundamental right is at stake, this court will give the challenged law, administrative order, rule or regulation a stricter scrutiny. It will not do for the authorities to invoke the presumption of regularity in the performance of official duties. Nor is it enough for the authorities to prove that their act is not irrational for a basic right can be diminished, if not defeated, even when the government does not act irrationally. They must satisfactorily show the presence of compelling state interests and that the law, rule, or regulation is narrowly drawn to preclude abuses. This approach is demanded by the 1987 Constitution whose entire matrix is designed to protect human rights and to prevent authoritarianism. In case of doubt, the least we can do is to lean towards the stance that will not put in danger the rights protected by the Constitution.

The case of *Whalen vs. Roe* cited by the Solicitor General is also off-line. In Whalen, the United States Supreme Court was presented with the question of whether the State of New York could keep a centralized computer record of the names and addresses of all persons who obtained certain drugs pursuant to a doctor's prescription. The New York State Controlled Substances Act of 1972 required physicians to identify patients obtaining prescription drugs enumerated in the statute, *i.e.,* drugs with a recognized medical use but with a potential for abuse, so that the names and addresses of the patients can be recorded in a centralized computer file of the State Department of Health. The plaintiffs, who were patients and doctors, claimed that some people might decline necessary medication because of their fear that the computerized data may be readily available and open to public disclosure; and that

once disclosed, it may stigmatize them as drug addicts. The plaintiffs alleged that the statute invaded a constitutionally protected zone of privacy, *i.e.,* the individual interest in avoiding disclosure of personal matters, and the interest in independence in making certain kinds of important decisions. The U.S. Supreme Court held that while an individual's interest in avoiding disclosure of personal matters is an aspect of the right to privacy, the statute did not pose a grievous threat to establish a constitutional violation. The Court found that the statute was necessary to aid in the enforcement of laws designed to minimize the misuse of dangerous drugs. The patient-identification requirement was a product of an orderly and rational legislative decision made upon recommendation by a specially appointed commission which held extensive hearings on the matter. Moreover, the statute was narrowly drawn and contained numerous safeguards against indiscriminate disclosure. The statute laid down the procedure and requirements for the gathering, storage and retrieval of the information. It enumerated who were authorized to access the data. It also prohibited public disclosure of the data by imposing penalties for its violation. In view of these safeguards, the infringement of the patients' right to privacy was justified by a valid exercise of police power. As we discussed above, A.O. No. 308 lacks these vital safeguards.

Even while we strike down A.O. No. 308, we spell out in neon that the Court is not per se against the use of computers to accumulate, store, process, retrieve and transmit data to improve our bureaucracy. Computers work wonders to achieve the efficiency which both government and private industry seek. Many information systems in different countries make use of the computer to facilitate important social objectives, such as better law enforcement, faster delivery of public services, more efficient management of credit and insurance programs, improvement of telecommunications and streamlining of financial activities. Used wisely, data stored in the computer could help good administration by making accurate and comprehensive information for those who have to frame policy and make key decisions. The benefits of the computer has revolutionized information technology. It developed the internet, introduced the concept of cyberspace and the information superhighway where the individual, armed only with his personal computer, may surf and search all kinds and classes of information from libraries and databases connected to the net.

In no uncertain terms, we also underscore that the right to privacy does not bar all incursions into individual privacy. The right is not intended to stifle scientific and technological advancements that enhance public service and the common good. It merely requires that the law be narrowly focused and a compelling interest justify such intrusions. Intrusions into the right must be accompanied by proper safeguards and well-defined standards to prevent unconstitutional invasions. We reiterate that any law or order that invades individual privacy will be subjected by this Court to strict scrutiny. The reason for this stance was laid down in *Morfe vs. Mutuc*, to wit:

"The concept of limited government has always included the idea

that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of a technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society."

IV

The right to privacy is one of the most threatened rights of man living in a mass society. The threats emanate from various sources — governments, journalists, employers, social scientists, etc. In the case at bar, the threat comes from the executive branch of government which by issuing A.O. No. 308 pressures the people to surrender their privacy by giving information about themselves on the pretext that it will facilitate delivery of basic services. Given the record-keeping power of the computer, only the indifferent will fail to perceive the danger that A.O. No. 308 gives the government the power to compile a devastating dossier against unsuspecting citizens. It is timely to take note of the well-worded warning of Kalvin, Jr., "the disturbing result could be that everyone will live burdened by an unerasable record of his past and his limitations. In a way, the threat is that because of its record-keeping, the society will have lost its benign capacity to forget." Oblivious to this counsel, the dissents still say we should not be too quick in labelling the right to privacy as a fundamental right. We close with the statement that the right to privacy was not engraved in our Constitution for flattery."

B. VIOLATION OF THE RIGHT TO PRIVACY AS INDEPENDENT TORT.

a. Development as Tort.

The development of violation of right to privacy as tort started in the United States with the seminal article of Warren and Brandeis published in Harvard Law Journal in 1890 entitled "Right to Privacy." The introduction to said article states:

> That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and

economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for *trespasses vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

Thus, with the recognition of the legal value of sensations, the protection against actual bodily injury was extended to prohibit mere attempts to do such injury; that is, the putting another in fear of such injury. From the action of battery grew that of assault. Much later there came a qualified protection of the individual against offensive noises and odors, against dust and smoke, and excessive vibration. The law of nuisance was developed. So regard for human emotions soon extended the scope of personal immunity beyond the body of the individual. His reputation, the standing among his fellow-men, was considered, and the law of slander and libel arose. Man's family relations became a part of the legal conception of his life, and the alienation of a wife's affections was held remediable. Occasionally the law halted, — as in its refusal to recognize the intrusion by seduction upon the honor of the family. But even here the demands of society were met. A mean fiction, the action *per quod servitium amisit*, was resorted to, and by allowing damages for injury to the parents' feelings, an adequate remedy was ordinarily afforded. Similar to the expansion of the right to life was the growth of the legal conception of property. From corporeal property arose the incorporeal rights issuing out of it; and then there opened the wide realm of intangible property, in the products and processes of the mind, as works of literature and art, goodwill, trade secrets, and trademarks.

This development of the law was inevitable. The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right "to be let alone." Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops." For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an inferior tribunal in New York a few months ago directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.

Of the desirability — indeed of the necessity — of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand. Each crop of unseemly gossip, thus, harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature

> which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can flourish, no generous impulse can survive under its blighting influence. *(Warren and Brandeis, The Right to Privacy Harv. L. Rev. 193, 193-197 [1890]).*

In 1960, another influential article was published regarding privacy, that is, the article of Dean Prosser which analyzed different cases involving privacy and classified them into four types of invasion, namely: (1) Intrusion upon the plaintiff's seclusion or solitude or into his private affairs; (2) Public disclosure of embarrassing private facts about the plaintiff; (3) Publicity which places the plaintiff in a false light in the public eye; and (4) Appropriation for the defendant's advantage, of plaintiff's likeness or name. *(Prosser, Privacy, 48 Cal. L. Rev. 383 [1960]).* This classification had been widely accepted. In fact, American Law Institute's the Restatement (Second) of Torts has adopted this four-fold division of privacy. *(Section 652A-652E [1977]).* However, the classification had been criticized that it is insufficiently supported by case law and that it failed to recognize that the single interest at stake in privacy cases is simply that of human dignity. *(Epstein, p. 1223).*

b. Persons Entitled to Relief.

Generally, the right to privacy can be invoked only by natural persons. Juridical persons cannot invoke such right because the entire basis of the right to privacy is an injury to the feelings and sensibilities of the party; a corporation would have no such ground for relief. *(Ricardo Valmonte vs. Feliciano Belmonte, Jr., 170 SCRA 256 [1989], citing Vassar College vs. Loose Wills Biscuit Co., 197 F. 982 [1912]).* Thus, if a corporation is in possession of personal information pertaining to a different natural person, there is no violation of privacy of the corporation itself if it is compelled by a competent court to release such information. The right to privacy belongs to the individual in his private capacity, and not to a corporation or any public and governmental agencies which has in its possession information pertaining to said individual. *(ibid.).*

The right against unreasonable searches and seizure can, however, be invoked by a juridical entity. A corporation also has the right to be secure in its papers and effects. *(Bache & Co. [Phils.], Inc. v. Ruiz, 37 SCRA 823 [1971]).* It is submitted that this is not a situation involving any violation of the right to privacy of the juridical persons.

This only means that the corporation is entitled to the constitutional right against unreasonable searches and seizure and violation thereof will entitle the corporation to damages under Article 32 of the Civil Code.

The right is purely personal in nature and it may be invoked only by the person whose privacy is claimed to have been violated. *(Ricardo Valmonte vs. Feliciano Balmonte, Jr., ibid., citing Atkinson vs. John Doherty & Co., 121 Mich. 372, 80 N.W. 285, 46 L.R.A. 219 [1899]; Schuyler vs. Curtis, 147 N.Y. 434, 42 N.E. 22, 31 L.R.A. 286 [1895]).* As a personal right, the right of privacy can be subject to waiver of the person whose zone of privacy is sought to be intruded into. Thus, a person may voluntarily enter into a licensing agreement with another to depict his own life in film. He can even enter into a licensing agreement to depict his and the life of his deceased relative. *(Lagunzad vs. Vda. de Gonzales, 92 SCRA 476 [1979]).*

Also as a consequence of the fact that the right is a personal right, the right ceases upon the death of the person. However, in some cases, the law allows the heirs of the deceased to enter into a licensing agreement for the depiction of the life of the deceased. *(ibid.)*. It is equally true that cases abound where courts have allowed recovery of damages for the unauthorized use of the name or picture of a deceased person for advertising or trade purposes. The Court of Appeals explained in one case *(Cordero, et al. vs. Buigasco, et al., 17 CAR 2s 517):*

> "… it is equally true that cases abound where courts have allowed recovery of damages for the unauthorized use of the name or picture of a deceased person for advertising or trade purposes. Thus, where a photographer was employed to make a photograph of the corpses of twin children, who had been born partially joined together, and to make twelve copies of the picture and no more, but contrary to the agreement, made other photographs from the negatives and procured a copyright thereon, it was held that the parents of the children could recover damages against the photographer on account of their humiliation and wounded feeling and sensibilities resulting from the exhibition of the photographs to others. Articulating its sentiment in language which at once combines pathos with bitter reproach, the Court spoke in this wise:
>
> 'The corpse of the children was in the custody of the parents. The photographer has no authority to make the photographs except by their authority, and when he exceeded his authority he invaded their right. We do not see that this case can be distinguished from those involving the like use of the photograph of

> a living person, and this has been held actionable . . . The most tender affections of the human heart cluster about the body of one's dead child. A man may recover for any injury or indignity done the body, and it would be to reproach to the law if physical injuries might be recovered for and not those incorporeal injuries which would cause much greater suffering and humiliation . . . If the defendant had wrongfully taken possession of the nude body of the plaintiff's dead children and exposed it to the public view in an effort to make money out of it, it would not be doubted that an injury had been done than to recover for which an action might be maintained. When he wrongfully used the photograph of it a like wrong was done; the injury, differing from that supposed in degree but not 'in kind.' *(138 ALR 53, citing Douglas vs. Stokes, 149 Ky 506, 149 SW 849, 42 LRA [NS] 386, Ann Cas 1914B 374).*

c. Reason for Protection.

It has been observed that privacy covers many aspects of a person's life. "It protects solitude necessary for creative thought. It allows us the independence that is part of raising a family. It protects our right to be secure in our homes and possessions, assured that government cannot come barging in. Privacy also encompasses our right to self-determination and to define who we are. Although we live in a world of noisy self-confession, privacy allows us to keep certain facts to ourselves if we choose. The right to privacy, it seems, is what makes us civilized." *(Ellen Alderman and Caroline Kennedy, The Right to Privacy, 1997 Ed., p. xiv).*

Justice Romero is of the same view. She observed in her concurring opinion in *Blas Ople vs. Ruben D. Torres, et al.* (G.R. No. 127685, July 23, 1998) that:

> "What marks off a man from a beast?
>
> Aside from the distinguishing physical characteristics, man is a rational being, one who is endowed with intellect which allows him to apply reasoned judgment to problems at hand; he has the innate spiritual faculty which can tell, not only what is right but, as well, what is moral and ethical. Because of his sensibilities, emotions and feelings, he likewise possesses a sense of shame. In varying degrees as dictated by diverse cultures, he erects a wall between himself and the outside world wherein he can retreat in solitude, protecting himself from prying eyes and ears and their extensions, whether from individuals, or much later, from authoritarian intrusions.
>
> Piercing through the mists of time, we find the original Man and Woman defying the injunction of God by eating of the

forbidden fruit in the Garden. And when their eyes were "opened," forthwith "they sewed fig leaves together, and made themselves aprons." Down the corridors of time, we find man fashioning "fig leaves" of sorts or setting up figurative walls, the better to insulate themselves from the rest of humanity.

Such vague stirrings of the desire "to be left alone," considered "anti-social" by some, led to the development of the concept of "privacy," unheard of among beasts. Different branches of science, have made their own studies of this craving of the human spirit — psychological, anthropological, sociological and philosophical, with the legal finally giving its imprimatur by elevating it to the status of a right, specifically a private right.

Initially recognized as an aspect of tort law, it created giant waves in legal circles with the publication in the Harvard Law Review of the trail-blazing article, "The Right to Privacy," by Samuel D. Warren and Louis D. Brandeis.

Whether viewed as a personal or a property right, it found its way in Philippine Constitutions and statutes; this, in spite of the fact that Philippine culture can hardly be said to provide a fertile field for the burgeoning of said right. In fact, our lexicographers have yet to coin a word for it in the Filipino language. Customs and practices, being what they have always been, Filipinos think it perfectly natural and in good taste to inquire into each other's intimate affairs.

One has only to sit through a televised talk show to be convinced that what passes for wholesome entertainment is actually an invasion into one's private life, leaving the interviewee embarrassed and outraged by turns.

With the overarching influence of common law and the recent advent of the Information Age with its high-tech devices, the right to privacy has expanded to embrace its public law aspect. The Bill of Rights of our evolving Charters, a direct transplant from that of the United States, contains in essence facets of the right to privacy which constitute limitations on the far-reaching powers of government.

So terrifying are the possibilities of a law such as Administrative Order No. 308 in making inroads into the private lives of the citizens, a virtual Big Brother looking over our shoulders, that it must, without delay, be "slain upon sight" before our society turns totalitarian with each of us, a mindless robot."

It was likewise explained that "privacy as a philosophical or moral concept, has escaped precise definition for over a hundred years. Given this difficulty, privacy may be best understood by the functions

that it serves. Privacy is central to dignity and individuality or personhood. Privacy is also indispensable to a sense of autonomy — to a feeling that there is an area of an individual's life that is totally under his or her control, an area that is free from outside intrusion." *(Harvard Law Review, Privacy, Photography and the Press, February, 1998, Vol. 111, No. 4).*

Our Court of Appeals recognized the existence of the tort of violation of privacy in *Jose Cordero, et al. vs. Alicia B. Buigasco, et al.* (17 CAR 2s 517, 532 [1972]) and explained the theoretical basis thereof. The Court observed that "the constitutional guaranties of life, liberty and the pursuit of happiness, as well as the right to security against unlawful search and seizure, even natural law, have been variously mentioned or suggested, as the bases and theories of the right of privacy." The Court of Appeals, citing the exposition in the American Law Reports, explained:

> "The court in the Pavesich Case (GA), *supra,* further stated: 'When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe . . . The liberty which he derives from natural law, and which is recognized by municipal law, embraces far more than freedom from physical restraint . . . . Liberty includes the right to live as one will, so long as that will does not interfere with the rights of another or of the public. One may desire to live a life of seclusion; another may desire to live a life of publicity; still another may wish to live a life of privacy as to certain matters and of publicity as to others. One may wish to live a life of toil where his work is of a nature that keeps him constantly before the public gaze; while another may wish to live a life of research and contemplation, only moving before the public at such times and under such circumstances as may be necessary to his actual existence. Each is entitled to a liberty of choice as to his manner of life, and neither an individual nor the public has the right to arbitrarily take away from him his liberty . . . . All will admit that the individual who desires to live a life of seclusion cannot be compelled, against his consent, to exhibit his person in any public place, unless such exhibition is demanded by the law of the land. He may be required to come from his place of seclusion to perform public duties — to serve as a juror and to testify as a witness, and the like; but when the public duty is once performed, if he exercise his liberty to go again into seclusion, no one can deny him the right. One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze. Subject to the limitation above referred to, the body of a person cannot be put

> an exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner, is embraced within the right of personal liberty. The right to withdraw from the public gaze at such times as a person may see fit, when his presence in public is not demanded by any rule of law, is also embraced within the right of personal liberty. Publicity in one instance and privacy in the other is each guaranteed. If personal liberty embraces the right of publicity, it no less embraces the correlative right of privacy.'
>
> x x x
>
> "Natural law has also been suggested as the basis of the right of privacy. In *Pavesich vs. New England Mut. L. Ins. Co.,* 122 GA190, 50 SE 68, 69 LRA 101 Am St Rep. 104, 2 Ann Cas 561, the court stated: 'The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence. Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual instinctively resents any encroachment by the public upon his rights which are of a private nature as he does the withdrawal of those of his rights which are of a public nature. A right of privacy in matters purely private is therefore derived from natural law.'

d. Reason for Rejection

It should be noted, however, that there are those who do not recognize the right to privacy as an independent right. In England, for instance, the right to privacy is not recognized although indirectly, facets of it are considered protected by other interests and other torts. *(Oxford Law Dictionary, 1997 Ed., p. 354).* Some courts give relief for infringement of rights that are, in substance, tantamount to the right of privacy, without calling it by that name or expressly affirming the existence of a legal right of privacy. In such cases, the right to recover is based upon well established rights, such as those relating to property, contracts, confidential relation or libel, depending upon which class of rights happens to approximate most closely the phase of the right of privacy that is involved in the particular case. *(Cordero, et al. vs. Buigasco, et al., supra, citing 138 ALR 30-33).*

Others are reluctant to recognize the right to privacy because they believe that the interest of free speech and the importance in our civilization of disseminating the truth about things and people weigh

heavily against any general recognition of a right to be let alone even though the invasion of privacy may be of intentional character. *(Page Keeton and Robert E. Keeton, Law of Torts, 2nd Ed., 1977, p. 1135).* Thus, Justice Mendoza, in his dissenting opinion in *Ople vs. Torres (supra)* stated:

> "Justice Romero, tracing the origin of privacy to the attempt of the first man and woman to cover their nakedness with fig leaves, bemoans the fact that technology and institutional pressures have threatened our sense of privacy. On the other hand, the majority would have none of the Identification Reference System "to prevent the shrinking of the right to privacy, once regarded as 'the most comprehensive of rights and the right most valued by civilized men." Indeed, techniques such as fingerprinting or electronic photography in banks have become commonplace. As has been observed, the teaching hospital has come to be accepted as offering medical services that compensate for the loss of the isolation of the sickbed; the increased capacity of applied sciences to utilize more and more kinds of data and the consequent calls for such data have weakened traditional resistance to disclosure. As the area of relevance, political or scientific, expands, there is strong psychological pressure to yield some ground of privacy.
>
> But this is a fact of life to which we must adjust, as long as the intrusion into the domain of privacy is reasonable. In *Morfe v. Mutuc*, this Court dealt the *coup de grace* to claims of latitudinarian scope for the right of privacy by quoting the pungent remark of an acute observer of the social scene, Carmen Guerrero-Nakpil:
>
> "Privacy? What's that? There is no precise word for it in Filipino, and as far as I know any Filipino dialect and there is none because there is no need for it. The concept and practice of privacy are missing from conventional Filipino life. The Filipino believes that privacy is an unnecessary imposition, an eccentricity that is barely pardonable or, at best, an esoteric Western afterthought smacking of legal trickery."
>
> Justice Romero herself says in her separate opinion that the word privacy is not even in the lexicon of Filipinos.
>
> As to whether the right of privacy is "the most valued right," we do well to remember the encomiums paid as well to other constitutional rights. For Professor Zechariah Chafee, "The writ of habeas corpus is 'the most important human rights provision in the fundamental law.'" For Justice Cardozo, on the other hand, freedom of expression "is the matrix, the indispensable condition, of nearly every other form of freedom."

> The point is that care must be taken in assigning values to constitutional rights for the purpose of calibrating them on the judicial scale, especially if this means employing stricter standards of review for regulations alleged to infringe certain rights deemed to be "most valued by civilized men."

e. Standard.

The right to privacy is not a guaranty to hermitic seclusion. *(65A Am. Jur. 2d 667, citing Bradley vs. Cowles Magazine Inc., 26 Ill. App. 2d. 331, 168 NE 2d 64).* The standard to be applied in determining if there was violation of the right is that of a person of ordinary sensibilities. It is relative to the customs of time and place, and is determined by the norm of an ordinary person. *(ibid., p. 666,* citing *Sidis vs. F.R. Pub. Corp., 113 F 2d 806).* As the injury is mental and subjective, the difficulties already considered must, at least be confined to legally securing of the interests of ordinary sensibilities. In the weighing of interests, the oversensitive must give way because over and above the difficulties in the mode of proof and in applying legal redress, social interests in free speech and dissemination of news have also to be considered. *(Roscoe Pound, "Interests of Personality," 28 Harvard Law Review, 343, 363).*

C. CLASSIFICATION OF THE TORT OF VIOLATION OF THE RIGHT TO PRIVACY.

The four types of invasion of privacy identified by Dean Prosser are recognized in Philippine case law. The Court of Appeals explained that the right to privacy, as the term is employed with respect to the determination of whether a cause of action in damages exists for an unwarranted invasion of such right or whether it may be protected by injunctive relief, may be defined as the right to be let alone, or to live a life of seclusion, to be free from unwarranted publicity, or to live without unwarranted interference by the public about matters with which the public is not necessarily concerned, or to be protected from any wrongful intrusion into an individual's private life which would outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *(Cordero, et al. vs. Buigasco, et al., supra, citing 77 CSJ, pp. 396-397).*

Thus, although jurisprudence on the matter is, in a manner of speaking, only in its infancy, the following types of tort of violation of privacy are recognized in this jurisdiction:

a. Intrusion;

b. Publication of private facts;

c. Making one appear before the public in an objectionable false light; and

d. Commercial appropriation of likeness of another.

(a) INTRUSION.

The tort of intrusion upon the plaintiff's solitude protects a person's sense of locational and psychological privacy. *(H.L.R., supra, p. 1088)*. The growing acceptance of the existence of this tort is equated with the increasing capability of the electronic devises' capacity to an individual's anonymity, intrude upon his most intimate activities and expose his most personal characteristics to public gaze." *(Dietemann vs. Time, Inc., 449 F. 2d 245 [9th Cir., 1971], citing Briscoe vs. Reader's Digest Ass'n. [1971])*. Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to define one's circle of intimacy — to choose who shall see bequeth the quotidian mask. Loss of control over which 'face' one puts on may result in literal loss of self-identity and is humiliating beneath the gaze of those whose curiosity treats a human being as an object. *(ibid.)*.

(1) Forms of Intrusion.

Intrusion may take many forms. It may, for instance, be an intrusion contemplated in paragraph (a) of Article 26 — prying into the privacy of another's residence. This tort may also take the form of criminal trespass defined under Article 280 of the Revised Penal Code which punishes "any private person who shall enter the dwelling of another against the latter's will."

Intrusion into the privacy of one's residence is not limited to cases where the defendant physically trespassed into another's property. It includes cases when the defendant invaded one's privacy by looking from the outside. A "peeping-tom" for instance may be sued for violation of privacy. "Even the not well known public figures have right to private retreats where they are free to talk, joke and perhaps be irresponsible without being accountable to the outside world." A person has the right "to be free from telephone, lens, the hidden microphone, and trespasser crouching below his window. The law has long held that it is illegal to peep, snoop, or eavesdrop on people in private places." *(Middleton and Chamberlin, The Law of Communica-*

tion, p. 175).

(2) Intrusion in Public Places.

Generally, there is no invasion of the right to privacy when a journalist records, photographs or writes about something that occurs in public places. *(John Watkins, The Mass Media and The Law, 1990 Ed., p. 123).* People in public places must assume that they might be photographed or recorded. As Dean Prosser explained: "On public street, or in any public place, the plaintiff has no right to be alone, and it is no invasion of his privacy to do no more than follow him about. Neither is it such an invasion to take his photograph in such a place, since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to state." *(William L. Prosser, Privacy, 48 CAL. L. REV., 383, 391-392 [1960]).*

There are exceptions, however. While merely watching a person in public places is not a violation, one does not automatically make public everything he does in public. *(Joyce Blalock, Civil Liability of Law Enforcement Officers, 1974 Ed., p. 131).* For instance, the acts of the journalist should not be to such extent that it constitutes harassment or overzealous shadowing. *(Middleton and Chamberlin, The Law of Communication, p. 172; see also 111 Harv. L. Rev. 1089 [1998]).*

(3) Persons Protected.

The law protects everyone, not just public figures. It is not material whether the plaintiff is popular or not. "Even the not well known public figures have a right to private retreats where they are free to talk, joke and perhaps be irresponsible without being accountable to the outside world." *(Middleton and Chamberlin, The Law of Communication, p. 175).*

(4) Intrusion and Freedom of the Press.

The Constitution protects freedom of the press. Integral part of such right is the right to be freely involved in newsgathering. However, the Constitutional right has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering. The right is not a license to trespass or to intrude by electronic means into precincts of another's home or office. *(Dietemann vs. Time, Inc., supra).* Newsworthiness may be invoked in some cases but in those cases, the newsworthiness inquiry is only

the first step; if the story concerns a matter of public interest, the question becomes whether its newsworthiness outweighs the privacy interest of the individual plaintiff. *(ibid.)*.

(5) Intrusion and Administrative Investigation.

There is no intrusion when an employer investigates its employee or when a school investigates its student. In the latter case, investigation may cover an alleged offense committed outside school premises. Thus, in *Jose Angeles, et al. vs. Hon. Rafael S. Sison, et al.* (G.R. No. L-45551, February 16, 1982) the Court rejected the argument of two students that an administrative investigation concerning an alleged offense outside the school violated their right to privacy. The said students were investigated for allegedly assaulting a professor in a restaurant on occasion of a birthday party of another professor. The Supreme Court explained that:

> "A college, or any school for that matter, has a dual responsibility to its students. One is to provide opportunities for learning and the other is to help them grow and develop into mature, responsible, effective and worthy citizens of the community. Discipline is one of the means to carry out the second responsibility.
>
> Thus, there can be no doubt that the establishment of an educational institution requires rules and regulations necessary for the maintenance of an orderly educational program and the creation of an educational environment conducive to learning. Such rules and regulations are equally necessary for the protection of the students, faculty, and property. The power of school officials to investigate, an adjunct of its power to suspend or expel, is a necessary corollary to the enforcement of such rules and regulations and the maintenance of a safe and orderly educational environment conducive to learning.
>
> The respondent judge correctly stated that the general rule is that the authority of the school is co-extensive with its territorial jurisdiction, or its school grounds, so that any action taken for acts committed outside the school premises should, in general, be left to the police authorities, the courts of justice, and the family concerned.
>
> However, this rule is not rigid or one without exceptions. It is the better view that there are instances when the school might be called upon to exercise its power over its student or students for acts committed outside the school and beyond school hours in the following:
>
> a) In cases of violations of school policies or regulations oc-

curring in connection with a school-sponsored activity off-campus; or

b) In cases where the misconduct of the student involves his status as a student or affects the good name or reputation of the school.

Common sense dictates that the school retains its power to compel its students in or off-campus to a norm of conduct compatible with their standing as members of the academic community. Hence, when as in the case at bar, the misconduct complained of directly affects the suitability of the alleged violators as students, there is no reason why the school can not impose the same disciplinary action as when the act took place inside the campus."

(6) Electronic Devices and other similar means.

Of particular interest is intrusion into the privacy of another through wire-tapping and other similar means. The applicable law is Republic Act No. 4200 that was passed in 1965 and known as "AN ACT TO PROHIBIT AND PENALIZE WIRE-TAPPING AND OTHER RELATED VIOLATIONS OF THE PRIVACY OF COMMUNICATION, AND FOR OTHER PURPOSES." The law is reproduced in full herein, *viz.:*

Sec. 1. It shall be unlawful for any person, not being authorized by all the parties to any private communication or spoken word, to tap any wire or cable, or by using any other device or arrangement, to secretly overhear, intercept, or record such communication or spoken word by using a device commonly known as a dictaphone or dictagraph or dectaphone or walkie-talkie or tape recorder, or however otherwise described:

It shall also be unlawful for any person, be he a participant or not in the act or acts penalized in the next preceding sentence, to knowingly possess any tape record, wire record, disc record, or any other such record, or copies thereof, of any communication or spoken word secured either before or after the effective date of this Act in the manner prohibited by this law; or to replay the same for any other person or persons; or to communicate the contents thereof, either verbally or in writing, or to furnish transcriptions thereof, whether complete or partial, to any other person: *Provided*, That the use of such record or any copies thereof as evidence in any civil, criminal investigation or trial of offenses mentioned in section 3 hereof, shall not be covered by this prohibition.

Sec. 2. Any person who wilfully or knowingly does or who shall aid, permit, or cause to be done any of the acts declared to be

unlawful in the preceding section or who violates the provisions of the following section or of any order issued thereunder, or aids, permits, or causes such violation shall, upon conviction thereof, be punished by imprisonment for not less than six months or more than six years and with the accessory penalty of perpetual absolute disqualification from public office if the offender be a public official at the time of the commission of the offense, and, if the offender is an alien he shall be subject to deportation proceedings.

Sec. 3. Nothing contained in this Act, however, shall render it unlawful or punishable for any peace officer, who is authorized by a written order of the Court, to execute any of the acts declared to be unlawful in the two preceding sections in cases involving the crimes of treason, espionage, provoking war and disloyalty in case of war, piracy, mutiny in the high seas, rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, inciting to sedition, kidnapping as defined by the Revised Penal Code, and violations of Commonwealth Act No. 616, punishing espionage and other offenses against national security: *Provided*, That such written order shall only be issued or granted upon written application and the examination under oath or affirmation of the applicant and the witnesses he may produce and a showing: (1) that there are reasonable grounds to believe that any of the crimes enumerated hereinabove has been committed or is being committed or is about to be committed: *Provided, however*, That in cases involving the offenses of rebellion, conspiracy and proposal to commit rebellion, inciting to rebellion, sedition, conspiracy to commit sedition, and inciting to sedition, such authority shall be granted only upon prior proof that a rebellion or acts of sedition, as the case may be, have actually been or are being committed; (2) that there are reasonable grounds to believe that evidence will be obtained essential to the conviction of any person for, or to the solution of, or to the prevention of, any of such crimes; and (3) that there are no other means readily available for obtaining such evidence.

The order granted or issued shall specify: (1) the identity of the person or persons whose communications, conversations, discussions, or spoken words are to be overheard, intercepted, or recorded and, in the case of telegraphic or telephonic communications, the telegraph line or the telephone number involved and its location; (2) the identity of the peace officer authorized to overhear, intercept, or record the communications, conversations, discussions, or spoken words; (3) the offense or offenses committed or sought to be prevented; and (4) the period of the authorization. The authorization shall be effective for the period specified in the order which shall not exceed sixty (60) days from the date of issuance of the order, unless extended or renewed by

the court upon being satisfied that such extension or renewal is in the public interest.

All recordings made under court authorization shall, within forty-eight hours after the expiration of the period fixed in the order, be deposited with the court in a sealed envelope or sealed package, and shall be accompanied by an affidavit of the peace officer granted such authority stating the number of recordings made, the dates and times covered by each recording, the number of tapes, discs, or records included in the deposit, and certifying that no duplicates or copies of the whole or any part thereof have been made, or if made, that all such duplicates or copies are included in the envelope or package deposited with the court. The envelope or package so deposited shall not be opened, or the recordings replayed, or used in evidence, or their contents revealed, except upon order of the court, which shall not be granted except upon motion, with due notice and opportunity to be heard to the person or persons whose conversation or communications have been recorded.

The court referred to in this section shall be understood to mean the Court of First Instance within whose territorial jurisdiction the acts for which authority is applied for are to be executed.

Sec. 4. Any communication or spoken word, or the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or any information therein contained obtained or secured by any person in violation of the preceding sections of this Act shall not be admissible in evidence in any judicial, quasi-judicial, legislative or administrative hearing or investigation.

Another related law is Presidential Decree No. 55 dealing with unlawful telephone installations. The Decree considers unlawful telephone installation as a nefarious activity because it deprives the lawful users of telephones of the right to full use of the telephones and violates their right to privacy. The law declares "it unlawful for any person, unless authorized by the proper telephone company/ corporation or unless authorized by the court under the provisions of Section 3 of Republic Act No. 4200, to install or connect or cause or induce to be installed or connected any telephone or line whether by connecting it by wire or cable or through any other means, with already existing telephone duly installed in private residences or public or private buildings."

Republic Act No. 5733, on the other hand, punishes registered electronics and communications engineer who "shall engage in illegal wire-tapping and/or the employment of electronics device in violation

of the privacy of another or in disregard of the privilege of private communications or maintain an unlicensed and/or unregistered communications system or device." *(Section 24[h]).*

In *Socorro D. Ramirez vs. Honorable Court of Appeals, et al.* (No. 93833, September 28, 1995, 248 SCRA 590), the Supreme Court explained that Republic Act No. 4200 makes it illegal for any person, not authorized by all the parties to any private communication to secretly record such communication by means of a tape recorder. The law makes no distinction as to whether the party sought to be penalized by the statute ought to be a party other than or different from those involved in the private communication. The statute's intent to penalize all persons unauthorized to make such recording is underscored by the use of the qualifier "any." The Court went on further to explain that:

> "A perusal of the Senate Congressional Records, moreover, supports the respondent court' conclusion that in enacting R.A. 4200 our lawmakers indeed contemplated to make illegal unauthorized tape recording of private conversations or communications taken either by the parties themselves or by third persons. Thus:
>
> x x x x x x x x x
>
> Senator Tañada:
>
> That qualified only 'overhear.'
>
> Senator Padilla:
>
> So that when it is intercepted or recorded; the element of secrecy would not appear to be material. Now, suppose, Your Honor, the recording is not made by all the parties but some parties and involved not criminal cases that would be mentioned under section 3 but would cover, for example civil cases or special proceedings whereby a recording is made not necessarily by all the parties but perhaps by some in an effort to show the intent of the parties because the actuation of the parties prior, simultaneous even subsequent to the contract or the act may be indicative of their intention. Suppose there is such a recording, would you say, Your Honor, that the intention is to cover it within the purview of this bill or outside?'
>
> Senator Tañada:
>
> That is covered by the purview of this bill, Your Honor.
>
> Senator Padilla:
>
> Even if the record should be used not in the prosecution of offense but as evidence to be used in Civil Cases or special

proceedings?

Senator Tañada:

That is right. This is a complete ban on tape recorded conversations taken without the authorization of all the parties.

Senator Padilla:

Now, would that be reasonable. Your Honor?

Senator Tañada:

I believe it is reasonable because it is not sporting to record the observation of one without his knowing it and then using it against him. It is not fair, it is not sportmanlike. If the purpose, Your honor, is to record the intention of the parties. I believe that all the parties should know that the observations are being recorded.

Senator Padilla:

This might reduce the utility of records.

Senator Tañada:

Well no. For example, I was to say that in meetings of the board of directors where a tape recording is taken, there is no objection to this if all the parties know. It is but fair that the people whose remarks and observations are being made should know that these are being recorded.

Senator Padilla:

Now, I can understand.

Senator Tañada:

That is why when we take statements of persons, we say: "Please be informed that whatever you say here may be used against you." That is fairness and that is what we demand. Now, in spite of that warning, he makes damaging statements against his own interest, well, he cannot complain any more. But if you are going to take a recording of the observations and remarks of a person without him knowing that it is being taped or recorded, without him knowing that what is being recorded may be used against him, I think it is unfair.

x x x x x x x x x

(Congressional Record, Vol. III, No. 31, p. 584, March 12, 1964)

Senator Diokno:

Do you understand, Mr. Senator, that under Section 1 of the bill as now worded, if a party secretly records a public speech, he would be penalized under Section 1? Because the speech is

public, but the recording is done secretly.

Senator Tañada:

Well, that particular aspect is not comtemplated by the bill. It is the communication between one person and another person — not between a speaker and a public.

x x x x x x x x x

(Congressional Record, Vol. III, No. 33, p. 626, March 12, 1964).

x x x x x x x x x

The unambiguity of the express words of the provision, taken together with the above-quoted deliberations from the Congressional Record, therefore plainly supports the view held by the respondent court that the provision seeks to penalize even those privy to the private communications. Where the law makes no distinctions, one does not distinguish.

Second, the nature of the conversation is immaterial to a violation of the statute. The substance of the same need not be specifically alleged in the information. What R.A. 4200 penalizes are the acts of secretly overhearing, intercepting or recording private communications by means of the devices enumerated therein. The mere allegation that an individual made a secret recording of a private communication by means of a tape recorder would suffice to constitute an offense under Section 1 of R.A. 4200. As the Solicitor General pointed out in his COMMENT before the respondent court: "Nowhere (in the said law) is it required that before one can be regarded as a violator, the nature of the conversation, as well as its communication to a third person should be professed."

Finally petitioner's contention that the phrase "private communication" in Section 1 of R.A. 4200 does not include "private conversations" narrows the ordinary meaning of the word "communication" to a point of absurdity. The word communicate comes from the latin word *communicare*, meaning "to share or to impart." In its ordinary signification, communication connotes the act of sharing or imparting, as in a conversation, or signifies the "process by which meanings or thoughts are shared between individuals through a common system of symbols (as language signs or gestures)." These definitions are broad enough to include verbal or non-verbal, written or expressive communications of "meanings or thoughts" which are likely to include the emotionally-charged exchange, on February 22, 1988, between petitioner and private respondent, in the privacy of the latter's office. Any doubts about the legislative body's meaning of the phrase "private communication" are, furthermore, put to rest by the fact that the terms "conversation" and "communication" were interchangeably used

by Senator Tañada in his Explanatory Note to the bill, quoted below:

> "It has been said that innocent people have nothing to fear from their conversations being overhead. But this statement ignores the usual nature of conversations as well as the undeniable fact that most, if not all, civilized people have some aspects of their lives they do not wish to expose. Free conversations are often characterized by exaggerations, obscenity, agreeable falsehoods, and the expression of anti-social desires or views not intended to be taken seriously. The right to the privacy of communication, among others, has expressly been assured by our Constitution. Needless to state here, the framers of our Constitution must have recognized the nature of conversations between individuals and the significance of man's spiritual nature, of his feelings and of his intellect. They must have known that part of the pleasures and satisfactions of life are to be found in the unaudited, and free exchange of communication between individuals — free from every unjustifiable intrusion by whatever means."

In *Gaanan vs. Intermediate Appellate Court (145 SCRA 112),* the Supreme Court held that the use of a telephone extension for the purpose of overhearing a private conversation without authorization did not violate R.A. 4200 because a telephone extension devise was neither among those devises enumerated in Section 1 of the law nor was it similar to those "device(s) or arrangement(s)" enumerated therein. The Court followed the principle that "penal statutes must be construed strictly in favor of the accused." It is believed, however, that the said act can still be considered violation of the right to privacy of the complainant whose seclusion was the object of an unauthorized intrusion. Listening to the private conversation of another through an extension telephone is an equally reprehensible tort as eavesdropping through an electronic devise. Thus, it is submitted that a civil case for damages under Article 26 may prosper even if it is not considered a crime under Republic Act No. 4200. *(See also Mamba vs. Garcia, 359 SCRA 426 [2001].)*

(7) Public Records.

Section 7, Article III of the Constitution states that:

> "The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law."

Thus, generally, there is no intrusion into the right of privacy of another if the information sought are matters of public record. This is specially true in case the persons who are invoking the right to privacy are public officers and the matter involved is of public concern. Thus, there is no violation of the right to privacy if a citizen will ask from the Government Service Insurance System a list of legislators who secured clean loans therefrom. *(Ricardo Valmonte, et al. vs. Feliciano Belmonte, Jr., Sept. 1989).*

Nevertheless, when the information requested from the government intrudes into the privacy of a citizen, a potential conflict between the rights to information and to privacy may arise. There can be violation of the right to privacy if the matter sought to be revealed does not involve anything of public concern. This rule is reflected in Republic Act No. 6713 otherwise known as the "Code of Conduct and Ethical Standards for Public Officials and Employees." Section 3 provides that:

> "Sec. 3. Every department, office or agency shall provide official information, records or documents to any requesting public, except if:
>
> x x x
>
> (e) it would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; x x x"

(8) Contract of Carriage.

Common carriers are required by law to exercise extraordinary diligence in ensuring the safety of its passengers. Consequently, it has the duty to make sure that no dangerous objects are brought inside the vehicle. However, fairness demands that in measuring a common carrier's duty towards its passengers, allowance must be given to the reliance that should be reposed on the sense of responsibility of all the passengers in regard to their common safety and their right to privacy. The Supreme Court explained in *Herminio L. Nocum vs. Laguna Tayabas Bus Company* (G.R. No. L-23733, October 31, 1969):

> "x x x It is to be presumed that a passenger will not take with him anything dangerous to the lives and limbs of his co-passengers, not to speak of his own. Not to be lightly considered be the right to privacy to which each passenger is entitled. He cannot be subjected to any unusual search, when he protests the innocuousness of his baggage and nothing appears to indicate the contrary, as in the case at bar. In other words, inquiry may be verbally made as to the nature of a passenger's baggage when such is not outwardly perceptible, but beyond this, constitutional

> boundaries are already in danger of being transgressed. Calling a policeman to his aid, as suggested by the service manual invoked by the trial judge, in compelling the passenger to submit to more rigid inspection, after the passenger had already declared that the box contained mere clothes and other miscellanies, could not have justified invasion of a constitutionally protected domain. Police officers acting without judicial authority secured in the manner provided by law are not beyond the pale of constitutional inhibitions designed to protect individual human rights and liberties. Withal, what must be importantly considered here is not so much the infringement of the fundamental sacred rights of the particular passenger herein involved, but the constant threat any contrary ruling would pose on the right of privacy of all passengers of all common carriers, considering how easily the duty to inspect can be made an excuse for mischief and abuse. Of course, when there are sufficient indications that the representations of the passenger regarding the nature of his baggage may not be true, in the interest of the common safety of all, the assistance of the police authorities may be solicited, not necessarily to force the passenger to open his baggage, but to conduct the needed investigation consistent with the rules of propriety and, above all, the constitutional rights of the passenger. It is in this sense that the mentioned service manual issued by appellant to its conductors must be understood.

(9) E-Commerce.

There will be intrusion through the "internet" if a person is engaged in what is known as unlawful access contemplated under Section 31 of Republic Act No. 8792 otherwise known as the "Electronic Commerce Act." Section 31 defines lawful access as:

> "SEC. 31. *Lawful Access*. — Access to an electronic file, or an electronic signature of an electronic data message or electronic document shall only be authorized and enforced in favor of the individual or entity having a legal right to the possession or the use of the plaintext, electronic signature or file and solely for the authorized purposes. The electronic key for identity or integrity shall not be made available to any person or party without the consent of the individual or entity in lawful possession of the electronic key."

Section 32 of the same law provides that except for the purposes authorized under the Act "any person who obtained access to an electronic key, electronic data message or electronic document, book, register, correspondence, information, or other material pursuant to any powers conferred by (the) Act, shall not convey to or

share the same with any other person." On the other hand, Section 33 punishes "hacking or cracking which refers to unauthorized access into or interference in a computer system/server or information and communication system; or any access in order to corrupt, alter, steal, or destroy using a computer or other similar information and communication devices, without the knowledge and consent of the owner of the computer or information and communications system."

All the foregoing acts likewise involve protection of a zone of privacy of the individual. Intrusion into one's computer or communication device is an intrusion sought to proscribed under existing laws.

In a magazine article entitled "An Eroded Self," Professor Jeffrey Rosen observed that there is no real wall between public and private in cyberspace. A version of a person is constructed in cyberspace from bits and pieces of stray data, which is not an accurate representation of the person. Thus, Prof. Rosen believes that this is probably the most disquieting effect of loss of privacy in cyberspace. He explained further:

> "There are many fearful consequences to the loss of privacy, but none perhaps more disquieting than this: privacy protects us from being misdefined and judged out of context. This protection is especially important in a world of short attention spans, a world where information can easily be confused with knowledge. When intimate personal information circulates among a small group of people who know you well, its significance can be weighed against other aspects of your personality and character. x x x But when your browsing habits or e-mail messages are exposed to strangers you may be reduced, in their eyes, to nothing more than the most salacious book you once read or the most vulgar joke you once told. An even if your Internet browsing isn't in any way embarassing, you run the risk of being stereotyped as the kind of person who would read a particular book or listen to a particular song. Your public identity may be distorted by fragments of information that have little to do with who you define yourself. In a world where citizens are bombarded with information, people form impressions quickly, based on sound bites, and these brief impressions tend to oversimplify and misrepresent our complicated and often contradictory characters. *(Jeffrey Rosen, The Eroded Self, The New York Times Sunday Magazine, April 20, 2000, pp. 48-49)."*

CASE:

RICARDO VALMONTE, et al. vs. FELICIANO BELMONTE, JR.
170 SCRA 256 [1989]

Petitioners in this special civil action for mandamus with preliminary injunction invoke their right to information and pray that respondent be directed:

(a) to furnish petitioners the list of the names of the Batasang Pambansa members belonging to the UNIDO and PDP-Laban who were able to secure clean loans immediately before the February 7 election thru the intercession/marginal note of the then First Lady Imelda Marcos; and/or

(b) to furnish petitioners with certified true copies of the documents evidencing their respective loans; and/or

(c) to allow petitioners access to the public records for the subject information. [Petition, pp. 4-5; paragraphing supplied.]

The controversy arose when petitioner Valmonte wrote respondent Belmonte the following letter:

June 4, 1986
Hon. Feliciano Belmonte
GSIS General Manager
Arroceros, Manila.

Sir:

As a lawyer, member of the media and plain citizen of our Republic, I am requesting that I be furnished with the list of names of the opposition members of (the) Batasang Pambansa who were able to secure a clean loan of P2 million each on guaranty (sic) of Mrs. Imelda Marcos. We understand that OIC Mel Lopez of Manila was one of those aforesaid MPs. Likewise, may we be furnished with the certified true copies of the documents evidencing their loan. Expenses in connection herewith shall be borne by us.

If we could not secure the above documents could we have access to them?

We are premising the above request on the following provision of the Freedom Constitution of the present regime.

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions or decisions, shall be afforded the citizen subject to such limitation as may be provided by law. (Art. IV, Sec. 6).

We trust that within five (5) days from receipt hereof we will receive your favorable response on the matter.

Very truly yours,

(Sgd.) RICARDO C. VALMONTE
[Rollo, p. 7.]

To the aforesaid letter, the Deputy General Counsel of the GSIS replied:

June 17, 1986

Atty. Ricardo C. Valmonte
108 E. Benin Street
Caloocan City

Dear Compañero:

Possibly because he must have thought that it contained serious legal implications, President & General Manager Feliciano Belmonte, Jr. referred to me for study and reply your letter to him of June 4, 1986 requesting a list of "the opposition members of Batasang Pambansa who were able to secure a clean loan of P2 million each on guaranty of Mrs. Imelda Marcos."

My opinion in this regard is that a confidential relationship exists between the GSIS and all those who borrow from it, whoever they may be; that the GSIS has a duty to its customers to preserve this confidentiality; and that it would not be proper for the GSIS to breach this confidentiality unless so ordered by the courts.

As a violation of this confidentiality may mar the image of the GSIS as a reputable financial institution, I regret very much that at this time we cannot respond positively to your request.

Very truly yours,

(Sgd.) MEYNARDO A. TIRO
Deputy General Counsel
[Rollo, p. 40.]

On June 20, 1986, apparently not having yet received the reply of the Government Service and Insurance System (GSIS) Deputy General Counsel, petitioner Valmonte wrote respondent another letter, saying that for failure to receive a reply "(W)e are now considering ourselves free to do whatever action necessary within the premises to pursue our desired objective in pursuance of public interest." [Rollo, p. 8.]

On June 26, 1986, Valmonte, joined by the other petitioners, filed the instant suit.

On July 19, 1986, the Daily Express carried a news item reporting that 137 former members of the defunct interim and regular Batasang Pambansa, including ten (10) opposition members, were granted housing loans by the GSIS. [Rollo, p. 41.]

Separate comments were filed by respondent Belmonte and the Solicitor General. After petitioners filed a consolidated reply, the petition was given due course and the parties were required to file their memoranda. The parties having complied, the case was deemed submitted for decision.

In his comment respondent raises procedural objections to the issuance of a writ of mandamus, among which is that petitioners have failed to exhaust administrative remedies.

Respondent claims that actions of the GSIS General Manager are reviewable by the Board of Trustees of the GSIS. Petitioners, however did not seek relief from the GSIS Board of Trustees. It is therefore asserted that since administrative remedies were not exhausted, then petitioners have no cause of action.

To this objection, petitioners claim that they have raised a purely legal issue, *viz*., whether or not they are entitled to the documents sought, by virtue of their constitutional right to information. Hence, it is argued that this case falls under one of the exceptions to the principle of exhaustion of administrative remedies.

Among the settled principles in administrative law is that before a party can be allowed to resort to the courts, he is expected to have exhausted all means of administrative redress available under the law. The courts for reasons of law, comity and convenience will not entertain a case unless the available administrative remedies have been resorted to and the appropriate authorities have been given opportunity to act and correct the errors committed in the administrative forum. However, the principle of exhaustion of administrative remedies is subject to settled exceptions, among which is when only a question of law is involved. *(Pascual vs. Provincial Board, 106 Phil. 466 [1959]; Aguilar vs. Valencia, et al., G.R. No. L-30396, July 30, 1971, 40 SCRA 210; Malabanan vs. Ramento, G.R. No. L-2270, May 21, 1984, 129 SCRA 359).* The issue raised by petitioners, which requires the interpretation of the scope of the constitutional right to information, is one which can be passed upon by the regular courts more competently than the GSIS or its Board of Trustees, involving as it does a purely legal question. Thus, the exception of this case from the application of the general rule on exhaustion of administrative remedies is warranted. Having disposed of this procedural issue, We now address ourselves to the issue of whether or not mandamus lies to compel respondent to perform the acts sought by petitioners to be done, in pursuance of their right to information.

We shall deal first with the second and third alternative acts sought to be done, both of which involve the issue of whether or not petitioners are entitled to access to the documents evidencing loans granted by the GSIS.

This is not the first time that the Court is confronted with a controversy directly involving the constitutional right to information. In *Tañada vs. Tuvera*, G.R. No. 63915, April 24, 1985, 136 SCRA 27 and in the recent case of *Legaspi vs. Civil Service Commission*, G.R. No. 72119, May 29, 1987, 150 SCRA 530, the Court upheld the people's constitutional right to be informed of matters of public interest and ordered the government agencies concerned

to act as prayed for by the petitioners.

The pertinent provision under the 1987 Constitution is Art. III, Sec. 7 which states:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law.

The right of access to information was also recognized in the 1973 Constitution, Art. IV, Sec. 6 of which provided:

The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents and papers pertaining to official acts, transactions, or decisions, shall be afforded the citizen subject to such limitations as may be provided by law.

An informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon, is vital to the democratic government envisioned under our Constitution. The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated. The postulate of public office as a public trust, institutionalized in the Constitution (in Art. XI, Sec. 1) to protect the people from abuse of governmental power, would certainly be mere empty words if access to such information of public concern is denied, except under limitations prescribed by implementing legislation adopted pursuant to the Constitution.

Petitioners are practitioners in media. As such, they have both the right to gather and the obligation to check the accuracy of information they disseminate. For them, the freedom of the press and of speech is not only critical, but vital to the exercise of their professions. The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this open dialogue can be effective only to the extent that the citizenry is informed and thus, able to formulate its will intelligently. Only when the participants in the discussion are aware of the issues and have access to information relating thereto can such bear fruit.

The right to information is an essential premise of a meaningful right to speech and expression. But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the

exercise of the freedoms of speech and of the press. Far from it. The right to information goes hand-in-hand with the constitutional policies of full public disclosure ** and honesty in the public service.*** It is meant to enhance the widening role of the citizenry in governmental decision-making as well in checking abuse in government.

Yet, like all the constitutional guarantees, the right to information is not absolute. As stated in *Legaspi*, The people's right to information is limited to "matters of public concern," and is further "subject to such limitations as may be provided by law." Similarly, the State's policy of full disclosure is limited to "transactions involving public interest," and is "subject to reasonable conditions prescribed by law."

Hence, before mandamus may issue, it must be clear that the information sought is of "public interest" or "public concern," and is not exempted by law from the operation of the constitutional guarantee. *(Legaspi vs. Civil Service Commission, supra, p. 542).*

The Court has always grappled with the meanings of the terms "public interest" and "public concern." As observed in *Legaspi*:

In determining whether or not a particular information is of public concern there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public. (*Ibid*., p. 541.)

In the *Tañada* case the public concern deemed covered by the constitutional right to information was the need for adequate notice to the public of the various laws which are to regulate the actions and conduct of citizens. In *Legaspi*, it was the "legitimate concern of citizens to ensure that government positions requiring civil service eligibility are occupied only by persons who are eligibles." (*Supra*, p. 539.).

The information sought by petitioners in this case is the truth of reports that certain Members of the Batasang Pambansa belonging to the opposition were able to secure "clean" loans from the GSIS immediately before the February 7, 1986 election through the intercession of the former First Lady, Mrs. Imelda R. Marcos.

The GSIS is a trustee of contributions from the government and its employees and the administrator of various insurance programs for the benefit of the latter. Undeniably, its funds assume a public character. More particularly, Secs. 5(b) and 46 of P.D. 1146, as amended (the Revised Government Service Insurance Act of 1977), provide for annual appropriations to pay the contributions, premiums, interest and other amounts payable to GSIS by the government, as employer, as well as the obligations which the Republic of the Philippines assumes or guarantees to pay. Considering

the nature of its funds, the GSIS is expected to manage its resources with utmost prudence and in strict compliance with the pertinent laws or rules and regulations. Thus, one of the reasons that prompted the revision of the old GSIS law (C.A. No. 186, as amended) was the necessity "to preserve at all times the actuarial solvency of the funds administered by the Systems. (Second Whereas Clause, P.D. No. 1146). Consequently, as respondent himself admits, the GSIS "is not supposed to grant 'clean loans.'" (Comment, p. 8.) It is therefore the legitimate concern of the public to ensure that these funds are managed properly with the end in view of maximizing the benefits that accrue to the insured government employees. Moreover, the supposed borrowers were Members of the defunct Batasang Pambansa who themselves appropriated funds for the GSIS and were therefore expected to be the first to see to it that the GSIS performed its tasks with the greatest degree of fidelity and that all its transactions were above board.

In sum, the public nature of the loanable funds of the GSIS and the public office held by the alleged borrowers make the information sought clearly a matter of public interest and concern.

A second requisite must be met before the right to information may be enforced through mandamus proceedings, *viz*., that the information sought must not be among those excluded by law.

Respondent maintains that a confidential relationship exists between the GSIS and its borrowers. It is argued that a policy of confidentiality restricts the indiscriminate dissemination of information.

Yet, respondent has failed to cite any law granting the GSIS the privilege of confidentiality as regards the documents subject of this petition. His position is apparently based merely on considerations of policy. The judiciary does not settle policy issues. The Court can only declare what the law is, and not what the law should be. Under our system of government, policy issues are within the domain of the political branches of the government, and of the people themselves as the repository of all State power.

Respondent however contends that in view of the right to privacy which is equally protected by the Constitution and by existing laws, the documents evidencing loan transactions of the GSIS must be deemed outside the ambit of the right to information.

There can be no doubt that right to privacy is constitutionally protected. In the landmark case of *Morfe vs. Mutuc* (130 Phil. 415 [1968], 22 SCRA 424), this Court, speaking through then Mr. Justice Fernando, stated:

> . . . The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection. The language of Prof. Emerson is particularly apt: "The concept of limited government has always included the idea that governmental powers stop short of certain intrusions into the personal life of the citizen. This is indeed one of the basic distinctions between absolute and limited government. Ultimate and pervasive

> control of the individual, in all aspects of his life, is the hallmark of the absolute state. In contrast, a system of limited government safeguards a private sector, which belongs to the individual, firmly distinguishing it from the public sector, which the state can control. Protection of this private sector — protection, in other words, of the dignity and integrity of the individual — has become increasingly important as modern society has developed. All the forces of technological age — industrialization, urbanization, and organization — operate to narrow the area of privacy and facilitate intrusion into it. In modern terms, the capacity to maintain and support this enclave of private life marks the difference between a democratic and a totalitarian society." (pp. 444-445.)

When the information requested from the government intrudes into the privacy of a citizen, a potential conflict between the rights to information and to privacy may arise. However, the competing interests of these rights need not be resolved in this case. Apparent from the above-quoted statement of the Court in *Morfe* is that the right to privacy belongs to the individual in his private capacity, and not to public and governmental agencies like the GSIS. Moreover, the right cannot be invoked by juridical entities like the GSIS. As held in the case of *Vassar College vs. Loose Wills Biscuit Co.,* (197 F. 982 [1912]), a corporation has no right of privacy in its name since the entire basis of the right to privacy is an injury to the feelings and sensibilities of the party and a corporation would have no such ground for relief.

Neither can the GSIS through its General Manager, the respondent, invoke the right to privacy of its borrowers. The right is purely personal in nature *(Cf. Atkinson vs. John Doherty & Co., 121 Mich 372, 80 N.W. 285, 46 L.R.A. 219 [1899]; Schuyler vs. Curtis, 147 N.Y. 434, 42 N.E. 22, 31 L.R.A. 286 [1895])*, and hence, may be invoked only by the person whose privacy is claimed to be violated.

It may be observed, however, that in the instant case, the concerned borrowers themselves may not succeed if they choose to invoke their right to privacy, considering the public offices they were holding at the time the loans were alleged to have been granted. It cannot be denied that because of the interest they generate and their newsworthiness, public figures, most especially those holding responsible positions in government, enjoy a more limited right to privacy as compared to ordinary individuals, their actions being subject to closer public scrutiny *(Cf. Ayer Productions Pty. Ltd. vs. Capulong, G.R. Nos. 82380 and 82398, April 29, 1988; See also Cohen vs. Marx, 211 P. 2d 321 [1949]).*

Respondent next asserts that the documents evidencing the loan transactions of the GSIS are private in nature and hence, are not covered by the Constitutional right to information on matters of public concern which guarantees "(a)ccess to official records, and to documents, and papers pertaining to official acts, transactions, or decisions" only.

It is argued that the records of the GSIS, a government corporation performing proprietary functions, are outside the coverage of the people's

right of access to official records.

It is further contended that since the loan function of the GSIS is merely incidental to its insurance function, then its loan transactions are not covered by the constitutional policy of full public disclosure and the right to information which is applicable only to "official" transactions.

First of all, the "constituent-ministrant" dichotomy characterizing government function has long been repudiated. In *ACCFA vs. Confederation of Unions and Government Corporations and Offices* (G.R. Nos. L-21484 and L-23605, November 29, 1969, 30 SCRA 644), the Court said that the government, whether carrying out its sovereign attributes or running some business, discharges the same function of service to the people.

Consequently, that the GSIS, in granting the loans, was exercising a proprietary function would not justify the exclusion of the transactions from the coverage and scope of the right to information.

Moreover, the intent of the members of the Constitutional Commission of 1986, to include government-owned and controlled corporations and transactions entered into by them within the coverage of the State policy of full public disclosure is manifest from the records of the proceedings:

THE PRESIDING OFFICER (Mr. Colayco).

Commissioner Suarez is recognized.

MR. SUAREZ. Thank you. May I ask the Gentleman a few question?

MR. OPLE. Very gladly.

MR. SUAREZ. Thank you.

When we declare "a policy of full public disclosure of all its transactions" — referring to the transactions of the State — and when we say the "State" which I suppose would include all of the various agencies, departments, ministries and instrumentalities of the government. . . .

MR. OPLE. Yes, and individual public officers, Mr. Presiding Officer.

MR. SUAREZ. Including government-owned and controlled corporations.

MR. OPLE. That is correct, Mr. Presiding Officer.

MR. SUAREZ. And when we say "transactions which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?

MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can cover both steps leading to a contract, and

already a consummated contract, Mr. Presiding Officer.

MR. SUAREZ. This contemplates inclusion of negotiations leading to the consummation of the transaction.

MR. OPLE. Yes, subject only to reasonable safeguards on the national interest.

MR. SUAREZ. Thank you. (V Record of the Constitutional Commission 24-25.) (Emphasis supplied.)

Considering the intent of the framers of the Constitution which, though not binding upon the Court, are nevertheless persuasive, and considering further that government-owned and controlled corporations, whether performing proprietary or governmental functions are accountable to the people, the Court is convinced that transactions entered into by the GSIS, a government-controlled corporation created by special legislation are within the ambit of the people's right to be informed pursuant to the constitutional policy of transparency in government dealings.

In fine, petitioners are entitled to access to the documents evidencing loans granted by the GSIS, subject to reasonable regulations that the latter may promulgate relating to the manner and hours of examination, to the end that damage to or loss of the records may be avoided, that undue interference with the duties of the custodian of the records may be prevented and that the right of other persons entitled to inspect the records may be insured *(Legaspi vs. Civil Service Commission, supra at p. 538, quoting Subido vs. Ozaeta, 80 Phil. 383, 387.)* The petition, as to the second and third alternative acts sought to be done by petitioners, is meritorious.

However, the same cannot be said with regard to the first act sought by petitioners, *i.e.,* "to furnish petitioners the list of the names of the Batasang Pambansa members belonging to the UNIDO and PDP-Laban who were able to secure clean loans immediately before the February 7 election thru the intercession/marginal note of the then First Lady Imelda Marcos."

Although citizens are afforded the right to information and, pursuant thereto, are entitled to "access to official records," the constitution does not accord them a right to compel custodians of official records to prepare lists, abstracts, summaries and the like in their desire to acquire information or matters of public concern.

It must be stressed that it is essential for a writ of mandamus to issue that the applicant has a well-defined, clear and certain legal right to the thing demanded and that it is the imperative duty of defendant to perform the act required. The corresponding duty of the respondent to perform the required act must be clear and specific. *(Lemi vs. Valencia, G.R. No. L-20768, November 29, 1968, 126 SCRA 203; Ocampo vs. Subido, G.R. No. L-28344, August 27, 1976, 72 SCRA 443).* The request of the petitioners fails to meet this standard, there being no duty on the part of respondent to prepare the list requested.

(b) PUBLICATION OF PRIVATE FACTS.

The invasion of the right of privacy which was of particular concern to Warren and Brandeis when they published their article in the Harvard Law Review is publication of private facts. In this type of violation of the right to privacy, the interest sought to be protected is the right to be free from unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern. *(Ayer Productions, Ltd. Pty., et al. vs. Hon. Ignacio Capulong, et al.).* The elements cited in American Jurisprudence of this tort are as follows: a) There must be a public disclosure; b) the facts diclosed must be a private fact; c) the matter must be one which would be offensive and objectionable to a reasonable person of ordinary sensibilities. *(62A Am. Jur. 2d 708).*

Our Court of Appeals ruled in *Cordero, et al. vs. Buigasco, et al.* (17 CAR 2s 517, 539 [1972]) that "there would be an actionable violation of the right of privacy if: (1) publicity is given to any private or purely personal information about a person, (2) without the latter's consent, (3) regardless of whether or not such publicity constitutes a criminal offense, like libel or defamation, the circumstance that the publication was made with intent of gain or for commercial and business purposes invariably serves to aggravate the violation of the right."

(1) Newsworthiness.

It is also settled that because of the interest they generate and their newsworthiness, public figures, most especially those holding responsible positions in government, enjoy a more limited right to privacy as compared to ordinary individuals, their actions being subject to closer public scrutiny. *(Ayer Productions Pty. Ltd. vs. Capulong, G.R. Nos. 82380 and 82398, April 29, 1988 and Cohen vs. Marx, 211 P. 2d 321 [1949]).* As a public figure, the subject must be regarded as having passed into public domain and as an appropriate subject of expression and coverage by any form of mass media. *(Ayer vs. Capulong, ibid.).* To be liable, the defendant must be guilty of knowing and reckless disregard of truth. The privilege is not limited to dissemination of news; it also extends to information or education or even entertainment or amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general, as well as reproduction of the public scene in newsreel and travelogues. *(ibid.).*

The Supreme Court adopted Prosser and Keeton's definition of

a "public figure":

> "A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' He is, in other words, a celebrity. Obviously to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person." *(Ibid.)*

The claim of newsworthiness can also be sustained if the facts to be published are strange and unusual. For instance, the unusual eating habits of a famous surfer can be published by a magazine without fear of liability for publication of private facts. *(Virgil vs. Times Inc., 425 U.S. 998 [1976]).*

(2) Official Proceedings.

The publication of facts derived from the records of official proceedings, which are not otherwise declared by law as confidential, cannot be considered a tortious conduct. The rule, however, admits of certain exceptions. Thus, Article 357 of the Revised Penal Code prohibits publication of certain acts referred to in the course of official proceedings. It punishes "any reporter, editor, or manager of a newspaper, daily or magazine, who shall publish facts connected with private life of another and offensive to the honor, virtue, and reputation of said person, even though said publication be made in connection with or under the pretext that it is necessary in the narration of any judicial or administrative proceedings wherein such facts have been mentioned."

(3) Official Functions.

It should be emphasized that the right to privacy belongs to the individual acting in his private capacity and not to a governmental agency or officers tasked with, and acting in, the discharge of public duties. Thus, there can be no invasion of privacy if what is sought to be divulged is a product of action undertaken in the course of the performance of official functions. To declare otherwise would be to clothe every public official with an impregnable mantle of protection

against public scrutiny for their official acts. *(Ma. Carmen G. Aquino-Sarmiento vs. Manuel Morato, et al., G.R. No. 92541, November 13, 1991).*

CASES:

AYER PRODUCTIONS PTY. LTD. and McELROY & McELROY FILM PRODUCTIONS vs. HON. IGNACIO M. CAPULONG AND JUAN PONCE ENRILE
G.R. No. L-82380, April 29, 1988

Petitioner Hal McElroy, an Australian film maker, and his movie production company, petitioner Ayer Productions Pty. Ltd. (Ayer Productions), envisioned, sometime in 1987, the filming for commercial viewing and for Philippine and international release, the historic peaceful struggle of the Filipinos at EDSA (Epifanio de los Santos Avenue). Petitioners discussed this project with local movie producer Lope V. Juban, who suggested that they consult with the appropriate government agencies and also with General Fidel V. Ramos and Senator Juan Ponce Enrile, who had played major roles in the events proposed to be filmed.

The proposed motion picture entitled "The Four Day Revolution" was endorsed by the Movie Television Review and Classification Board as well as the other government agencies consulted. General Fidel Ramos also signified his approval of the intended film production.

In a letter dated 16 December 1987, petitioner Hal McElroy, informed private respondent Juan Ponce Enrile about the projected motion picture enclosing a synopsis of it, the full text of which is set out below:

"The Four Day Revolution is a six hour mini-series about People Power — a unique event in modern history — that made possible the peaceful revolution in the Philippines in 1986.

Faced with the task of dramatising these remarkable events, screenwriter David Williamson and history Prof. Al McCoy have chosen a 'docudrama' style and created [four] fictitious characters to trace the revolution from the death of Senator Aquino, to the February revolution and the fleeing of Marcos from the country.

These characters' stories have been woven through the real events to help our huge international audience understand this extraordinary period in Filipino history.

First, there's Tony O'Neil, an American television journalist working for a major network. Tony reflects the average American attitude to the Philippines — once a colony, now the home of crucially important military bases. Although Tony is aware of the corruption and of Marcos' megalomania, for him, there appears to be no alternative to Marcos except the Communists.

Next, Angie Fox, a fiery Australian photo-journalist. A 'new girl in town,' she is quickly caught up in the events as it becomes clear that the time has come for a change. Through Angie and her relationship with one of the Reform Army Movement Colonels (a fictitious character), we follow the developing discontent in the armed forces. Their dislike for General Ver, their strong loyalty to Defense Minister Enrile, and ultimately their defection from Marcos.

The fourth fictitious character is Ben Balano, a middle-aged editor of a Manila newspaper who despises the Marcos regime and is a supporter and promoter of Cory Aquino. Ben has two daughters, Celie — a left-wing lawyer who is a secret member of the New People's Army, and Eva — a P.R. girl, politically moderate and very much in love with Tony. Ultimately, she must choose between her love and the revolution.

Through the interviews and experiences of these central characters, we show the complex nature of Filipino society, and the intertwining series of events and characters that triggered these remarkable changes.

Through them also, we meet all of the principal characters and experience directly dramatic recreation of the revolution. The story incorporates actual documentary footage filmed during the period which we hope will capture the unique atmosphere and forces that combined to overthrow President Marcos.

David Williamson is Australia's leading playwright with some 14 hugely successful plays to his credit ('Don's Party,' 'The Club,' 'Travelling North') and 11 feature films ('The Year of Living Dangerously,' 'Gallipoli,' 'Phar Lap').

Professor McCoy (University of New South Wales) is an American historian with a deep understanding of the Philippines, who has worked on the research for this project for some 18 months. Together with David Williamson they have developed a script we believe accurately depicts the complex issues and events that occurred during the period.

The six-hour mini-series is a McElroy and McElroy co-production with Home Box Office in America, the Australian Broadcasting Corporation in Australia and Zenith Productions in the United Kingdom."

The proposed motion picture would be essentially a reenactment of the events that made possible the EDSA revolution; it is designed to be viewed in a six-hour mini-series television play, presented in a "docu-drama" style, creating four (4) fictional characters interwoven with real events, and utilizing actual documentary footage as background.

On 21 December 1987, private respondent Enrile replied that "[he] would not and will not approve of the use, appropriation, reproduction and/or exhibition of his name, or picture, or that of any member of his family in any cinema or television production, film or other medium for advertising or commercial exploitation" and further advised petitioners that "in the production, airing, showing, distribution or exhibition of said or similar film, no reference whatsoever (whether written, verbal or visual) should not be

made to [him] or any member of his family, much less to any matter purely personal to them."

It appears that petitioners acceded to this demand and the name of private respondent Enrile was deleted from the movie script, and petitioners proceeded to film the projected motion picture.

[Enrile then filed a Complaint with application for Temporary Restraining Order and Writ of Preliminary Injunction with the Regional Trial Court of Makati, docketed as Civil Case No. 88-151 in Branch 134 thereof, seeking to enjoin petitioners from producing the movie "The Four Day Revolution." The respondent judge issued the writ of injunction prayed for, hence, the petitioner filed a petition for certiorari with the Supreme Court.]

I

The constitutional and legal issues raised by the present Petitions are sharply drawn. Petitioners' claim that in producing and filming "The Four Day Revolution," they are exercising their freedom of speech and of expression protected under our Constitution. Private respondent, upon the other hand, asserts a right of privacy and claims that the production and filming of the projected mini-series would constitute an unlawful intrusion into his privacy which he is entitled to enjoy.

Considering first petitioners' claim to freedom of speech and of expression, the Court would once more stress that this freedom includes the freedom to film and produce motion pictures and to exhibit such motion pictures in theaters or to diffuse them through television. In our day and age, motion pictures are a universally utilized vehicle of communication and medium of expression. Along with the press, radio and television, motion pictures constitute a principal medium of mass communication for information, education and entertainment. In *Gonzales vs. Katigbak*, former Chief Justice Fernando, speaking for the Court, explained:

"1. Motion pictures are important both as a medium for the communication of ideas and the expression of the artistic impulse. Their effects on the perception by our people of issues and public officials or public figures as well as the prevailing cultural traits is considerable. Nor as pointed out in *Burstyn vs. Wilson* (343 US 495 [1942]) is the "importance of motion pictures as an organ of public opinion lessened by the fact that they are designed to entertain as well as to inform.' (*Ibid*., 501). There is no clear dividing line between what involves knowledge and what affords pleasure. If such a distinction were sustained, there is a diminution of the basic right to free expression. . . ."

This freedom is available in our country both to locally-owned and to foreign-owned motion picture companies. Furthermore, the circumstance that the production of motion picture films is a commercial activity expected to yield monetary profit, is not a disqualification for availing of freedom of speech and of expression. In our community as in many other countries, media facilities are owned either by the government or the private sector but

the private sector-owned media facilities commonly require to be sustained by being devoted in whole or in part to revenue producing activities. Indeed, commercial media constitute the bulk of such facilities available in our country and hence to exclude commercially owned and operated media from the exercise of constitutionally protected freedom of speech and of expression can only result in the drastic contraction of such constitutional liberties in our country.

The counter-balancing claim of private respondent is to a right of privacy. It was demonstrated sometime ago by the then Dean Irene R. Cortes that our law, constitutional and statutory, does include a right of privacy. It is left to case law, however, to mark out the precise scope and content of this right in differing types of particular situations. The right of privacy or "the right to be let alone," like the right of free expression, is not an absolute right. A limited intrusion into a person's privacy has long been regarded as permissible where that person is a public figure and the information sought to be elicited from him or to be published about him constitute matters of a public character. Succinctly put, the right of privacy cannot be invoked to resist publication and dissemination of matters of public interest. The interest sought to be protected by the right of privacy is the right to be free from "unwarranted publicity, from the wrongful publicizing of the private affairs and activities of an individual which are outside the realm of legitimate public concern."

Lagunzad vs. Vda. de Gonzales, on which private respondent relies heavily, recognized a right to privacy in a context which included a claim to freedom of speech and of expression. Lagunzad involved a suit for enforcement of a licensing agreement between a motion picture producer as licensee and the widow and family of the late Moises Padilla as licensors. This agreement gave the licensee the right to produce a motion picture portraying the life of Moises Padilla, a mayoralty candidate of the Nacionalista Party for the Municipality of Magallon, Negros Occidental during the November 1951 elections and for whose murder, Governor Rafael Lacson, a member of the Liberal Party then in power and his men were tried and convicted. In affirming the judgment of the lower court enforcing the licensing agreement against the licensee who had produced the motion picture and exhibited it but refused to pay the stipulated royalties, the Court, through Mme. Justice Melencio-Herrera, said:

"Neither do we agree with petitioner's submission that the Licensing Agreement is null and void for lack of, or for having an illegal cause or consideration, while it is true that petitioner had purchased the rights to the book entitled 'The Moises Padilla Story,' that did not dispense with the need for prior consent and authority from the deceased heirs to portray publicly episodes in said deceased's life and in that of his mother and the members of his family. As held in *Schuyler vs. Curtis*, ([1895], 147 NY 434, 42 NE, 31 LRA 286. 49 Am St Rep 671), 'a privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased.'

Petitioner's averment that private respondent did not have any property right over the life of Moises Padilla since the latter was a public figure, is neither well taken. Being a public figure *ipso facto* does not automatically destroy *in toto* a person's right to privacy. The right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be. (*Garner vs. Triangle Publications*, DCNY, 97 F. Supp., 564, 549 [1951]). In the case at bar, while it is true that petitioner exerted efforts to present a true-to-life story of Moises Padilla, petitioner admits that he included a little romance in the film because without it, it would be a drab story of torture and brutality."

In *Lagunzad*, the Court had need, as we have in the instant case, to deal with contraposed claims to freedom of speech and of expression and to privacy. Lagunzad, the licensee in effect claimed, in the name of freedom of speech and expression, a right to produce a motion picture biography at least partly "fictionalized" of Moises Padilla without the consent of and without paying pre-agreed royalties to the widow and family of Padilla. In rejecting the licensee's claim, the Court said:

Lastly, neither do we find merit in petitioner's contention that the Licensing Agreement infringes on the constitutional right of freedom of speech and of the press, in that, as a citizen and as a newspaperman, he had the right to express his thoughts in film on the public life of Moises Padilla without prior restraint. The right of freedom of expression, indeed, occupies a preferred position in the 'hierarchy of civil liberties.' *(Philippine Blooming Mills Employees Organization vs. Philippine Blooming Mills Co., Inc., 51 SCRA 191 [1963]).* It is not, however, without limitations. As held in *Gonzales vs. Commission on Elections*, 27 SCRA 835, 858 (1960):

x x x x x x x x x

The prevailing doctrine is that the clear and present danger rule is such a limitation. Another criterion for permissible limitation on freedom of speech and of the press, which includes such vehicles of the mass media as radio, television and the movies, is the 'balancing-of-interests test.' (Chief Justice Enrique M. Fernando on the Bill of Rights, 1970 ed., p. 79). The principle 'requires a court to take conscious and detailed consideration of the interplay of interests observable in a given situation or type of situation.' (Separation Opinion of the late Chief Justice Castro in *Gonzales vs. Commission on Elections, supra*, p. 899).

In the case at bar, the interests observable are the right to privacy asserted by respondent and the right of freedom of expression invoked by petitioner. Taking into account the interplay of those interests, we hold that under the particular circumstances presented and considering the obligations assumed in the Licensing Agreement entered into by petitioner, the validity of such agreement will have to be upheld particularly because the limits of freedom of expression are reached when expression touches upon matters of

essentially private concern.

Whether the "balancing of interests test" or the "clear and present danger test" be applied in respect of the instant Petitions, the Court believes that a different conclusion must here be reached: The production and filming by petitioners of the projected motion picture "The Four Day Revolution" does not, in the circumstances of this case, constitute an unlawful intrusion upon private respondent's "right of privacy."

1. It may be observed at the outset that what is involved in the instant case is a prior and direct restraint on the part of the respondent Judge upon the exercise of speech and of expression by petitioners. The respondent Judge has restrained petitioners from filming and producing the entire proposed motion picture. It is important to note that in Lagunzad, there was no prior restrain of any kind imposed upon the movie producer who in fact completed and exhibited the film biography of Moises Padilla. Because of the preferred character of the constitutional rights of freedom of speech and of expression, a weighty presumption of invalidity vitiates measures of prior restraint upon the exercise of such freedoms. The invalidity of a measure of prior restraint does not, of course, mean that no subsequent liability may lawfully be imposed upon a person claiming to exercise such constitutional freedoms. The respondent Judge should have stayed his hand, instead of issuing an *ex-parte* Temporary Restraining Order one day after filing of a complaint by the private respondent and issuing a Preliminary Injunction twenty (20) days later; for the projected motion picture was as yet uncompleted and hence not exhibited to any audience. Neither private respondent nor the respondent trial Judge knew what the completed film would precisely look like. There was, in other words, no "clear and present danger" of any violation of any right to privacy that private respondent could lawfully assert.

2. The subject matter of "The Four Day Revolution" relates to the non-bloody change of government that took place at Epifanio de los Santos Avenue in February 1986, and the train of events which led up to that denouement. Clearly, such subject matter is one of public interest and concern. Indeed, it is, petitioners' argue, of international interest. The subject thus relates to a highly critical stage in the history of this country and as such, must be regarded as having passed into the public domain and as an appropriate subject for speech and expression and coverage by any form of mass media. The subject matter, as set out in the synopsis provided by the petitioners and quoted above, does not relate to the individual life and certainly not to the private life of private respondent Ponce Enrile. Unlike in *Lagunzad*, which concerned the life story of Moises Padilla necessarily including at least his immediate family, what we have here is not a film biography, more or less fictionalized, of private respondent Ponce Enrile. "The Four Day Revolution" is not principally about, nor is it focused upon, the man Juan Ponce Enrile; but it is compelled, if it is to be historical, to refer to the role played by Juan Ponce Enrile in the precipitating and the constituent events of the change of government in February 1986.

3. The extent of the intrusion upon the life of private respondent Juan Ponce Enrile that would be entailed by the production and exhibition of "The Four Day Revolution" would, therefore, be limited in character. The extent of that intrusion, as this Court understands the synopsis of the proposed film, may be generally described as such intrusion as is reasonably necessary to keep that film a truthful historical account. Private respondent does not claim that petitioners threatened to depict in "The Four Day Revolution" any part of the private life of private respondent or that of any member of his family.

4. At all relevant times, during which the momentous events, clearly of public concern, that petitioners propose to film were taking place, private respondent was what Profs. Prosser and Keeton have referred to as a "public figure:"

> "A public figure has been defined as a person who, by his accomplishments, fame, or mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs, and his character, has become a 'public personage.' He is, in other words, a celebrity. Obviously, to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous inventors and explorers, war heroes and even ordinary soldiers, an infant prodigy, and no less a personage than the Grand Exalted Ruler of a lodge. It includes, in short, anyone who has arrived at a position where public attention is focused upon him as a person."

Such public figures were held to have lost, to some extent at least, their right of privacy. Three reasons were given, more or less indiscrimately, in the decisions that they had sought publicity and consented to it, and so could not complain when they received it; that their personalities and their affairs had already become public, and could no longer be regarded as their own private business; and that the press had a privilege, under the Constitution, to inform the public about those who have become legitimate matters of public interest. On one or another of these grounds, and sometimes all, it was held that there was no liability when they were given additional publicity, as to matters legitimately within the scope of the public interest they had aroused.

The privilege of giving publicity to news, and other matters of public interest, was held to arise out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell it. 'News' includes all events and items of information which are out of the ordinary humdrum routine, and which have 'that indefinable quality of information which arouses public attention.' To a very great extent the press, with its experience or instinct as to what its readers will want, has succeeded in making its own definition of news, as a glance at any morning newspaper will sufficiently indicate. It includes homicide and other crimes, arrests and police raides, suicides, marriages

and divorces, accidents, a death from the use of narcotics, a woman with a rare disease, the birth of a child to a twelve year old girl, the reappearance of one supposed to have been murdered years ago, and undoubtedly many other similar matters of genuine, if more or less deplorable, popular appeal.

The privilege of enlightening the public was not, however, limited to the dissemination of news in the sense of current events. It extended also to information or education, or even entertainment and amusement, by books, articles, pictures, films and broadcasts concerning interesting phases of human activity in general, as well as the reproduction of the public scene in newsreels and travelogues. In determining where to draw the line, the courts were invited to exercise a species of censorship over what the public may be permitted to read; and they were understandably liberal in allowing the benefit of the doubt."

Private respondent is a "public figure" precisely because, *inter alia,* of his participation as a principal actor in the culminating events of the change of government in February 1986. Because his participation therein was major in character, a film reenactment of the peaceful revolution that fails to make reference to the role played by private respondent would be grossly unhistorical. The right of privacy of a "public figure" is necessarily narrower than that of an ordinary citizen. Private respondent has not retired into the seclusion of simple private citizenship. He continues to be a "public figure." After a successful political campaign during which his participation in the EDSA Revolution was directly or indirectly referred to in the press, radio and television, he sits in a very public place, the Senate of the Philippines.

5. The line of equilibrium in the specific context of the instant case between the constitutional freedom of speech and of expression and the right of privacy, may be marked out in terms of a requirement that the proposed motion picture must be fairly truthful and historical in its presentation of events. There must, in other words, be no knowing or reckless disregard of truth in depicting the participation of private respondent in the EDSA Revolution. There must, further, be no presentation of the private life of the unwilling private respondent and certainly no revelation of intimate or embarrassing personal facts. The proposed motion picture should not enter into what Mme. Justice Melencio-Herrera in Lagunzad referred to as "matters of essentially private concern." To the extent that "The Four Day Revolution" limits itself in portraying the participation of private respondent in the EDSA Revolution to those events which are directly and reasonably related to the public facts of the EDSA Revolution, the intrusion into private respondent's privacy cannot be regarded as unreasonable and actionable. Such portrayal may be carried out even without a license from private respondent.

JOSE CORDERO, et al. vs. ALICIA B. BUIGASCO, et al.
17 CAR 2s 517
CA, G.R. No. 34130-R, April 17, 1972

Named defendants in this action for damages, instituted by Joselito

Gomez and the spouses Jose Cordero and Eusebia B. Cordero, now appellees, pursuant to the first and second paragraphs of Article 26 of the new Civil Code, are Alicia Buigasco, author of the article "Malagim Na Wakas Ng Isang Pagibig," the Liwayway Publications, Incorporated, which owns the *Aliwan* Magazine in which that article appeared, and Hilario Coronel, editor of the *Aliwan* Magazine. After trial, the Court below rendered judgment for the plaintiffs and against the defendants, condemning the said Alicia Buigasco, the Liwayway Publications, Incorporated and the heirs of Hilario Coronel who died during the pendency of the case, namely, Leticia Manikis, Hernando, Luis and Hector, all surnamed Coronel, to pay plaintiff-appellees the amount of Ten Thousand Pesos (P10,000.00) as moral damages, Two Thousand Pesos (P2,000.00) in concept of attorney's fees, and the costs of the suit.

From this judgment, the defendants appealed, and in their brief assailed the correctness of the award of the sums aforestated as damages and the propriety of applying Article 26 of the new Civil Code to the case at bar.

"Malagim Na Wakas Ng Isang Isang Pagibig" the story in question, contains the details of the private and personal affairs of plaintiff-appellee Joselito Gomez and Anida Cordero, whose real names were used. It was written just after the publication of the news reports on the death of Anida Cordero, on March 20, 1961, in a motor vehicle mishap in front of the Brown Derby at Quezon City, where she and her boyfriend, Joselito Gomez, were then going for a snack.

Because it spawned the present lawsuit, and in view of its basic relevance and pertinence to an intelligent and judicious consideration of this appeal, we think it best before proceeding to take up the issues, which to us appear to be the object of debate to reproduce in full the English translation of the short story in question, which translation has been presented as Exhibit C, to wit:

"LOVE'S TRAGIC END

"As told by Joselito Gomez to Alicia Buigasco

"When shared with your beloved, love is sweet and heavenly. But when one of you is gone, love turns bitter, colorless and lifeless. Nor would you ever care to utter love's endearing words again. Rather you would wish to go where she has gone.

"This was what I felt when my beloved Anida was taken away from me. My sweetheart was killed recently in an accident.

"Her death pierced my heart. It continued to bleed. I wonder when it would heal.

"Her death left me in pain. The two of us formed that love, we dreamt, we hoped, we waited. And when our dream was fast becoming a reality, death snatched her from me. Why should this happen to us? I still can't find the answer. All I know is that I long for Anida.

"I wouldn't want to remember our happy days together. It only aggravates the pain in my heart. But now that she's gone, nothing is left me but her memory. I cannot part with her memory. Her body was already taken away from me but her memory will remain with me fresh at all times. Her memory lingers with me; and veil of solitude, loneliness and mourning shall cover my heart.

"I didn't know that meeting Anida would end in pure and sweet story of love. I met her at the university where she was studying. I went there because I happen to need something from a friend who was also taking up medicine. My friend and I were conversing when she passed by. I admired her the first time I saw her. She was in her white uniform and was carrying some books. When my friend saw her, they smiled at each other and they chatted.

"'Pit, this is my classmate, Anida Cordero,' my friend turned to me.

"'And he is Joselito Gomez, Pit for short.' Bert introduced me to her.

"'You didn't tell me you have such beautiful classmates.' I told Bert.

"'That's to surprise you. We really have many beautiful ladies here.'

"'So that's why you're so contented staying around.' I teased Bert.

"We laughed and Anida laughed, too.

"'Shall we talk here? Let's go to the canteen.' Bert suggested. 'Let's go Anida.'

"And Anida obliged. We teased each other even more in the canteen. I don't know my own feelings then. I was very, very happy. It seemed I was on the clouds.

"I would often glance at her but would look elsewhere when she would look at me.

"I didn't realize that Bert was watching me as I stared at Anida. He was noting my every glance. Really, at that moment I was captivated by Anida.

"When the bell rang for the next period, Anida quickly picked up her books and bade us good-bye.

"'I still have a class, Bert, Pit. I shall go now. Thanks ha?' And she left.

"My eyes followed her as she walked away.

"'You seem to have fallen for her,' Bert said. 'Your eyes seemed

glued to her face.'

"'Not really.' I lied. 'I merely was admiring her.'

"'Don't you try to cover up. It was too obvious.' Bert laughed. I laughed, too.

"I was very happy on my way home. I was whistling when I reached our house.

"'You look happy.' My mother told me. 'What have you eaten?'

"'Nothing,' I laughed. 'Is it bad to be happy once in a while?'

"'You're really satisfied. That's why I'm wondering.' My mother teased further.

"'You'll know why later.' And I quickly went to my room upstairs.

"That night I didn't sleep much. I could see Anida's face everywhere. Her image seemed glued to my eyelids. Her kind face, her nose, eyes, lips slowly passed before my sight. She was in my thoughts until I finally slept.

"The next day, I was full of energy when I reported for work.

"In the afternoon after my office hours, I wanted to go to UST. My heart whispered that I should see Anida. I longed to see and talk with her. But I vascillated. I felt somewhat shy. But my heart won after all. I could not control myself anymore and I found my feet negotiating the spacious UST grounds.

"The classes were over when I arrived at the College of Medicine. I craned my neck searching for her among the students leaving the building. Then, I saw Anida with her classmates. She left them when she saw me.

"'Did you see Bert?' She asked.

"'Not yet,' I answered feeling the loud thump thump of my heart.

"'I didn't see him today.' Anida said looking at the door of the building. 'Maybe he's absent.'

"'Let's go then.'

"'Where?' She looked at me.

"'Home. Why aren't you going home?'

"'I am.' And together we walked the road leading towards the gate.

"Before we went home, I invited her for a snack at the restaurant opposite the campus. And she obliged. We talked about a lot of things, including our own lives.

"I learned that she was the eldest of three children. Two girls and a boy. Her brother was married and was living with his in-laws. Her father was from Cavite and her mother was from Cabuyao.

"She was her father's favorite because she's the eldest. She was given everything she wanted but her father forbade her to fall in love while she was studying. After our snack I took her to the bus line. I couldn't take her home because she didn't want me to.

"And we met a lot of times, I've lost count. And the time came when I could no longer keep my love to myself, I told her I loved her.

"'You might get sick,' she teased me.

"'I will really get sick if you won't love me.' I stared at her.

"Anida smiled. I held her hand and saw happiness on her face.

"'You love me too, don't you?' I said pressing her hand in mine.

"She smiled and nodded her head. My heart overflowed with joy. I wanted to shout to the whole world my beautiful fate that day.

"'We got engaged without the knowledge of her parents. We kept our secret to ourselves. From that time one I would fetch Anida from her school. We were always very happy. Our hearts had no room for sadness.'

"Once I took her to the bus line.

"I shall take you home now.' I told her. 'I would like to see your place and meet your folks.'

"Anida looked sad.

"'No,' she forbade. 'Don't go to our house. My father will get mad. I told you he told me not to fall in love while I'm still studying. I shall introduce you to them when I am through with my studies.'

"'And when will that be? It might take you three years more to finish your course.'

"'Nevermind. Times run very fast these days. You merely blink your eyes and it's night already. And in a while, the morning's here again.'

"I smiled at what she said.

"'Don't you worry. I shall finish eventually. You be patient.'

"And her words sustained me. And though I felt some failure because I couldn't take her home that day, I consoled myself that time will come when I shall meet her parents too.

"After a year, Anida told me that she will be sent to Baguio with some of her classmates. They shall be trained in a hospital there.

"'Then we shall not see each other for a long time.' I told Anida. 'I shall be lonely.'

"'Maybe we won't stay there long. After we have observed there, we shall be back.'

"'Even then. That will take long.'

"Maybe it would be better if I go to Baguio too, could I?'

"Her eyes sparkled.

"'That's up to you. But let's keep this a secret.'

"And I followed Anida to Baguio without anyone getting wind of it.

"We didn't stay long in Baguio and that at a few days of stay, we returned back to Manila. I could feel then that the love in our hearts became more stronger, and that, the tie between us became more real and pure as ever. Like what Anida said to me, it didn't take long and I learned that Anida finally finished her studies. I said to myself then, that at last our dreams will eventually be fulfilled, and the period of waiting will finally be compensated.

"Anida was very happy then. 'It will be very soon that our dreams will be reduced to reality,' she said. 'I'm so happy also Anida,' I answered her. 'I have been waiting for a day to meet your parents personally, I added.'

"It was on the 24th of March when Anida received her diploma. I was present and had witnessed her during her graduation on that day, which she considered as very significant in her life. I attended her graduation, though I keep on hiding from her parents whom I know were also there. Though, I was very eager then to meet her parents personally, I just kept silent about it because I would like her to be the one to introduce me to them.

"Five days after her graduation, Anida and I met again, I went to the University to fetch her. I never thought nor conceived that it was on that day that our love affair would come to an end. Anida was preparing her things when I arrived at the University. 'Wait for a few minutes and this will be finished,' she said smiling. 'Where are we going?' She asked. 'We will just take a snack at the Brown Derby.' I answered. 'You look tired and you need something cold to drink,' I continued. 'Yes, just a few more minutes,' she said. After she finished all her papers, we left the University together. We boarded a bus bound to Brown Derby. She was very happy then, and she kept on telling me many things while we were inside the bus.

"We were already crossing the road opposite the place where we will take the snack when suddenly a truck appeared towards our direction. I took hold of Anida very tightly and helped her cross the street.

But, I've noticed that as if she can't move her feet, as if she can't walk. She became confused and moved backward. I can't remember anymore what happened next after that. I just found myself already on the other side of the street, and that I saw Anida lying on the middle of the street. 'Anida!' I cried. And I ran towards her. I carried her towards the side of the street, but she is already dead. I took hold of her pulse but it is no longer beating. Anida is no longer breathing. 'Anida! Oh Anida!' I cried and wept unashamedly without noticing at the time that there were already many people around us. All that I know only is the lifeless body of my dear sweetheart.

"After the lapse of a few minutes, policemen arrived and they questioned me. I don't know what to answer at the time. I was very confused then. After a while, I thought of the parents of Anida. They must know what happened, I said to myself. And so I called them over the phone. 'Your daughter met an accident,' I said. The corpse was brought to the morgue, I was always beside her. I don't want to leave her alone.

"The following day, the body of Anida was brought to their house. I was not able to evade them anymore because I knew then that her parents read already in the morning papers what happened and my relation to Anida. So that on the afternoon of that day, I personally went to the house of Anida. That was my first time to reach their place. Right after I reached their place, I kissed the hands of her parents. I can't utter any word, neither her parents.

"I went to her lifeless body. I looked at her and when my eyes saw her face, I began to cry again unashamedly.

"It was on the 2nd of April (the day when our Lord Jesus Christ came to life again), about 4:00 o'clock in the afternoon when Anida was brought to her grave in Cabuyao, Laguna. When her body was about to be dropped at her grave, I requested that her cadaver be opened again for the last time. After it was opened, I touched her face, I looked at her face for the last time, I stared at her in order that her face will be enshrined forever in my mind.

"It's really bitter that such fate happened to us. Right at that very moment, I would like to die also in order to follow her.

"Because of the sudden and tragic death of Anida, my heart, life and love were burried with her. To me she is incomparable – irreplaceable.

There is hardly any doubt, therefore, that appellees have made out a case within the compass of Article 26, paragraphs 1 and 2 of the new Civil Code, which provides that:

x x x

The rationale for Article 26, *supra*, has been stated by the Code Com-

mission in its Report, thus —

> "The sacredness of human personality is a concomitant of every plan for human amelioration. The touchstone of every system of laws, of the culture and civilization of every country, is how it dignifies man. If in legislation, inadequate regard is observed for human life and safety; if laws do not sufficiently forestall human suffering or do not try effectively to curb those factors or influences that wound the noblest sentiments; if the statutes insufficiently protect persons from being unjustly humiliated; in short, if human personality is not properly exalted – then the laws are indeed defective." *(1 Tolentino, Civil Code of the Philippines, 1968 Edition, p. 89).*

Quite manifestly, the law in question was enacted in view of the recognized inadequacy or insufficiency of the existing laws on libel and other related pieces of legislation purposely to exalt, enhance and protect the human personality from uncalled for intrusions or humiliation. That being so, the said article is decidedly broader in meaning and application than the laws on defamation. As Senator Arturo N. Tolentino has accurately pointed out, the article "is perhaps one of the most fruitful sources of litigation under the present Code. It has practically incorporated into the Civil Code a large portion of the system of torts of American law, and has gone even farther by creating a statutory sanction for acts which many American courts have refused to consider as grounds for action." He submits the view that the "enumeration contained in the four numbered paragraphs of this article is merely illustrative and does not limit the scope of the article. The principal rule is expressed in general terms in the first sentence; and the cases mentioned in the numbered paragraphs are merely instances falling within the terms of the general rule," considering that the article "denounces similar acts." *(I Tolentino, Civil Code of the Philippines, 1968 Edition, p. 88).*

> "There is a mild criticism in 70 U.S.L. Rev. 435, 447, of the reasoning of the courts in basing the right of privacy on the declaration of rights with respect to the pursuit of happiness. And in 13 Southern Cal. L. Rev. 81, 88, it is stated, with reference to this and the other 'constitutional peg' — the right to liberty under the due process clause, mentioned in the Pavesich Case: 'Neither clause ordinarily has been interpreted as conferring personal rights on an individual as against other individuals. They rather have been construed as limitations on government action alone.' "

At the risk of prolixity, let it be said again that there is here a tortious intrusion upon appellees' domestic circle which can hardly be gainsaid. For the love affair between appellee Joselito Gomez and the late Anida Cordero; how that affair was conceived, born, nurtured and ended; the attitude of Anida's parents, Jose Cordero and Eusebia B. Cordero, towards it; and how the parents tried to control and steer their daughter away from such an affair, are matters which are strictly and essentially private and purely personal to the parties concerned over which the public obviously can claim

no legitimate interest whatsoever. That these matters were given undue and unwarranted publicity by the appellants without the consent or authorization of the persons involved in a manner which openly revealed the identities of the latter, either thru the use of their real names, their pictures, or their description which could have left no room for doubt as to the identity of the subject being described, have all been competently established by appellee's evidence and not disproved by appellants. In this regard, the authorities are almost one in holding that —

> "The unwarranted publication of a person's name, or the unauthorized use or publication of his photograph or other likeness, constitutes the most common means of invasion of the right of privacy. The sale of photographs of the plaintiff, the unwarranted publication of the plaintiff's picture in a newspaper, the unauthorized exhibition of an x-ray picture showing a part of the plaintiff's body or of pictures showing the performance of an operation upon the plaintiff or the effects of disease upon the plaintiff's appearance, or the publication of the name and picture of a woman in bed in a hospital, in connection with a story concerning her unusual ailment, has been held to violate the right of privacy." *(41 Am. Jur., S. 21, p. 940).*
>
> "The right to privacy covers all intrusion upon the plaintiff's solitude, publicity given to his name or likeness or to private information about him and the commercial appropriation of his personality. A publication of a man's picture, therefore, without the consent, even though the same does not constitute libel, violates his privacy. With more reason is a man's privacy violated by the publication of his picture without his consent for commercial purposes. The right, however, is subject to a privilege to publish matters of news value, and public interest to waiver as when a person runs for public office." *(Caguioa, Civil Code, Vol. I, 1959 ed., pp. 40-42, citing Prosses on Torts, 1050, 1059).*

Clearly, therefore, there would be an actionable violation of the right of privacy if (1) publicity is given to any private or purely personal information about a person, (2) without the latter's consent, (3) regardless of whether or not such publicity constitutes a criminal offense, like libel or defamation, the circumstance that the publication was made with the intent of gain or for commercial and business purposes invariably serves to aggravate the violation of the right.

It is chiefly for this reason that appellant's reliance on the defense that the story in question is non-defamatory in character, must prove unavailing. Quite categorically, Article 26, in excluding the element of a questioned publication being of a defamatory character, as a requisite to the recovery of damages, provides that the acts enumerated therein, which, as already pointed out elsewhere, are merely illustrative, not restrictive, of so many other tortious wrongs contemplated by the article — "although they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief." Stated differently, the question of whether or

not the publication complained of is defamatory in character, is relevant only in a prosecution for the crime of libel, but not so in a civil action for violation of the right of privacy. Similar principles are held in American Law and jurisprudence. *(Cf.: 41 Am. Jr., p. 953 and the cases cited therein; 77 C.J.S. pp. 414, 415, citing several cases; 138 ALR pp. 47-48).*

Finally, while it is true that the right of privacy is a purely personal right which cannot, as a general rule, be asserted by anyone other than by him whose privacy is invaded *(See 138 ALR, pp. 50-52 and the cases therein cited)*, it is equally true that cases abound where courts have allowed recovery of damages for the unauthorized use of the name or picture of a deceased person for advertising or trade purposes. Thus, where a photographer was employed to make a photograph of the corpses of twin children, who had been born partially joined together, and to make twelve copies of the picture and no more, but contrary to the agreement, made other photographs from the negatives and procured a copyright thereon, it was held that the parents of the children could recover damages against the photographer on account of their humiliation and wounded feeling and sensibilities resulting from the exhibition of the photographs to others. x x x

(c) FALSE LIGHT.

The interest to be protected in this tort is the interest of the individual in not being made to appear before the public in an objectionable false light or false position. *(Restatement [Second] of the Law of Torts, Section 652E Comment b.)*. In many cases, the publicity given to the plaintiff is defamatory hence an action for libel is also warranted. In such a case, the action for invasion of privacy will afford an alternative remedy. *(ibid.)*.

The tort of putting another in false light may be distinguished from defamation primarily because in the former the gravamen of the claim is not reputational harm but rather the embarrassment of a person in being made into something he is not. *(Watkins, p. 145)*. Publication in defamation is satisfied if a letter is sent to a third person while in false light cases (as in publication of private facts), the statement should be actually made public. In defamation, what is published lowers the esteem in which the plaintiff is held. In false light cases, the defendant may still be held liable even if the statements tell something good about the plaintiff. For example, the defendant may be held liable for damages if he published an unauthorized biography of a famous baseball player exaggerating his feats on the baseball field and falsely portraying him as a war hero. *(Spahn vs. Julian Messner, Inc., 233 N.E. 2d 840 [N.Y. 1967])*.

Similarly, fictionalized account of the life of a person in films may result in liability. As the Supreme Court explained in *Lagunzad vs. Vda de Gonzales (supra):*

> "Petitioner's averment that private respondent did not have any property right over the life of Moises Padilla since the latter was a public figure, is neither well taken. Being a public figure *ipso facto* does not automatically destroy *in toto* a person's right to privacy. The right to invade a person's privacy to disseminate public information does not extend to a fictional or novelized representation of a person, no matter how public a figure he or she may be. In the case at bar, while it is true that petitioner exerted efforts to present a true-to-life story of Moises Padilla, petitioner admits that he included a little romance in the film because without it, it would be a drab story of torture and brutality."

The tort may be committed by the media by distorting the news report. Thus, liability may result if film or video tape is edited in such a way that the plaintiff is made to appear to have committed an illegal act although he actually did not do so. *(Uhl vs. CBS, Inc., 476 F. Supp. 1134 [W.D. P. 1979]).*

An example of a case that demonstrate a similar tort is *Globe Mackay Cable and Radio Corporation vs. Court of Appeals* (176 SCRA 778 [1989]). The complainant in the said case was dismissed from employment for being allegedly involved in fictitious purchases and other fraudulent transactions. Six criminal cases were filed against him but all of them were dismissed. The police likewise investigated the alleged irregularities but the complainant was also cleared. The dismissal of the complainant was then found to be based on an imputation of guilt without basis. Despite such absence of basis, the employer wrote a letter to another corporation where the complainant had pending application, stating that the complainant had been dismissed for dishonesty. As a result, the complainant failed to gain employment and remained unemployed for a longer period of time.

Note, however, that the situation in *Globe Mackay Cable and Radio Corporation* case, as well as the *Concepcion* case reproduced hereunder, is not exactly the tort contemplated in the *Restatement (Second) of the Law of Torts* because there was no publication. It is not even clear if the Supreme Court will eventually include similar cases in the tort of "false light." This uncertainly is brought about by the fact that the tort of "false light" that we have in Philippine jurisprudence — just like all the different types of violation of the right to privacy — is still largely undefined. There are no settled boundaries and there are no fixed requisites prescribed therefor.

CASE:

ST. LOUIS REALTY CORPORATION vs. COURT OF APPEALS
133 SCRA 179 [1984]

This case is about the recovery of damages for a wrongful advertisement in the Sunday Times where Saint Louis Realty Corporation misrepresented that the house of Doctor Conrado J. Aramil belonged to Arcadio S. Arcadio.

St. Louis Realty caused to be published with the permission of Arcadio S. Arcadio (but without permission of Doctor Aramil) in the issue of the Sunday Times of December 15, 1968 an advertisement with the heading "WHERE THE HEART IS." Below that heading was the photograph of the residence of Doctor Aramil and the Arcadio family and then below the photograph was the following write-up:

"Home is where the heart is. And the hearts of MR. AND MRS. ARCADIO S. ARCADIO and their family have been captured by BROOKSIDE HILLS. They used to rent a small 2-bedroom house in a cramped neighborhood, sadly inadequate and unwholesome for the needs of a large family. They dream(ed) of a more pleasant place free from the din and dust of city life yet near all facilities. Plans took shape when they heard of BROOKSIDE HILLS. With thrift and determination, they bought a lot and built their dream house . . . for P31,000. The Arcadios are now part of the friendly, thriving community of BROOKSIDE HILLS . . . a beautiful first-class subdivision planned for wholesome family living."

The same advertisement appeared in the Sunday Times dated January 5, 1969. Doctor Aramil, a neuropsychiatrist and a member of the faculty of the U.E. Ramon Magsaysay Memorial Hospital, noticed the mistake. On that same date, he wrote St. Louis Realty the following letter of protest:

"Dear Sirs:

This is anent to your advertisements appearing in the December 15, 1968 and January 5, 1969 issues of the Sunday Times which boldly depicted my house at the above-mentioned address and implying that it belonged to another person. I am not aware of any permission or authority on my part for the use of my house for such publicity.

"This unauthorized use of my house for your promotional gain and much more the apparent distortions therein are I believe not only transgression to my private property but also damaging to my prestige in the medical profession. I have had invited in several occasions numerous medical colleagues, medical students and friends to my house and after reading your December 15 advertisement, some of them have uttered some remarks purporting doubts as to my professional and personal integrity. Such sly remarks although in light vein as 'it looks like your house,' 'how much are you renting from the Arcadios?', 'like your wife portrayed in the papers as belonging to another husband,' etc., have resulted in no little mental anguish on my part.

"I have referred this matter to the Legal Panel of the Philippine Medical

Association and their final advice is pending upon my submission of supporting ownership papers.

"I will therefore be constrained to pursue court action against your corporation unless you could satisfactorily explain this matter within a week upon receipt of this letter."

The letter was received by Ernesto Magtoto, an officer of St. Louis Realty in charge of advertising. He stopped publication of the advertisement. He contacted Doctor Aramil and offered his apologies. However, no rectification or apology was published.

On February 20, 1969, Aramil's counsel demanded from St. Louis Realty actual, moral and exemplary damages of P110,000 (Exh. D). In its answer dated March 10, St. Louis Realty claimed that there was an honest mistake and that if Aramil so desired, rectification would be published in the Manila Times (Exh. 3).

It published in the issue of the Manila Times of March 18, 1969 a new advertisement with the Arcadio family and their real house. But it did not publish any apology to Doctor Aramil and an explanation of the error.

On March 29, Aramil filed his complaint for damages. St. Louis Realty published in the issue of the Manila Times of April 15, 1969 the following "NOTICE OF RECTIFICATION" in a space 4 by 3 inches:

"This will serve as a notice that our print ad 'Where the Heart is' which appeared in the Manila Times issue of March 18, 1969 is a rectification of the same ad that appeared in the Manila Times issues of December 15, 1968 and January 5, 1969 wherein a photo of the house of another Brookside Homeowner (Dr. Aramil — private respondent) was mistakenly used as a background for the featured homeowner's — the Arcadio family.

"The ad of March 18, 1969 shows the Arcadio family with their real house in the background, as was intended all along."

Judge Jose M. Leuterio observed that St. Louis Realty should have immediately published a rectification and apology. He found that as a result of St. Louis Realty's mistake, magnified by its utter lack of sincerity, Doctor Aramil suffered mental anguish and his income was reduced by about P1,000 to P1,500 a month. Moreover, there was violation of Aramil's right to privacy. (Art. 26, Civil Code).

The trial court awarded Aramil P8,000 as actual damages, P20,000 as moral damages and P2,000 as attorney's fees. St. Louis Realty appealed to the Court of Appeals.

The Appellate Court affirmed that judgment, with Acting Presiding Justice Magno S. Gatmaitan as *ponente*, and Justices Sixto A. Domondon and Samuel F. Reyes concurring.

The Appellate Court reasoned out that St. Louis Realty committed an actionable quasi-delict under Articles 21 and 26 of the Civil Code because the questioned advertisements pictured a beautiful house which did not

belong to Arcadio but to Doctor Aramil who, naturally, was annoyed by that contretemps.

In this appeal, St. Louis Realty contends that the Appellate Court ignored certain facts and resorted to surmises and conjectures. This contention is unwarranted. The Appellate Court adopted the facts found by the trial court. Those factual findings are binding on this Court.

St. Louis Realty also contends that the decision is contrary to law and that the case was decided in a way not in conformity with the rulings of this Court. It argues that the case is not covered by Article 26 which provides that "every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons." "Prying into the privacy of another's residence" and "meddling with or disturbing the private life or family relations of another" and "similar acts," "though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief."

The damages fixed by Judge Leuterio are sanctioned by Articles 2200, 2208 and 2219 of the Civil Code. Article 2219 allows moral damages for acts and actions mentioned in Article 26. As lengthily explained by Justice Gatmaitan, the acts and omissions of the firm fall under Article 26.

St. Louis Realty's employee was grossly negligent in mixing up the Aramil and Arcadio residences in a widely circulated publication like the Sunday Times. To suit its purpose, it never made any written apology and explanation of the mixup. It just contented itself with a cavalier "rectification."

Persons, who know the residence of Doctor Aramil, were confused by the distorted, lingering impression that he was renting his residence from Arcadio or that Arcadio had leased it from him. Either way, his private life was mistakenly and unnecessarily exposed. He suffered diminution of income and mental anguish.

RODRIGO CONCEPCION vs. COURT OF APPEALS, et al.
G.R. No. 120706, January 31, 2000

[Petitioner Rodrigo Concepcion assailed the Decision of the Court of Appeals dated 12 December 1994 which affirmed the decision of the Regional Trial Court of Pasig City ordering him to pay damages to respondent spouses Nestor Nicolas and Allem Nicolas. The decision of the Regional Trial Court was however affirmed by the Supreme Court.]

The courts *a quo* found that sometime in 1985 the spouses Nestor Nicolas and Allem Nicolas resided at No. 51 M. Concepcion St., San Joaquin, Pasig City, in an apartment leased to them by the owner thereof, Florence "Bing" Concepcion, who also resided in the same compound where the apartment was located. Nestor Nicolas was then engaged in the business of supplying government agencies and private entities with office equipment, appliances

and other fixtures on a cash purchase or credit basis. Florence Concepcion joined this venture by contributing capital on condition that after her capital investment was returned to her, any profit earned would be divided equally between her and Nestor.

Sometime in the second week of July 1985, Rodrigo C. Concepcion, brother of the deceased husband of Florence, angrily accosted Nestor at the latter's apartment and accused him of conducting an adulterous relationship with Florence. He shouted, *"Hoy Nestor, kabit ka ni Bing! . . . Binigyan ka pa pala ni Bing Concepcion ng P100,000.00 para umakyat ng Baguio. Pagkaakyat mo at ng asawa mo doon ay bababa ka uli para magkasarilinan kayo ni Bing."*

To clarify matters, Nestor went with Rodrigo, upon the latter's dare, to see some relatives of the Concepcion family who allegedly knew about the relationship. However, those whom they were able to see denied knowledge of the alleged affair. The same accusation was hurled by Rodrigo against Nestor when the two (2) confronted Florence at the terrace of her residence. Florence denied the imputations and Rodrigo backtracked saying that he just heard the rumor from a relative. Thereafter, however, Rodrigo called Florence over the telephone reiterating his accusation and threatening her that should something happen to his sick mother, in case the latter learned about the affair, he would kill Florence.

As a result of this incident, Nestor Nicolas felt extreme embarrassment and shame to the extent that he could no longer face his neighbors. Florence Concepcion also ceased to do business with him by not contributing capital anymore so much so that the business venture of the Nicolas spouses declined as they could no longer cope with their commitments to their clients and customers. To make matters worse, Allem Nicolas started to doubt Nestor's fidelity resulting in frequent bickerings and quarrels during which Allem even expressed her desire to leave her husband. Consequently, Nestor was forced to write Rodrigo demanding public apology and payment of damages. Rodrigo pointedly ignored the demand, for which reason the Nicolas spouses filed a civil suit against him for damages.

In his defense, Rodrigo denied that he maligned Nestor by accusing him publicly of being Florence's lover. He reasoned out that he only desired to protect the name and reputation of the Concepcion family which was why he sought an appointment with Nestor through Florence's son Roncali to ventilate his feelings about the matter. Initially, he discussed with Nestor certain aspects of the joint venture in a friendly and amiable manner, and then only casually asked the latter about his rumored affair with his sister-in-law.

x x x

Petitioner argues that in awarding damages to private respondents, the Court of Appeals was without legal basis to justify its verdict. The alleged act imputed to him by respondent spouses does not fall under Arts. 262 and 2219

of the Civil Code since it does not constitute libel, slander, or any other form of defamation. Neither does it involve prying into the privacy of another's residence or meddling with or disturbing the private life or family relation of another. Petitioner also insists that certain facts and circumstances of the case were manifestly overlooked, misunderstood or glossed over by respondent court which, if considered, would change the verdict. Impugning the credibility of the witnesses for private respondents and the manner by which the testimonial evidence was analyzed and evaluated by the trial court, petitioner criticized the appellate court for not taking into account the fact that the trial judge who penned the decision was in no position to observe first-hand the demeanor of the witnesses of respondent spouses as he was not the original judge who heard the case. Thus, his decision rendered was flawed.

x x x

Has sufficient reason then been laid before us by petitioner to engender doubt as to the factual findings of the court *a quo*? We find none. A painstaking review of the evidence on record convinces us not to disturb the judgment appealed from. The fact that the case was handled by different judges brooks no consideration at all, for preponderant evidence consistent with their claim for damages has been adduced by private respondents as to foreclose a reversal. Otherwise, everytime a Judge who heard a case, wholly or partially, dies or leaves the service, the case cannot be decided and a new trial will have to be conducted. That would be absurd; inconceivable.

According to petitioner, private respondents' evidence is inconsistent as to time, place and persons who heard the alleged defamatory statement. We find this to be a gratuitous observation, for the testimonies of all the witnesses for the respondents are unanimous that the defamatory incident happened in the afternoon at the front door of the apartment of the Nicolas spouses in the presence of some friends and neighbors, and later on, with the accusation being repeated in the presence of Florence, at the terrace of her house. That this finding appears to be in conflict with the allegation in the complaint as to the time of the incident bears no momentous significance since an allegation in a pleading is not evidence; it is a declaration that has to be proved by evidence. If evidence contrary to the allegation is presented, such evidence controls, not the allegation in the pleading itself, although admittedly it may dent the credibility of the witnesses. But not in the instant case.

x x x

All told, these factual findings provide enough basis in law for the award of damages by the Court of Appeals in favor of respondents. We reject petitioner's posture that no legal provision supports such award, the incident complained of neither falling under Art. 2219 nor Art. 26 of the Civil Code. It does not need further elucidation that the incident charged of petitioner was no less than an invasion on the right of respondent Nestor as a person. The philosophy behind Art. 26 underscores the necessity for its inclusion in

our civil law. The Code Commission stressed in no uncertain terms that the human personality must be exalted. The sacredness of human personality is a concomitant consideration of every plan for human amelioration. The touchstone of every system of law, of the culture and civilization of every country, is how far it dignifies man. If the statutes insufficiently protect a person from being unjustly humiliated, in short, if human personality is not exalted — then the laws are indeed defective. Thus, under this article, the rights of persons are amply protected, and damages are provided for violations of a person's dignity, personality, privacy and peace of mind.

It is petitioner's position that the act imputed to him does not constitute any of those enumerated in Arts. 26 and 2219. In this respect, the law is clear. The violations mentioned in the codal provisions are not exclusive but are merely examples and do not preclude other similar or analogous acts. Damages therefore are allowable for actions against a person's dignity, such as profane, insulting, humiliating, scandalous or abusive language. Under Art. 2217 of the Civil Code, moral damages which include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury, although incapable of pecuniary computation, may be recovered if they are the proximate result of the defendant's wrongful act or omission.

There is no question that private respondent Nestor Nicolas suffered mental anguish, besmirched reputation, wounded feelings and social humiliation as a proximate result of petitioner's abusive, scandalous and insulting language. Petitioner attempted to exculpate himself by claiming that he made an appointment to see Nestor through a nephew, Roncali, the son of Florence, so he could talk with Nestor to find out the truth about his rumored illicit relationship with Florence. He said that he wanted to protect his nephews and nieces and the name of his late brother (Florence's husband). How he could be convinced by some way other than a denial by Nestor, and how he would protect his nephews and nieces and his family's name if the rumor were true, he did not say. Petitioner admitted that he had already talked with Florence herself over the telephone about the issue, with the latter vehemently denying the alleged immoral relationship. Yet, he could not let the matter rest on the strength of the denial of his sister-in-law. He had to go and confront Nestor, even in public, to the latter's humiliation.

Testifying that until that very afternoon of his meeting with Nestor he never knew respondent, had never seen him before, and was unaware of his business partnership with Florence, his subsequent declarations on the witness stand however belie this lack of knowledge about the business venture for in that alleged encounter he asked Nestor how the business was going, what were the collection problems, and how was the money being spent. He even knew that the name of the business, Floral Enterprises, was coined by combining the first syllables of the name Florence and Allem, the name of Nestor's wife. He said that he casually asked Nestor about the rumor between him and Florence which Nestor denied. Not content with such denial, he dared Nestor to go with him to speak to his relatives who were the source of

his information. Nestor went with him and those they were able to talk to denied the rumor.

We cannot help noting this inordinate interest of petitioner to know the truth about the rumor and why he was not satisfied with the separate denials made by Florence and Nestor. He had to confront Nestor face to face, invade the latter's privacy and hurl defamatory words at him in the presence of his wife and children, neighbors and friends, accusing him — a married man — of having an adulterous relationship with Florence. This definitely caused private respondent much shame and embarrassment that he could no longer show himself in his neighborhood without feeling distraught and debased. This brought dissension and distrust in his family where before there was none. This is why a few days after the incident, he communicated with petitioner demanding public apology and payment of damages, which petitioner ignored.

If indeed the confrontation as described by private respondents did not actually happen, then there would have been no cause or motive at all for them to consult with their lawyer, immediately demand an apology, and not obtaining a response from petitioner, file an action for damages against the latter. That they decided to go to court to seek redress bespeaks of the validity of claim. On the other hand, it is interesting to note that while explaining at great length why Florence Concepcion testified against him, petitioner never advanced any reason why the Nicolas spouses, persons he never knew and with whom he had no dealings in the past, would sue him for damages. It also has not escaped our attention that, faced with a lawsuit by private respondents, petitioner sent his lawyer, a certain Atty. Causapin, to talk not to the Nicolas spouses but to Florence, asking her not to be involved in the case, otherwise her name would be messily dragged into it. Quite succinctly, Florence told the lawyer that it was not for her to decide and that she could not do anything about it as she was not a party to the court case.

(d) COMMERCIAL APPROPRIATION OF LIKENESS.

(1) Concept.

The tort of commercial appropriation of likeness has been held to protect various aspects of an individual's identity from commercial exploitation: name, likeness, achievements, identifying characteristics, actual performances and fictitious characters created by a performer. It was even extended in one case to phrases and other things which are associated with an individual. *(Carson vs. Here's Johny Portable Toilets, Inc., United States Court of Appeals, 6th Circuit, 1983, 698 F. 2d 831, 218 U.S.P.Q. 1).* Under this right, the unwarranted publication of a person's name or the unauthorized use of his photograph or likeness for commercial purposes is an invasion of privacy. *(De los Reyes, et al. vs. Mobil Oil Phils., Inc., 25 CAR 2s 1089 [1980]).*

The right is of special interest to celebrities who are often targets of invasion by advertisers. "Advertisers use celebrities to promote their products. The more popular the celebrity, the greater the number of people who recognize her, and the greater the visibility for the product." *(White vs. Samsung Electronics America, Inc., 971 F. 2d 1395)*. "Television and other media create marketable celebrity identity value. Considerable energy and ingenuity are expended by those who have achieved celebrity value to exploit it for profit. The law protects the celebrities' sole right to exploit his value whether the celebrity has achieved her fame out of rare ability, dumb luck, or a combination thereof." *(ibid.)*.

With respect to celebrities, however, the right of publicity is often treated as a separate right that overlaps but is distinct from the right of privacy. It has been observed that celebrities are not interested in barring any person from commercially appropriating their likeness. They treat their names and likeness as property and they want to control and profit therefrom. In invasion of privacy, damages is measured by the injury to feelings, emotional distress, humiliation and mental anguish. On the other hand, celebrities who file actions to protect their right to publicity do so to protect their economic interest. They treat their names and likeness as property which cannot be encroached upon by another.

The tort of commercial appropriation of likeness or violation of the right of publicity was involved in *Simonette de los Reyes, et al. vs. Mobil Oil Philippines, Inc.* (25 CAR 2s 1089 [1978]). The plaintiffs in the case were commercial models and winners of beauty pageants. They agreed to lend their services to a project of the First Lady of the Philippines and had their pictures taken. Later, they discovered that their pictures were used in the calendars of defendant corporation. The plaintiffs sued for damages and their claim was sustained by the Court of Appeals because of the violation of their right to privacy.

(2) Policy Considerations.

There are at least three policy considerations behind the right of publicity on the part of celebrities. *(Hoffman, Limitations on the Right of Publicity, 28 Bull. Copr. Soc'y, 111, 116-22 [1980], cited in the dissenting opinion in Carson vs. Here's Johny Portable Toilets, Inc., supra)*. First, the right of publicity vindicates the economic interests of celebrities, enabling those whose achievements have imbued their identities with pecuniary value to profit from their fame. Second, the right of publicity fosters the production of intellectual and creative works by providing the financial incentive for individuals to expend

the time and resources necessary to produce them. Third, the right of publicity serves both individual and societal interests by preventing what our legal tradition regards as wrongful misconduct: unjust enrichment and deceptive trade practices. *(ibid.)*.

(3) Personal Right.

The right to privacy is a personal right. Consequently, a person is entitled to enter into a licensing agreement so that his life can be depicted in film. The Supreme Court, however, stated in *Lagunzad vs*. *Vda de Gonzales (supra)* that a privilege may be given the surviving relatives of a deceased person to protect his memory, but the privilege exists for the benefit of the living, to protect their feelings and to prevent a violation of their own rights in the character and memory of the deceased. There would be invasion of privacy if a person films another's life or the life of a deceased without his consent or the consent of the relatives as the case may be.

2. INTERFERENCE WITH FAMILY AND OTHER RELATIONS

The second and third paragraphs of Article 26 were explained by the Code Commission in this wise:

> The acts referred to in No. 2 are multifarious, and yet many of them are not within the purview of the laws in force. Alienation of the affection of another's wife or husband, unless it constitutes adultery or concubinage, is not condemned by the law, much as it may shock society. There are numerous acts, short of criminal unfaithfulness, whereby the husband or wife breaks the marital vows, thus causing untold moral suffering to the other spouse. Why should not these acts be the subject-matter of a civil action for moral damages? In American law they are.
>
> Again, there is the meddling of so-called friends who poison the mind of one or more members of the family against the other members. In this manner many a happy family is broken up or estranged. Why should not the law try to stop this by creating a civil action for moral damages?
>
> Of the same nature is that class of acts specified in No. 3: intriguing to cause another to be alienated from his friends.

The Family Code imposes on the spouses the obligation to live together, observe mutual love, respect and fidelity, and render mutual help and support. *(Article 68)*. Interference with such obligations may result in tort liability known as alienation of affection. Alienation of

affection consists of depriving one spouse of the affection, society, companionship and comfort of the other. *(Prosser, p. 685)*. It is not necessary that there is adultery or the spouse is deprived of household services. The gist of the tort is an interference with one spouse's mental attitude toward the other and the conjugal kindness of marital relations resulting in some actual conduct which materially affects it. (*ibid*., p. 686). It extends to all cases of wrongful interference in the family affairs of others whereby one spouse is induced to leave the other spouse or to conduct himself or herself that the comfort of married life is destroyed. *(Thomas M. Cooley and D. Avery Haggard, Treatise on the Law of Torts, Vol. 2, 1932 Ed., p. 6)*.

If the interference is by the parents of the spouse, like the parents of the wife, on the assumption that the wife was ill-treated to an extent that justifies her in withdrawing from her husband's society and control, it may reasonably be presumed that they have acted with commendable motives and a clear case of want of justification may be justly required to be shown before they should be held responsible. (*ibid*., p. 7). "The law has tender regard for the ties of kinship subsisting between parent and child and it will not disregard these ties, although the child be married and of full age. When trouble and disagreements arise between the married pair, the most natural promptings of the child direct it to find solace and advise under the parental roof. All legitimate presumptions in such cases must be that the parent will only act for the best interest of the child. The law recognizes the right of the parent in such cases to advise the son or daughter, and when such advise is given in good faith, and results in separation, the act does not give the injured party a right of action. In such a case, malice must be established, and it must appear that defendant's acts were the controlling cause of the loss of affection; but to accomplish this it is not necessary that ill will or spite towards the wife be shown. The malice consists of intentional doing of the wrongful act to the injury of the plaintiff." (*ibid*., pp. 23-24).

The requirement of malice is likewise necessary if the defendant is not a relative of a spouse whose affection was said to have been alienated. Thus, a religious sect cannot be held liable for the tort of alienation of affection if, upon their invitation, the wife of the plaintiff joined their group over the objection of the husband. The Court ruled that no tort was committed if the wife accepted the invitation of members of the religious sect to attend the religious service over the objection of the husband. The members of the sect cannot prevent the wife from attending nor were they duty bound to cooperate with the husband in preventing her. They also have the lawful right to invite the wife to attend religious services and they had a lawful right to

take part in the services with her there being nothing unlawful or improper in the services. Mere objection of the husband alone cannot make it objectionable. "In order to prove his case, it was incumbent upon plaintiff to produce some substantial evidence that the act of the defendants of which he complained of were committed maliciously or from improper motives implying malice in law, and with design and intent to alienate the affections of plaintiff's wife from him and that such were the controlling cause which produced an estrangement between him and his wife." *(W.L. Hughes vs. Frank Holman, et al., 223 Pac. 730, 31 ALR 1108 [Oregon, 1924]).*

CASE:

TENCHAVEZ vs. ESCAÑO
G.R. No. L-19671, November 29, 1965

The facts, supported by the evidence of record, are the following:

Missing her late-afternoon classes on 24 February 1948 in the University of San Carlos, Cebu City, where she was then enrolled as a second year student of commerce, Vicenta Escaño, 27 years of age (scion of a well-to-do and socially prominent Filipino family of Spanish ancestry and a "sheltered colegiala"), exchanged marriage vows with Pastor Tenchavez, 32 years of age, an engineer, ex-army officer and of undistinguished stock, without the knowledge of her parents, before a Catholic chaplain, Lt. Moises Lavares, in the house of one Juan Alburo in the said city. The marriage was the culmination of previous love affair and was duly registered with the local civil registrar.

Vicenta's letters to Pastor, and his to her, before the marriage indicate that the couple were deeply in love. Together with a friend, Pacita Noel, their matchmaker and go-between, they had planned out their marital future whereby Pacita would be the governess of their first-born; they started saving money in a piggy bank. A few weeks before their secret marriage, their engagement was broken; Vicenta returned the engagement ring and accepted another suitor, Joseling Lao. Her love for Pastor beckoned; she pleaded for his return and they reconciled. This time they planned to get married and then elope. To facilitate the elopement, Vicenta had brought some of her clothes to the room of Pacita Noel in St. Mary's Hall, which was their usual trysting place.

Although planned for the midnight following their marriage, the elopement did not, however, materialize because when Vicenta went back to her classes after the marriage, her mother, who got wind of the intended nuptials, was already waiting for her at the college. Vicenta was taken home where she admitted that she had already married Pastor. Mamerto and Mena Escaño were surprised, because Pastor never asked for the hand of Vicenta, and were

disgusted because of the great scandal that the clandestine marriage would provoke. (t.s.n., vol. 111, pp. 1105-06). The following morning, the Escaño spouses sought priestly advice. Father Reynes suggested a recelebration to validate what he believed to be an invalid marriage, from the standpoint of the Church, due to the lack of authority from the Archbishop or the parish priest for the officiating chaplain to celebrate the marriage. The recelebration did not take place, because on 26 February 1948 Mamerto Escaño was handed by a maid, whose name he claims he does not remember, a letter purportedly coming from San Carlos College students and disclosing an amorous relationship between Pastor Tenchavez and Pacita Noel; Vicenta translated the letter to her father, and thereafter would not agree to a new marriage. Vicenta and Pastor met that day in the house of Mrs. Pilar Mendezona. Thereafter, Vicenta continued living with her parents while Pastor returned to his job in Manila. Her letter of 22 March 1948 (Exh. "M"), while still solicitous of her husband's welfare, was not as endearing as her previous letters when their love was aflame.

Vicenta was bred in Catholic ways but is of a changeable disposition and Pastor knew it. She fondly accepted her being called a "jellyfish." She was not prevented by her parents from communicating with Pastor (Exh. 1-Escaño"), but her letters became less frequent as the days passed. As of June, 1948 the newlyweds were already estranged. (Exh. "2-Escaño"). Vicenta had gone to Jimenez, Misamis Occidental, to escape from the scandal that her marriage stirred in Cebu society. There, a lawyer filed for her a petition, drafted by then Senator Emmanuel Pelaez, to annul her marriage. She did not sign the petition. (Exh. "B-5"). The case was dismissed without prejudice because of her non-appearance at the hearing. (Exh. "B-4").

On 24 June 1950, without informing her husband, she applied for a passport, indicating in her application that she was single, that her purpose was to study, that she was domiciled in Cebu City, and that she intended to return after two years. The application was approved, and she left for the United States. On 22 August 1950, she filed a verified complaint for divorce against the herein plaintiff in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, on the ground of "extreme cruelty, entirely mental in character." On 21 October 1950, a decree of divorce, "final and absolute," was issued in open court by the said tribunal.

In 1951, Mamerto and Mena Escaño filed a petition with the Archbishop of Cebu to annul their daughter's marriage to Pastor. (Exh. "D"). On 10 September 1954, Vicenta sought papal dispensation of her marriage. (Exh. "D-2").

On 13 September 1954, Vicenta married an American, Russell Leo Moran, in Nevada. She now lives with him in California, and, by him, has begotten children. She acquired American citizenship on 8 August 1958.

But on 30 July 1955, Tenchavez had initiated the proceedings at bar by a complaint in the Court of First Instance of Cebu, and amended on 31 May 1956, against Vicenta F. Escaño; her parents, Mamerto and Mena

Escaño, whom he charged with having dissuaded and discouraged Vicenta from joining her husband, and alienating her affections, and against the Roman Catholic Church, for having, through its Diocesan Tribunal, decreed the annulment of the marriage, and asked for legal separation and one million pesos in damages. Vicenta claimed a valid divorce from plaintiff and an equally valid marriage to her present husband, Russell Leo Moran; while her parents denied that they had in anyway influenced their daughter's acts, and counterclaimed for moral damages.

The appealed judgment did not decree a legal separation, but freed the plaintiff from supporting his wife and to acquire property to the exclusion of his wife. It allowed the counterclaim of Mamerto Escaño and Mena Escaño for moral and exemplary damages and attorney's fees against the plaintiff-appellant, to the extent of P45,000.00, and plaintiff resorted directly to this Court.

The appellant ascribes, as errors of the trial court, the following:

1. In not declaring legal separation; in not holding defendant Vicenta F. Escaño liable for damages and in dismissing the complaint;

2. In not holding the defendant parents Don Mamerto Escaño and the heirs of Doña Mena Escaño liable for damages;

3. In holding the plaintiff liable for and requiring him to pay the damages to the defendant parents on their counterclaim; and

4. In dismissing the complaint and in denying the relief sought by the plaintiff.

[The Supreme Court explained that Pastor Tenchavez and Vicenta Escaño, were validly married to each other and that said marriage was subsisting and undissolved under Philippine Law, notwithstanding the decree of absolute divorce that the wife sought and obtained on 21 October 1950 from the Second Judicial District Court of Washoe County, State of Nevada. The Court ruled that in this jurisdiction Vicenta Escaño's divorce and second marriage are not entitled to recognition as valid; for her previous union to plaintiff Tenchavez must be declared to be existent and undissolved. The Supreme Court found that her refusal to perform her wifely duties, and her denial of consortium and her desertion of her husband constitute in law a wrong caused through her fault, for which the husband is entitled to the corresponding indemnity. (Civil Code, Art. 2176). The Supreme Court therefore sustained the first assigned error.]

However, the plaintiff-appellant's charge that his wife's parents, Dr. Mamerto Escaño and his wife, the late Doña Mena Escaño, alienated the affection of their daughter and influenced her conduct toward her husband are not supported by credible evidence. The testimony of Pastor Tenchavez about the Escaño's animosity toward him strikes us to be merely conjecture and exaggeration, and are belied by Pastor's own letters written before this suit was begun. (Exh. "2 Escaño" and "2-Vicenta," Rec. on App., pp. 270-274).

In these letters he expressly apologized to the defendants for "misjudging them" and for the "great unhappiness" caused by his "impulsive blunders" and "sinful pride" "effrontery and audacity" (sic). Plaintiff was admitted to the Escaño house to visit and court Vicenta, and the record shows nothing to prove that he would not have been accepted to marry Vicenta had he openly asked for her hand, as good manners and breeding demanded. Even after learning of the clandestine marriage, and despite their shock at such unexpected event, the parents of Vicenta proposed and arranged that the marriage be recelebrated in strict conformity with the canons of their religion upon advice that the previous one was canonically defective. If no recelebration of the marriage ceremony was had it was not due to defendants Mamerto Escaño and his wife, but to the refusal of Vicenta to proceed with it. That the spouses Escaño did not seek to compel or induce their daughter to assent to the recelebration but respected her decision, or that they abided by her resolve, does not constitute in law an alienation of affections. Neither does the fact that Vicenta's parents sent her money while she was in the United States; for it was natural that they should not wish their daughter to live in penury even if they did not concur in their decision to divorce Tenchavez. *(27 Am. Jur., pp. 130-132).*

There is no evidence that the parents of Vicenta, out of improper motives, aided and abetted her original suit for annulment, or her subsequent divorce; she appears to have acted independently and being of age, she was entitled to judge what was best for her and ask that her decisions be respected. Her parents, in so doing, certainly can not be charged with alienation of affections in the absence of malice or unworthy motives, which have not been shown, good faith being always presumed until the contrary is proved.

"Sec. 529. *Liability of Parents, Guardians or kin.* — The law distinguishes between the right of a parent to interest himself in the marital affairs of his child and the absence of right in a stranger to intermeddle in such affairs. However, such distinction between the liability of parents and that of strangers is only in regard to what will justify interference. A parent is liable for alienation of affections resulting from his own malicious conduct, as where he wrongfully entices his son or daughter to leave his or her spouse, but he is not liable unless he acts maliciously, without justification and from unworthy motives. He is not liable where he acts and advises his child in good faith with respect to his child's marital relations, in the interest of his child as he sees it, the marriage of his child not terminating his right and liberty to interest himself in, and be extremely solicitous for, his child's welfare and happiness, even where his conduct and advice suggest or result in the separation of the spouses or the obtaining of a divorce or annulment, or where he acts under mistake or misinformation, or where his advice or interference are indiscreet or unfortunate, although it has been held that the parent is liable for consequences resulting from recklessness. He may in good faith take his child into his home and afford him or her protection and support, so long as he has not maliciously enticed his child away, or does not maliciously entice or cause him or her to stay away, from his or her spouse. This rule has more frequently been applied in the case of advice given to a

married daughter, but it is equally applicable in the case of advice given to a son."

Plaintiff Tenchavez, in falsely charging Vicenta's aged parents with racial or social discrimination and with having exerted efforts and pressured her to seek annulment and divorce, unquestionably caused them unrest and anxiety, entitling them to recover damages. While his suit may not have been impelled by actual malice, the charges were certainly reckless in the face of the proven facts and circumstances. Court actions are not established for parties to give vent to their prejudices or spleen.

3. VEXATION AND HUMILIATION

The fourth paragraph of Article 26 makes one liable for vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition. The Code Commission explained that:

> Not less serious are the acts mentioned in No. 4: vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect or other personal condition. The penal laws against defamation and unjust vexation are glaringly inadequate.
>
> Religious freedom does not authorize anyone to heap obloquy and disrepute upon another by reason of the latter's religion.
>
> Not a few of the rich people treat the poor with contempt because of the latter's lowly station in life. To a certain extent this is inevitable, from the nature of the social make-up, but there ought to be a limit somewhere, even when the penal laws against defamation and unjust vexation are not transgressed. In a democracy, such a limit must be established. The courts will recognize it in each case. Social equality is not sought by the legal provision under consideration, but due regard for decency and propriety.
>
> Place of birth, physical defect and other personal conditions are too often the pretext of humiliation cast upon persons. Such tampering with human personality, even though the penal laws are not violated, should be the cause of civil action.
>
> The article under study denounces 'similar acts' which could readily be named, for they occur with unpleasant frequency."

Consequently, discrimination against a person on account of his physical defect, which causes emotional distress, may result in liability on the part of the offending party. Sexual harassment also falls under this category although an action for damages may also

be based on violation of a woman's right to privacy. Public humiliation due to lowly station in life may likewise result in liability. For example, a department store manager who searched a person in public for no other reason than the fact that such person looked poor will be held liable for damages.

Another example is the tort described in *Globe Mackay Cable and Radio vs. Court of Appeals* (176 SCRA 778 [1989]). The complainant in the said case was dismissed from employment for being allegedly involved in fictitious purchases and other fraudulent transactions. Six criminal cases were filed against him but all of them were dismissed. The police likewise investigated the alleged irregularities but the complainant was also cleared. The dismissal of the complainant was found by the court to be based on an imputation of guilt that was without basis. Worse, after the filing of the first of six criminal complaints against the complainant, the latter talked to Hendry, one of the officers of the corporation, to protest the actions taken against him. In response, Hendry cut short the complainant's protestations by telling him to just confess or else the company would file a hundred more cases against him until he landed in jail. Hendry added that, "You Filipinos cannot be trusted." The threat unmasked petitioner's bad faith in the various actions taken against Tobias. On the other hand, the scornful remark about Filipinos as well as Hendry's earlier statements about the complainant being a "crook" and "swindler" are clear violations of the complainant's personal dignity under Article 26 of the Civil Code.

A. INFLICTION OF EMOTIONAL DISTRESS.

In *MVRS Publications Inc. et al v. Islamic Da'wah Council of the Philippines, Inc., et al. (396 SCRA 210 [2003])*, although the Supreme Court ruled that there was no intentional infliction of emotional distress in said case, it recognized the possibility that one may be made liable for the tort of intentional infliction of emotional distress. The Supreme Court explained that under the Second Restatement of the Law, to recover for the intentional infliction of emotional distress the plaintiff must show that: (a) The conduct of the defendant was intentional or in reckless disregard of the plaintiff; (b) The conduct was extreme and outrageous; (c) There was a causal connection between the defendant's conduct and the plaintiff's mental distress; and, (d) The plaintiff's mental distress was extreme and severe.

"Extreme and outrageous conduct" means conduct that is so outrageous in character, and so extreme in degree, as to go beyond

all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in civilized society. The defendant's actions must have been so terrifying as naturally to humiliate, embarrass or frighten the plaintiff. Generally, conduct will be found to be actionable where the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him or her to exclaim, "Outrageous!" as his or her reaction *(ibid.)*.

"Emotional distress" means any highly unpleasant mental reaction such as extreme grief, shame, humiliation, embarrassment, anger, disappointment, worry, nausea, mental suffering and anguish, shock, fright, horror, and chagrin. "Severe emotional distress," in some jurisdictions, refers to any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, including posttraumatic stress disorder, neurosis, psychosis, chronic depression, or phobia. The plaintiff is required to show, among other things, that he or she has suffered emotional distress so severe that no reasonable person could be expected to endure it; severity of the distress is an element of the cause of action, not simply a matter of damages *(ibid.)*.

Any party seeking recovery for mental anguish must prove more than mere worry, anxiety, vexation, embarrassment, or anger. Liability does not arise from mere insults, indignities, threats, annoyances, petty expressions, or other trivialities. In determining whether the tort of outrage had been committed, a plaintiff is necessarily expected and required to be hardened to a certain amount of criticism, rough language, and to occasional acts and words that are definitely inconsiderate and unkind; the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough *(ibid.)*.

The Supreme Court explained in the *MVRS Publications, Inc.* case that *Hustler Magazine v. Falwell (485 U.S. 46 [1988]* illustrates the test case of a civil action for damages on intentional infliction of emotional distress. A parody appeared in Hustler magazine featuring the American fundamentalist preacher and evangelist Reverend Jerry Falwell depicting him in an inebriated state having an incestuous, sexual liaison with his mother in an outhouse. Falwell sued Hustler and its publisher Larry Flynt for damages. The United States District Court for the Western District of Virginia ruled that the parody was not libelous, because no reasonable reader would have understood it as a factual assertion that Falwell engaged in the act described. The jury, however, awarded $200,000 in damages on a separate count of "intentional infliction of emotional distress," a cause of action that did not require a false statement of fact to be made. The United States

Supreme Court in a unanimous decision overturned the jury verdict of the Virginia Court and held that Reverend Falwell may not recover for intentional infliction of emotional distress. It was argued that the material might be deemed outrageous and may have been intended to cause severe emotional distress, but these circumstances were not sufficient to overcome the free speech rights guaranteed under the First Amendment of the United States Constitution. Simply stated, an intentional tort causing emotional distress must necessarily give way to the fundamental right to free speech. It must be observed that although Falwell was regarded by the U.S. High Court as a "public figure," he was an individual particularly singled out or identified in the parody appearing on Hustler magazine. Also, the emotional distress allegedly suffered by Reverend Falwell involved a reactive interest — an emotional response to the parody which supposedly injured his psychological well-being.

The Supreme Court likewise cited Professor William Prosser who views tort actions on intentional infliction of emotional distress in this manner:

> There is virtually unanimous agreement that such ordinary defendants are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation. The reasons are not far to seek. Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy in the form of tort damages for all intended mental disturbance. Liability of course cannot be extended to every trivial indignity . . . The plaintiff must necessarily be expected and required to be hardened to a certain amount of rough language, and to acts that are definitely inconsiderate and unkind . . . The plaintiff cannot recover merely because of hurt feelings.

The Supreme Court also noted that Professor Calvert Magruder reinforces Prosser with this succinct observation, *viz:*

> There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.
>
> Thus, it is evident that even American courts are reluctant to adopt a rule of recovery for emotional harm that would "open up a wide vista of litigation in the field of bad manners," an area in which a "toughening of the mental hide" was thought to be a more appropriate remedy. Perhaps of greater concern were the questions of causation, proof, and the ability to accurately assess

> damages for emotional harm, each of which continues to concern courts today.

On the other hand, Justice Vitug explained in his separate concurring opinion:

> "Defined in simple terms, vexation is an act of annoyance or irritation that causes distress or agitation. Early American cases have refused all remedy for mental injury, such as one caused by vexation, because of the difficulty of proof or of measurement of damages. In comparatively recent times, however, the infliction of mental distress as a basis for an independent tort action has been recognized. It is said that "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress." Nevertheless, it has also been often held that petty insult or indignity lacks, from its very nature, any convincing assurance that the asserted emotional or mental distress is genuine, or that if genuine it is serious. Accordingly, it is generally declared that there can be no recovery for insults, indignities or threats which are considered to amount to nothing more than mere annoyances or hurt feelings. At all events, it would be essential to prove that personal damage is directly suffered by the plaintiff on account of the wrongful act of the defendant."

a. Distinguished from defamation.

The Supreme Court distinguished defamation from "emotional distress" by saying that primarily, an "emotional distress" tort action is personal in nature, *i.e.*, it is a civil action filed by an individual to assuage the injuries to his emotional tranquility due to personal attacks on his character. Emotional distress properly belongs to the reactive harm principle while defamation calls for the application of the relational harm principle. The principle of relational harm includes harm to social relationships in the community in the form of defamation as distinguished from the principle of reactive harm which includes injuries to individual emotional tranquility *(MVRS Publications Inc. v. Islamic Da'wah Council of the Philippines, ibid.; See Chapter 8 for the facts of the case)*.

b. Distinguished from "parasitic" damages for emotional distress.

Based on the ruling of the Supreme Court, there is no question that the tort of intentional infliction of emotional distress may be a cause of action in this jurisdiction. However, it should be pointed

out that even if the requirements for such tort as prescribed by the Restatement (Second) of Tort are absent, it is still possible for one to recover damages for emotional distress.

In the first place, there are instances when the law allows the imposition of moral damages in other tort cases (See Chapter 14). There are instances when damages for emotional distress take the form of damages that are described as "parasitic" damages for emotional distress because they depend on the existence of another tort instead of an independent tort for intentional infliction of emotional distress.

Secondly, even if the requisites enumerated in the Restatement are absent, it is still necessary to determine if the facts justify the award of damages under Articles 19, 20 and 21 of the New Civil Code. Thus, while the act may not be an intentional infliction of emotional distress as contemplated in American law, the act may still be considered an abuse of right or an act that is contrary to morals.

B. DISCRIMINATION.

Different forms of discrimination are expressly prohibited under the existing laws in this jurisdiction. Public policy abhors discrimination — a policy that is reflected in our Constitution and statutes. *(Section 1, Art. XIII and Article 19 of the New Civil Code).* International law, which springs from general principles of law likewise proscribes discrimination. Among the treaties that can be invoked are the Universal Declaration of Human Rights, the International Convention on Economic, Social and Cultural Rights, the International Convention on the Elements of All Forms of Racial Discrimination, the Convention against Discrimination in Education and the Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation. *(International School Alliance of Educators vs. Quisumbing, G.R. No. 128846, June 1, 2000).*

Thus, existing statutes recognize different forms of discrimination. The Labor Code expressly disallows discrimination of women in the workplace *(Article 135, Labor Code)*; the Magna Carta for Disabled Persons likewise expressly prohibits discrimination of disabled persons; Republic Act No. 8504 makes one liable for discrimination of "AIDS" victims *(Sections 35-42);* and Republic Act No. 8972 prohibits discrimination of solo parents *(Section 7, Solo Parents Act).*

a. Discrimination in Labor.

An employer who unreasonably discriminates against women

who works in his factory may similarly be held liable for damages. The law on discrimination against women is reinforced by Article 135 of the Labor Code. The said statute states that it shall be unlawful for any employer to discriminate against any woman employee with respect to terms and conditions of employment solely on account of her sex. The law identifies two examples of acts of discrimination: a) Payment of a lesser compensation, including wage, salary or other form of remuneration and fringe benefits to a female employee as against a male employee, for work of value; and b) favoring a male employee over female employee with respect to promotion, training opportunities, study and scholarship grants solely on account of their sexes. The law imposes criminal liability on the person who violates the provision. Nevertheless, it is expressly provided that the "institution of any criminal action shall not bar the aggrieved employee from filing an entirely separate and distinct action for money claim." The actions shall proceed independently of each other.

b. Discrimination of Disabled.

Discrimination of disabled persons is expressly prohibited in Republic Act No. 7277 otherwise known as "Magna Carta for Disabled Persons."

Section 32 provides that no entity, whether public or private shall discriminate against a qualified disabled person by reason of disability in regard to job application procedures, the hiring, promotion, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment. The following acts are identified to be discriminatory:

> a) Limiting, segregating or classifying a disabled job applicant in such a manner that adversely affects his work opportunities;
>
> b) Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person unless such standards, tests or other selection criteria are shown to be job-related for the position in question and are consistent with business necessity;
>
> c) Utilizing standards, criteria, or methods of administration that:
>
> > 1) have the effect of discrimination on the basis of disability; or
> >
> > 2) perpetuate the discrimination of others who are subject to common administrative control.
>
> d) Providing less compensation, such as salary, wage,

or other forms of remuneration and fringe benefits, to a qualified disabled employee, by reason of his disability, than the amount to which a non-disabled person performing the same work is entitled;

e) Favoring a non-disabled employee over a qualified disabled employee with respect to promotion, training opportunities, study and scholarship grants, solely on account of the latter's disability;

f) Re-assigning or transferring a disabled employee to a job or position he cannot perform by reason of his disability;

g) Dismissing or terminating the services of a disabled employee by reason of his disability unless the employer can prove that he impairs the satisfactory performance of the work involved to the prejudice of the business entity; *Provided, however*, That the employer first sought to provide reasonable accommodations for disabled persons;

h) Failing to select or administer in the most effective manner employment tests which accurately reflect the skills, aptitute or other factor of the disabled applicant or employee that such tests purports to measure, rather than the impaired sensory, manual or speaking skills of such applicant or employee, if any; and

i) Excluding disabled persons from membership in labor unions or similar organizations.

Chapter II of the law specifies acts of discrimination on transportation. Section 34 provides that "it shall be considered discrimination for franchisees or operators and personnel of sea, land, and air transportation facilities to charge higher fare or to refuse to convey a passenger, his orthopedic devices, personal effects, and merchandize by reason of his disability." Section 36, on the other hand, provides that "no disabled person shall be discriminated on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages or accomodations of any place of public accommodations by any person who owns, leases, or operates a place of public accommodation. The following acts constitute acts of discrimination under Section 36:

1) denying a disabled person, directly or through contractual, licensing, or other arrangement, the opportunity to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity by reason of his disability;

2) affording a disable person, on the basis of his disability, directly or through contractual, licensing or other arrange-

> ment, with the opportunity to participate in or benefit from a good or service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other able-bodied persons; and
>
> 3) providing a disabled person, on the basis of his disability, directly or through contractual, licensing, or other arrangement, with a good service, facility, advantage, privilege, or accommodation that is different or separate from that provided to other able-bodied persons unless such action is necessary to provide the disable person with a good service, facility, advantage, privilege, or accommodation, or other opportunity that is as effective as that provided to others.

Section 35 of the law enumerates all the establishments that are considered public accommodations or services. Examples of such establishments are hotels, inns, motel, restaurants, theater, place of gathering like a convention center, bakery, grocery store, bank, barbershop, museum, park, schools, or place of exercise. *(See Section 35, pars. a to l).*

C. SEXUAL HARASSMENT.

Another act that merits the imposition of damages for being contrary to law and morals is sexual harassment. There is no doubt that sexual harassment in various forms had been committed from the dawn of history. However, the topic of sexual harassment was virtually unstudied until the concern of feminists brought the issue to the attention of the public and researchers. *(Barbara A. Gutek, Understanding Sexual Harassment at Work, Notre Dame Journal of Law, Ethics and Public Policy [1992] reprinted in James P. Sterba, Morality in Practice, 4th Ed., p. 354).*

In the Philippines, the special law on sexual harassment, Republic Act No. 7877 (otherwise known as the "Anti-Sexual Harassment Act of 1995") was passed only in February, 1995. It contains the following declaration of policy:

> Sec. 2. *Declaration of Policy*. — The State shall value the dignity of every individual, enhance the development of its human resources, guarantee full respect for human rights, and uphold the dignity of workers, employees, applicants for employment, students or those undergoing training, instruction or education. Towards this end, all forms of sexual harassment in the employment, education or training environment are hereby declared unlawful.

Consistent with such policy, the law penalizes violators, upon

conviction, by imprisonment of not less than one (1) month nor more than six (6) months, or a fine of not less than Ten thousand pesos (P10,000) nor more than Twenty thousand pesos (P20,000), or both such fine and imprisonment at the discretion of the court. *(Section 7, Republic Act. No. 7877)*. However, the action arising from the violation of the provisions of the Act shall prescribe in three (3) years.

A civil action, separate and distinct from the criminal action may be commenced under Republic Act No. 7877. Section 6 of the said law provides that nothing in the Anti-Sexual Harassment Act "shall preclude the victim of work, education or training-related sexual harassment from instituting a separate and independent action for damages and other affirmative relief."

The historical development of the action based on sexual harassment was discussed in *Vedana vs. Valencia* (295 SCRA 1, [1998]), a disciplinary case against a member of the judiciary:

> "Before closing, it is apropos to discuss the implications of the enactment of R.A. No. 7877 or the Anti-Sexual Harassment Law to the Judiciary. Under our system of governance, the very tenets of our republican democracy presuppose that the will of the people is expressed, in large part, through the statutes passed by the Legislature. Thus, the Court, in instances such as these, may take judicial notice of the heightened sensitivity of the people to gender-related issues as manifested through legislative issuances. It would not be remiss to point out that no less than the Constitution itself has expressly recognized the invaluable contributions of the women's sector to national development, thus the need to provide women with a working environment conducive to productivity and befitting their dignity.
>
> In the community of nations, there was a time when discrimination was institutionalized through the legalization of now prohibited practices. Indeed, even within this century, persons were discriminated against merely because of gender, creed or the color of their skin, to the extent that the validity of human beings being treated as mere chattel was judicially upheld in other jurisdictions. But in humanity's march towards a more refined sense of civilization, the law has stepped in and seen it fit to condemn this type of conduct for, at bottom, history reveals that the moving force of civilization has been to realize and secure a more humane existence. Ultimately, this is what humanity as a whole seeks to attain as we strive for a better quality of life or higher standard of living. Thus, in our nation's very recent history, the people have spoken, through Congress, to deem conduct constitutive of sexual harassment or hazing, acts previously considered harmless by custom, as criminal. In disciplining erring judges

and personnel of the Judiciary then, this Court can do no less."

a. Parties.

Section 3 of R.A. No. 7877 provides that work, education or training-related sexual harassment is committed by an employer, employee, manager, supervisor, agent of the employer, teacher, instructor, professor, coach, trainor, or any other person who, having authority, influence or moral ascendancy over another in a work or training or education environment.

Therefore, in general, it may be committed by one having authority, influence or moral ascendancy over another in a work, or training or education environment against the person over whom the influence or moral ascendancy is exerted. In an education or training environment in particular, the law expressly provides that it may be committed against "one who is under the care, custody or supervision of the offender" or "against one whose education, training, apprenticeship or tutorship is entrusted to the offender." *(Sec. 3[b][1] and [2], R.A. No. 7877).*

A manager who sexually harasses a subordinate may be dismissed for loss of trust and confidence by the employer. A managerial employee is bound by a more exacting work ethics. He fails to live up to this higher standard of responsibility when he succumbs to his moral perversity by bringing a subordinate to a motel without her consent. "It is a right, nay, the duty of every employer to protect its employees from over sexed superiors" *(Delfin G. Villarama v. National Labor Relations Commission and Golden Donuts, Inc., G.R. No. 106341, September 2, 1994).*

(1) Principal by Inducement.

Any person who directs or induces another to commit any act of sexual harassment as herein defined, or who cooperates in the commission thereof by another without which it would not have been committed, shall also be held liable under the Act. *(Sec. 3).*

(2) Employer or Head of Office.

The law likewise imposes liability on the employer or head of the Office or Educational or Training Institution concerned. Section 5 of the law provides that "the employer or head of office, educational or training institution shall be solidarily liable for damages arising from the acts of sexual harassment committed in the employment, education or training environment if the employer or head of office,

educational or training institution is informed of such acts by the offended party and no immediate action is taken thereon."

Additionally, the law imposes additional duties to the employer or head of office under Section 4 of the law.

> Sec. 4. *Duty of the Employer or Head of Office in a Work-related, Education or Trainings Environment.* — It shall be the duty of the employer or the head of the work-related, educational or training environment or institution, to prevent or deter the commission of acts of sexual harassment and to provide the procedures for the resolution, settlement or prosecution of acts of sexual harassment. Towards this end, the employer or head of office shall:
>
> (a) Promulgate appropriate rules and regulations in consultation with and jointly approved by the employees or students or trainees, through their duly designated representatives, prescribing the procedure for the investigation of sexual harassment cases and the administrative sanctions therefor.
>
> Administrative sanctions shall not be a bar to prosecution in the proper courts for unlawful acts of sexual harassment.
>
> The said rules and regulations issued pursuant to this subsection (a) shall include, among others, guidelines on proper decorum in the workplace and educational or training institutions.
>
> (b) Create a committee on decorum and investigation of cases on sexual harassment. The committee shall conduct meetings, as the case may be, with officers and employees, teachers, instructors, professors, coaches, trainors and students or trainees to increase understanding and prevent incidents of sexual harassment. It shall also conduct the investigation of alleged cases constituting sexual harassment.
>
> In the case of a work-related environment, the committee shall be composed of at least one (1) representative each from the management, the union, if any, the employees from the supervisory rank, and from the rank and file employees.
>
> In the case of the educational or training institution, the committee shall be composed of at least one (1) representative from the administration, the trainors, teachers, instructors, professors or coaches and students or trainees, as the case may be.
>
> The employer or head of office, educational or training institution shall disseminate or post a copy of this Act for the information of all concerned.

b. How committed.

Sexual harassment is committed whenever any of the persons mentioned in paragraph (a) above "demands, requests or otherwise requires any sexual favor from the other, regardless of whether the demand, request or requirement for submission is accepted by the object of said act." *(Section 3)*.

Section 3 (a) provides that in a work-related or employment environment, sexual harassment is committed when:

> (1) The sexual favor is made as a condition in the hiring or in the employment, re-employment or continued employment of said individual, or in granting said individual favorable compensation, terms, conditions, promotions, or privileges; or the refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee;
>
> (2) The above acts would impair the employee's rights or privileges under existing labor laws; or
>
> (3) The above acts would result in an intimidating, hostile, or offensive environment for the employee.

On the other hand, sexual harassment in an education or training environment is committed under Section 3(b):

> (3) When the sexual favor is made a condition to the giving of a passing grade, or the granting of honors and scholarships or the payment of a stipend, allowance or other benefits, privileges, or considerations; or
>
> (4) When the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice.

The foregoing provisions contemplate two (2) types of sexual harassment, namely, *quid pro quo* cases and hostile environment cases.

(1) Quid pro quo cases.

Quid pro quo cases are those mentioned in the first clause of Section 3(a)(1) and Section 3(b). The defendant in those cases, conditions employment benefits, honors, awards, or privileges on sexual favors. Sexual favors are elicited in return for something else.

This sexual harassment can therefore be committed by a single

act. A *quid pro quo* case is present whenever "sexual favor is made as a condition in the hiring or in the employment, re-employment or continued employment of said individual, or in granting said individual favorable compensation, terms, conditions, promotions, or privileges" or when "the sexual favor is made a condition to the giving of a passing grade, or the granting of honors and scholarships or the payment of a stipend, allowance or other benefits, privileges or considerations." This is also present whenever the refusal to grant sexual favor "would impair the employee's right or privileges under existing labor law." (Section 3[a][2]).

(2) Hostile environment cases.

Hostile environment cases, on the other hand, involve the allegation that employees or students work or study in offensive or abusive environment. Although a single act of the defendant may be enough, "generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident." *(King vs. Board of Regents of University of Wisconsin System, 898 f. 2d 533, 537 [7th Cir. 1990]).*

This covers the cases mentioned in the second part of Section 3(a)(1) which include cases where the "refusal to grant the sexual favor results in limiting, segregating or classifying the employee which in any way would discriminate, deprive or diminish employment opportunities or otherwise adversely affect said employee."

There is also a hostile environment case whenever the solicitation of sexual favors or refusal to grant the same "would result in an intimidating, hostile, or offensive environment for the employee. (Section 3[a][3]). In an education or training environment, a hostile environment is present "when the sexual advances result in an intimidating, hostile or offensive environment for the student, trainee or apprentice." (Section 3[b][4]).

Strict interpretation of the language of the special law will limit hostile environment cases to instances where there is solicitation of sexual favors, refusal to grant the same or sexual advances. Thus, there is serious doubt if the special law covers cases involving sexual comments only and other verbal or physical conduct of a sexual nature without asking for sexual favor. Since the Anti-Sexual Harassment Law is a penal statute, courts may exclude those cases on the ground that laws of this nature should be strictly construed in favor of the accused.

(3) Civil Service Rules.

Civil Service Commission Resolution No. 01-0940 providing for Administrative Disciplinary Rules on Sexual Harassment Cases provides a more detailed enumeration of the forms of sexual harassment. The Rules were issued pursuant to Section 11, Article II of the 1987 Constitution, The Vienna Declaration and Programme of Action of the World Conference on Human Rights (June 1993), the Beijing Declaration and Platform for Action of the Fourth World Conference on Women (September 1995) and the express mandate of Section 4 (a) of Republic Act No. 7877. Sections 3 to 5 of the Rules provide:

> Section 3. For the purpose of these Rules, the administrative offense of sexual harassment is an act, or a series of acts, involving any unwelcome sexual advance, request or demand for a sexual favor, or other verbal or physical behavior of a sexual nature, committed by a government employee or official in a work-related, training or education related environment of the person complained of.
>
> (a) Work-related sexual harassment is committed under the following circumstances:
>
> (1) submission to or rejection of the act or series of acts is used as a basis for any employment decision (including, but not limited to, matters related to hiring, promotion, raise in salary, job security, benefits and any other personnel action) affecting the applicant/employee; or
>
> (2) the act or series of acts have the purpose or effect of interfering with the complainants' work performance, or creating an intimidating, hostile or offensive work environment; or
>
> (3) the act or series of acts might reasonably be expected to cause discrimination, insecurity, discomfort, offense or humiliation to a complainant who may be a co-employee, applicant, customer, or ward of the person complained of.
>
> (b) Education or training-related sexual harassment is committed against one who is under the actual or constructive care, custody or supervision of the offender, or against one whose education, training, apprenticeship, internship or tutorship is directly or constructively entrusted to, or is provided by, the offender, when:
>
> (1) submission to or rejection of the act or series of acts is used as a basis for any decision affecting the complainant, including, but not limited to, the giving or a grade,

the granting of honors or a scholarship, the payment of a stipend or allowance, or the giving of any benefit, privilege or consideration.

(2) the act or series of acts have the purpose or effect of interfering with the performance, or creating an intimidating, hostile or offensive academic environment of the complainant; or

(3) the act or series of acts might reasonably be expected to cause discrimination, insecurity, discomfort, offense or humiliation to a complainant who may be a trainee, apprentice, intern, tutee or ward of the person complained of.

Section 4. Sexual harassment may take place:

1. in the premises of the workplace or office or of the school or training institution;

2. in any place where the parties were found as a result of work or education or training responsibilities or relations;

3. at work or education or training-related social functions;

4. while on official business outside the office or school or training institution or during work or school or training-related travel;

5. at official conferences, fora, symposia, or training sessions; or

6. by telephone, cellular phone, fax machine or electronic mail.

Section 5. The following are illustrative forms of sexual harassment:

(a) Physical

i. Malicious Touching,

ii. Overt sexual advances,

iii. Gestures with lewd insinuation.

(b) Verbal, such as but not limited to requests or demands for sexual favors, and lurid remarks,

(c) Use of objects, pictures or graphics, letters or written notes with sexual underpinnings,

(d) Other forms analogous to the foregoing.

It is readily noticeable that the presence of sexual advances

or solicitation of sexual favors is not required under the Civil Service rules. The second and third paragraphs (2 & 3) of Sections 3(a) and 3(b) contemplate hostile environment situations which may not involve sexual advances or solicitation of sexual favors. Hostile environment may even be created through lurid remarks and use of objects with sexual underpinnings.

(4) Bases of Liability.

Articles 21 and 26.

A civil action for damages based on tort may be maintained under Articles 21 and 26 of the Civil Code in both *quid pro quo* cases and *hostile environment* cases. The defendant may be liable for damages under Articles 21 and 26 if he or she is guilty of overt sexual advances. However, this does not include a case where a superior innocently shook the hands of the alleged victim *(Biboso v. Judge Osmundo M. Villanueva, A.M. No. MTC-01-1356, April 26, 2001).*

Nevertheless, the action based on Articles 21 and 26 of the Civil Code is available even in hostile environment cases that are, by strict interpretation, not covered by Republic Act No. 7877. The plaintiff who is forced to work or study in a hostile environment is certainly subjected to act that is contrary to morals and good customs. He or she is, by this hostile environment, unduly vexed on account of his or her gender. A hostile environment case can also be considered discrimination that is actionable in tort.

Discrimination.

The hostile environment case can also be maintained on the theory that there is discrimination. In *Meritor Savings Bank vs. Vinson* (477 U.S. 57 [1986], reiterated in *Harris vs. Forklift Systems, Inc.*), the United States Supreme Court expressed the view that a woman who is a victim of sexual harassment due to hostile environment can base her action on Title VI of the Civil Rights Act of 1964. The said law makes it an unlawful practice of an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. The Court explained that the language of the law is not limited to economic or tangible discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment. The Court explained that the Civil Rights

Act is violated when the workplace is permeated with discriminatory intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

By parity of reasoning, it can be reasonably argued that a hostile environment case is actionable under Article 135 of the Labor Code. Moreover, the action may also be justified under Article 21 of the New Civil Code because the act of the defendant or the employer is in violation of the right of the plaintiff under Section 1 of Article XIII of the Constitution.

Requisites.

It is also believed that the requirements on hostile environment cases prescribed by American case law may be applied in this jurisdiction. In one case, the court found that there was hostile environment where a hotel's chief of engineering frequently made sexual comments and a female supervisor called her female employees "dogs" and "whores." In *Jordan vs. Clark* (847 F. 2d 1368, 1373 [9th Cir., 1988]; see also *Kerry Ellison vs. Nicholas F. Brady*, No. 89-15248, January 23, 1991, 9th Cir.), the United States Court of Appeals ruled that hostile environment exists when the plaintiff can show (1) that he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct of sexual nature, (2) that this conduct was unwelcome, and (3) that the conduct was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.

The United States Supreme Court also believes that hostile environment can be present even if the conduct did not seriously affect the plaintiff's psychological well-being. *(Teresa Harris vs. Forklift Systems, Inc., No. 92-1168, November 9, 1993).* Justice O'Connor explained:

> "x x x A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's (Civil Rights Act of 1964) broad rule of workplace equality. The appalling conduct alleged in *Meritor,* and the reference in that case to environments 'so

heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers' x x x merely present some specially egregious examples of harassment. They do not mark the boundary of what is actionable.

We, therefore, believe the District Court erred in relying on whether the conduct 'seriously affect[ed] plaintiff's psychological well-being' or led her to 'suffe[r] injury.' Such inquiry may needlessly focus the factfinder's attention on concrete psychological harm, an element Title VII does not require. Certainly, Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive x x x there is no need for it also to be psychologically injurius.

This is not, and by its nature cannot be, a mathematically precise test. x x x But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment offensive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

(5) Standard of Conduct.

Closely related to the preceding topic is the determination of the standard to be used in determining if the plaintiff found the environment offensive. The weight of authority is to use the standard of a "reasonable man" that is used in negligence cases. Under this view, the environment is hostile if a person of ordinary prudence would not have been engaged in the allegedly harassing conduct.

However, we cannot lose sight of alternative standards imposed by other courts. Thus, in *Kerry Ellison vs. Nicholas F. Brady* (No. 89-15248, January 23, 1991 [9th Cir.]), the United States Court of Appeals used the standard of a "reasonable woman." In other words, the Court requires that we should focus on the perspective of the victim. The Court explained that if we only examine whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. The Court said that "harassers could continue to harass merely because a particular discriminatory practice was common, and victims of

harassment would have no remedy" and conduct that men consider unobjectionable may offend many women.

The Court believed that the reasonable woman standard does not establish a higher level of protection for women than men. "Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work toward ensuring that neither men nor women will have 'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living.'"

CASES:

DR. RICO S. JACUTIN v PEOPLE OF THE PHILIPPINES
G.R. No. 140604, March 6, 2002

[In 1996, petitioner, City Health Officer Rico Jacutin of Cagayan de Oro City, was charged before the Sandiganbayan with the crime of Sexual Harassment Petitioner was convicted by the Sandiganbayan after trial on the merits.]

Juliet Q. Yee, then a 22-year old fresh graduate of nursing, averred that on 28 November 1995 her father accompanied her to the office of petitioner at the City Health Office to seek employment. Juliet's father and petitioner were childhood friends. Juliet was informed by the doctor that the City Health Office had just then filled up the vacant positions for nurses but that he would still see if he might be able to help her.

The following day, 29 November 1995, Juliet and her father returned to the City Health Office, and they were informed by petitioner that a medical group from Texas, U.S.A., was coming to town in December to look into putting up a clinic in Lapasan, Cagayan de Oro, where she might be considered. On 01 December 1995, around nine o'clock in the morning, she and her father went back to the office of petitioner. The latter informed her that there was a vacancy in a family planning project for the city and that, if she were interested, he could interview her for the job. Petitioner then started putting up to her a number of questions. When asked at one point whether or not she already had a boyfriend, she said "no." Petitioner suggested that perhaps if her father were not around, she could afford to be honest in her answers to the doctor. The father, taking the cue, decided to leave. Petitioner then inquired whether she was still a virgin, explaining to her his theory on the various aspects of virginity. He "hypothetically" asked whether she would tell her family or friends if a male friend happened to intimately touch her. Petitioner later offered her the job where she would be the subject of a "research" program. She was requested to be back after lunch.

Before proceeding to petitioner's office that afternoon, Juliet dropped by at the nearby church to seek divine guidance as she felt so "confused." When

she got to the office, petitioner made several telephone calls to some hospitals to inquire whether there was any available opening for her. Not finding any, petitioner again offered her a job in the family planning research undertaking. She expressed hesitation if a physical examination would include "hugging" her but petitioner assured her that he was only kidding about it. Petitioner then invited her to go bowling. Petitioner told her to meet him at Borja Street so that people would not see them on board the same car together. Soon, at the designated place, a white car driven by petitioner stopped. She got in. Petitioner held her pulse and told her not to be scared. After dropping by at his house to put on his bowling attire, petitioner got back to the car.

While driving, petitioner casually asked her if she already took her bath, and she said she was so in a hurry that she did not find time for it. Petitioner then inquired whether she had varicose veins, and she said "no." Petitioner told her to raise her foot and lower her pants so that he might confirm it. She felt assured that it was all part of the research. Petitioner still pushed her pants down to her knees and held her thigh. He put his hands inside her panty until he reached her pubic hair. Surprised, she exclaimed "hala ka!" and instinctively pulled her pants up. Petitioner then touched her abdomen with his right hand saying words of endearment and letting the back of his palm touch her forehead. He told her to raise her shirt to check whether she had nodes or lumps. She hesitated for a while but, eventually, raised it up to her navel. Petitioner then fondled her breast. Shocked at what petitioner did, she lowered her shirt and embraced her bag to cover herself, telling him angrily that she was through with the research. He begged her not to tell anybody about what had just happened. Before she alighted from the car, petitioner urged her to reconsider her decision to quit. He then handed over to her P300.00 for her expenses.

Arriving home, she told her mother about her meeting with Dr. Jacutin and the money he gave her but she did not give the rest of the story. Her mother scolded her for accepting the money and instructed her to return it. In the morning of 04 December 1994, Juliet returned to the clinic to return the money to petitioner but she was not able to see him until about one o'clock in the afternoon. She tried to give back the money but petitioner refused to accept it.

A week later, Juliet told her sister about the incident. On 16 December 1995, she attempted to slash her wrist with a fastener right after relating the incident to her mother. Noticing that Juliet was suffering from some psychological problem, the family referred her to Dr. Merlita Adaza for counseling. Dr. Adaza would later testify that Juliet, together with her sister, came to see her on 21 December 1995, and that Juliet appeared to be emotionally disturbed, blaming herself for being so stupid as to allow Dr. Jacutin to molest her. Dr. Adaza concluded that Juliet's frustration was due to post trauma stress.

Petitioner contradicted the testimony of Juliet Yee. He claimed that on 28 November 1995 he had a couple of people who went to see him in his office, among them, Juliet and her father, Pat. Justin Yee, who was a boyhood friend. When it was their turn to talk to petitioner, Pat. Yee introduced his

daughter Juliet who expressed her wish to join the City Health Office. Petitioner replied that there was no vacancy in his office, adding that only the City Mayor really had the power to appoint city personnel. On 01 December 1995, the afternoon when the alleged incident happened, he was in a meeting with the Committee on Awards in the Office of the City Mayor. On 04 December 1995, when Juliet said she went to his office to return the P300.00, he did not report to the office for he was scheduled to leave for Davao at 2:35 p.m. to attend a hearing before the Office of the Ombudsman for Mindanao. He submitted in evidence a photocopy of his plane ticket. He asserted that the complaint for sexual harassment, as well as all the other cases filed against him by Vivian Yu, Iryn Salcedo, Mellie Villanueva and Pamela Rodis, were but forms of political harassment directed at him.

x x x

[*Petitioner questioned his conviction by arguing that Republic Act No. 7877 is inapplicable and that his constitutional right to due process and to be presumed innocent was allegedly violated. The Supreme Court rejected the arguments of the Petitioner and affirmed his conviction.*]

The above contentions of petitioner are not meritorious. Section 3 of Republic Act 7877 provides:

x x x

Petitioner was the City Health Officer of Cagayan de Oro City, a position he held when complainant, a newly graduated nurse, saw him to enlist his help in her desire to gain employment. He did try to show an interest in her plight, her father being a boyhood friend, but finding no opening suitable for her in his office, he asked her about accepting a job in a family planning research project. It all started from there; the Sandiganbayan recited the rest of the story:

> "x x x. Succeeding in convincing the complainant that her physical examination would be a part of a research, accused asked complainant if she would agree that her private parts (bolts) would be seen. Accused assured her that with her cooperation in the research, she would gain knowledge from it. As complainant looked upon the accused with utmost reverence, respect, and paternal guidance, she agreed to undergo the physical examination. At this juncture, accused abruptly stopped the interview and told the complainant to go home and be back at 2:00 o'clock in the afternoon of the same day, December 1, 1995. Complainant returned at 2:00 o'clock in the afternoon, but did not proceed immediately to the office of the accused, as she dropped by a nearby church to ask divine guidance, as she was confused and at a loss on how to resolve her present predicament. At 3:00 o'clock in the afternoon, she went back to the office of the accused. And once inside, accused called up a certain Madonna, inquiring if there was a vacancy, but he was told that she would only accept a registered nurse. Complainant was

about to leave the office of the accused when the latter prevailed upon her to stay because he would call one more hospital. In her presence, a call was made. But again accused told her that there was no vacancy. As all efforts to look for a job in other hospitals failed, accused renewed the offer to the complainant to be a part of the research in the Family Planning Program where there would be physical examination. Thereafter, accused motioned his two (2) secretaries to go out of the room. Upon moving closer to the complainant, accused asked her if she would agree to the offer. Complainant told him she would not agree because the research included hugging. He then assured her that he was just kidding and that a pre-schooler and high schooler have already been subjected to such examination. With assurance given, complainant changed her mind and agreed to the research, for she is now convinced that she would be of help to the research and would gain knowledge from it. At this point, accused asked her if she was a 'tomboy', she answered in the negative. He then instructed her to go with him but he would first play bowling, and later proceed with the research (physical examination). On the understanding of the complainant that they will proceed to the clinic where the research will be conducted, she agreed to go with the accused. But accused instructed her to proceed to Borja St. where she will just wait for him, as it was not good for people to see them riding in a car together. She walked from the office of the accused and proceeded to Borja St. as instructed. And after a while, a white car arrived. The door was opened to her and she was instructed by the accused to come inside. Inside the car, he called her attention why she was in a pensive mood. She retorted she was not. As they were seated side by side, the accused held her pulse and told her not to be scared. He informed her that he would go home for a while to put on his bowling attire. After a short while, he came back inside the car and asked her if she has taken a bath. She explained that she was not able to do so because she left the house hurriedly. Still while inside the car, accused directed her to raise her foot so he could see whether she has varicose veins on her legs. Thinking that it was part of the research, she did as instructed. He told her to raise it higher, but she protested. He then instructed her to lower her pants instead. She did lower her pants, exposing half of her legs. But then the accused pushed it forward down to her knees and grabbed her legs. He told her to raise her shirt. Feeling as if she had lost control of the situation, she raised her shirt as instructed. Shocked, she exclaimed, 'hala ka!' because he tried to insert his hand into her panty. Accused then held her abdomen, saying, 'you are like my daughter, 'Day'! (Visayan word of endearment),' and let the back of his palm touch her forehead, indicating the traditional way of making the young respect their elders. He again told her to raise her shirt. Feeling embarrassed and uncomfortable, yet unsure whether she was entertaining malice, she raised her shirt up to her breast. He then fondled her breast. Reacting, she impulsively lower her shirt and embraced her bag while silently asking God what was happening to her and asking the courage to resist accused's physical advances. After a short while, she asked him if there could be a right place for physical

examination where there would be many doctors. He just exclaimed, 'so you like that there are many doctors!' Then he asked her if she has tooth decay. Thinking that he was planning to kiss her, she answered that she has lots of decayed teeth. He advised her then to have them treated. Finally, she informed him that she would not continue with the research. The accused retorted that complainant was entertaining malice and reminded her of what she earlier agreed; that she would not tell anybody about what happened. He then promised to give her P15,000.00 so that she could take the examination. She was about to open the door of the car when he suddenly grabbed her thigh, but this time, complainant instantly parried his hand with her bag."

While the City Mayor had the exclusive prerogative in appointing city personnel, it should stand to reason, nevertheless, that a recommendation from petitioner in the appointment of personnel in the municipal health office could carry good weight. Indeed, petitioner himself would appear to have conveyed, by his words and actions, an impression that he could facilitate Juliet's employment. Indeed, petitioner would not have been able to take undue liberalities on the person of Juliet had it not been for his high position in the City Health Office of Cagayan de Oro City. The findings of the Sandiganbayan were bolstered by the testimony of Vivian Yu, petitioner's secretary between 1979 to 1994, of Iryn Lago Salcedo, Public Health Nurse II, and of Farah Dongallo y Alkuino, a city health nurse, all of whom were said to have likewise been victims of perverse behavior by petitioner.

The Sandiganbayan rightly rejected the defense of alibi proffered by petitioner, *i.e.*, that he was at a meeting of the Committee on Awards; the court a quo said:

"There are some observations which the Court would like to point out on the evidence adduced by the defense, particularly in the Minutes of the meeting of the Awards Committee, as testified to by witness Myrna Maagad on September 8, 1998.

"First, admitted, Teresita I. Rozabal was the immediate supervisor of witness Myrna Maagad. The Notices to hold the meeting (Exh. '3-A' and '3-B') were signed by Teresita Rozabal. But the Minutes of the meeting, Exh. '5', was signed by Myrna Maagad and not by Teresita Rozabal. The documents, Exhs. '3-A' and '3-B' certify that the officially designated secretary of the Awards Committee was Teresita Rozabal.

"Second, why was Myrna Maagad in possession of the attendance logbook and how was she able to personally bring the same in court when she testified on September 8, 1998, when in fact, she admitted during her testimony that she retired from the government service on December 1, 1997? Surely, Myrna Maagad could not still be the custodian of the logbook when she testified.

"And finally, in the logbook, under the sub-heading, 'Others Present,' the attendance of those who attended was individually handwritten by the persons concerned who wrote and signed their names. But in

the case of Dr. Tiro and Dr. Rico Jacutin, their names were handwritten by clerk Sylvia Tan-Nerry, not by Dr. Tiro and Dr. Jacutin. However, Myrna Maagad testified that the logbook was passed around to attending individuals inside the conference room."

PHILIPPINE AEOLUS AUTOMOTIVE UNITED CORPORATION vs. NATIONAL LABOR RELATIONS COMMISSION and ROSALINDA C. CORTEZ
G.R. No. 124617, April 28, 2000

Petitioner Philippine Aeolus Automotive United Corporation (PAAUC) is a corporation duly organized and existing under Philippine laws, petitioner Francis Chua is its President while private respondent Rosalinda C. Cortez was a company nurse of petitioner corporation until her termination on 7 November 1994.

On 5 October 1994 a memorandum was issued by Ms. Myrna Palomares, Personnel Manager of petitioner corporation, addressed to private respondent Rosalinda C. Cortez requiring her to explain within forty-eight (48) hours why no disciplinary action should be taken against her (a) for throwing a stapler at Plant Manager William Chua, her superior, and uttering invectives against him on 2 August 1994; (b) for losing the amount of P1,488.00 entrusted to her by Plant Manager Chua to be given to Mr. Fang of the CLMC Department on 23 August 1994; and (c) for asking a co-employee to punch-in her time card thus making it appear that she was in the office in the morning of 6 September 1994 when in fact she was not. The memorandum however was refused by private respondent although it was read to her and discussed with her by a co-employee. She did not also submit the required explanation, so that while her case was pending investigation the company placed her under preventive suspension for thirty (30) days effective 9 October 1994 to 7 November 1994.

On 20 October 1994, while Cortez was still under preventive suspension, another memorandum was issued by petitioner corporation giving her seventy-two (72) hours to explain why no disciplinary action should be taken against her for allegedly failing to process the ATM applications of her nine (9) co-employees with the Allied Banking Corporation. On 21 October 1994 private respondent also refused to receive the second memorandum although it was read to her by a co-employee. A copy of the memorandum was also sent by the Personnel Manager to private respondent at her last known address by registered mail.

Meanwhile, private respondent submitted a written explanation with respect to the loss of the P1,488.00 and the punching-in of her time card by a co-employee.

On 3 November 1994 a third memorandum was issued to private respondent, this time informing her of her termination from the service effective November 1994 on grounds of gross and habitual neglect of duties, serious misconduct and fraud or willful breach of trust.

[Private respondent filed with the Labor Arbiter a complaint for illegal dismissal against PAAUC and its president Francis Chua. The Labor Arbiter rendered a decision holding the termination of Cortez as valid and legal. On appeal to the NLRC, public respondent reversed the decision of the Labor Arbiter and found petitioner corporation guilty of illegal dismissal of private respondent Cortez.]

The crux of the controversy may be narrowed down to two (2) main issues: whether the NLRC gravely abused its discretion in holding as illegal the dismissal of private respondent, and whether she is entitled to damages in the event that the illegality of her dismissal is sustained.

The Labor Code as amended provides specific grounds by which an employer may validly terminate the services of an employee, which grounds should be strictly construed since a person's employment constitutes "property" under the context of the constitutional protection that "no person shall be deprived of life, liberty or property without due process of law" and, as such, the burden of proving that there exists a valid ground for termination of employment rests upon the employer. Likewise, in light of the employee's right to security of tenure, where a penalty less punitive than dismissal will suffice, whatever missteps may have been committed by labor ought not to be visited with a consequence so severe.

A perusal of the termination letter indicates that private respondent was discharged from employment for "serious misconduct, gross and habitual neglect of duties and fraud or willful breach of trust." Specifically —

1. On August 2, 1994, you committed acts constituting gross disrespect to your superior Mr. William Chua, the Plant Manager.

x x x

As to the first charge, respondent Cortez claims that as early as her first year of employment her Plant Manager, William Chua, already manifested a special liking for her, so much so that she was receiving special treatment from him who would oftentimes invite her "for a date," which she would as often refuse. On many occasions, he would make sexual advances — touching her hands, putting his arms around her shoulders, running his fingers on her arms and telling her she looked beautiful. The special treatment and sexual advances continued during her employment for four (4) years but she never reciprocated his flirtations, until finally, she noticed that his attitude towards her changed. He made her understand that if she would not give in to his sexual advances he would cause her termination from the service; and he made good his threat when he started harassing her. She just found out one day that her table which was equipped with telephone and intercom units and containing her personal belongings was transferred without her knowledge to a place with neither telephone nor intercom, for which reason, an argument ensued when she confronted William Chua resulting in her being charged with gross disrespect.

x x x

The Supreme Court, in a litany of decisions on serious misconduct warranting dismissal of an employee, has ruled that for misconduct or improper behavior to be a just cause for dismissal: (a) it must be serious; (b) must relate to the performance of the employee's duties; and, (c) must show that the employee has become unfit to continue working for the employer. The act of private respondent in throwing a stapler and uttering abusive language upon the person of the plant manager may be considered, from a lay man's perspective, as a serious misconduct. However, in order to consider it a serious misconduct that would justify dismissal under the law, it must have been done in relation to the performance of her duties as would show her to be unfit to continue working for her employer. The acts complained of, under the circumstances they were done, did not in any way pertain to her duties as a nurse. Her employment identification card discloses the nature of her employment as a nurse and no other. Also, the memorandum informing her that she was being preventively suspended pending investigation of her case was addressed to her as a nurse.

x x x

On the issue of moral and exemplary damages, the NLRC ruled that private respondent was not entitled to recover such damages for her failure to prove that petitioner corporation had been motivated by malice or bad faith or that it acted in a wanton, oppressive or malevolent manner in terminating her services. In disbelieving the explanation proffered by private respondent that the transfer of her table was the response of a spurned lothario, public respondent quoted the Labor Arbiter —

"Complainant's assertion that the cause of the altercation between her and the Plant Manager where she threw a stapler to him and uttered invectives against him as her refusal to submit to his advances to her which started from her early days of employment and lasted for almost four years, is hardly believable. For indeed, if there was such harassment, why was there no complaints (sic) from her during that period? Why did she stay there for so long? Besides, it could not have taken that period for the Plant Manager to react. This assertion of the complainant deserves no credence at all.

Public respondent in thus concluding appears baffled why it took private respondent more than four (4) years to expose William Chua's alleged sexual harassment. It reasons out that it would have been more prepared to support her position if her act of throwing the stapler and uttering invectives on William Chua were her immediate reaction to his amorous overtures. In that case, according to public respondent, she would have been justified for such outburst because she would have been merely protecting her womanhood, her person and her rights."

We are not persuaded. The gravamen of the offense in sexual harassment is not the violation of the employee's sexuality but the abuse of power by the employer. Any employee, male or female, may rightfully cry "foul" provided the claim is well substantiated. Strictly speaking, there is no time period within which he or she is expected to complain through the proper channels. The time to do so may vary depending upon the needs, circum-

stances, and more importantly, the emotional threshold of the employee.

Private respondent admittedly allowed four (4) years to pass before finally coming out with her employer's sexual impositions. Not many women, especially in this country, are made of the stuff that can endure the agony and trauma of a public, even corporate, scandal. If petitioner corporation had not issued the third memorandum that terminated the services of private respondent, we could only speculate how much longer she would keep her silence. Moreover, few persons are privileged indeed to transfer from one employer to another. The dearth of quality employment has become a daily "monster" roaming the streets that one may not be expected to give up one's employment easily but to hang on to it, so to speak, by all tolerable means. Perhaps, to private respondent's mind, for as long as she could outwit her employer's ploys she would continue on her job and consider them as mere occupational hazards. This uneasiness in her place of work thrived in an atmosphere of tolerance for four (4) years, and one could only imagine the prevailing anxiety and resentment, if not bitterness, that beset her all that time. But William Chua faced reality soon enough. Since he had no place in private respondent's heart, so must she have no place in his office. So, he provoked her, harassed her, and finally dislodged her, and for finally venting her pent-up anger for years, he "found" the perfect reason to terminate her.

In determining entitlement to moral and exemplary damages, we restate the bases therefor. In moral damages, it suffices to prove that the claimant has suffered anxiety, sleepless nights, besmirched reputation and social humiliation by reason of the act complained of. Exemplary damages, on the other hand, are granted in addition to, inter alia, moral damages "by way of example or correction for the public good" if the employer "acted in a wanton, fraudulent, reckless, oppressive or malevolent manners."

Anxiety was gradual in private respondent's five (5)-year employment. It began when her plant manager showed an obvious partiality for her which went out of hand when he started to make it clear that he would terminate her services if she would not give in to his sexual advances. Sexual harassment is an imposition of misplaced "superiority" which is enough to dampen an employee's spirit in her capacity for advancement. It affects her sense of judgment; it changes her life. If for this alone private respondent should be adequately compensated. Thus, for the anxiety, the seen and unseen hurt that she suffered, petitioners should also be made to pay her moral damages, plus exemplary damages, for the oppressive manner with which petitioners effected her dismissal from the service, and to serve as a forewarning to lecherous officers and employers who take undue advantage of their ascendancy over their employees.

HUMAN DIGNITY

CHAPTER 8

TORTS WITH INDEPENDENT CIVIL ACTION

Articles 32, 33 and 34 of the Chapter on Human Relations of the New Civil Code commonly provide for the authority to file independent civil actions. "Independent civil actions" include actions for damages for violation of civil and political rights, defamation, fraud, physical injuries and neglect of public officers.

It should be noted in this connection that independent civil actions are not peculiar to Articles 32, 33 and 34 of the New Civil Code because there are special laws that likewise recognize the right to initiate independent civil actions. For example, Article 135 of the Labor Code recognizes an independent civil action for discrimination. Likewise, Section 5 of the Anti-Sexual Harassment Act of 1995 provides that nothing in the provisions of the said Act "shall preclude the victim of work, education or training-related sexual harassment from institution a separate and independent action for damages and other affirmative relief."

1. CONCEPT

There are two views on the basis of liability under Articles 32, 33 and 34 of the New Civil Code. In *Madeja vs. Caro* (126 SCRA 293, 296 [1983]), the Supreme Court sustained former Senator Tolentino's view that the civil action which the Civil Code provisions allow to be filed (particularly Article 33) is *ex-delicto*, that is, civil liability arising from delict. The Supreme Court explained that:

> "1. The civil action for damages which it (Article 33) allows to be instituted is *ex-delicto*. This is manifest from the provision which uses the expressions 'criminal action' and 'criminal prosecution.' This conclusion is supported by the comment of the Code Commission, thus:
>
> "The underlying purpose of the principle under consideration is to allow the citizen to enforce his rights in a private action brought by him, regardless of the action of the State attorney. It

> is not conducive to civic spirit and to individual self-reliance and initiative to habituate the citizens to depend upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provision cited, a criminal prosecution is proper, but it should be remembered that while the State is the complainant in the criminal case, the injured individual is the one most concerned because it is he who has suffered directly. He should be permitted to demand reparation for the wrong which peculiarly affects him." *(Report, p. 46).*

And Tolentino says:

> "The general rule is that when a criminal action is instituted, the civil action for recovery of civil liability arising from the offense charged is impliedly instituted with the criminal action, unless the offended party reserves his right to institute it separately; and after a criminal action has been commenced, no civil action arising from the same offense can be prosecuted. The present articles creates an exception to this rule when the offense is defamation, fraud, or physical injuries. In these cases, a civil action may be filed independently of the criminal action, even if there has been no reservation made by the injured party; the law itself in this article makes such reservation; but the claimant is not given the right to determine whether the civil action should be scheduled or suspended until the criminal action has been terminated. The result of the civil action is thus independent of the result of the criminal action." *(I Civil Code, p. 144 [1974]).*

Justice Caguioa (1 Caguioa 53) takes the opposite view that the liability sought to be enforced by independent civil actions granted under Articles 32, 33, and 34 is not the civil liability arising from crime. The basis is said to be tortious actions more of the nature of *culpa aquiliana* and, therefore, separate and distinct from the civil liability arising from crime. He believes that the ruling in *Barredo vs. Almario* (73 Phil. 607) is indicative of such rule.

It is believed that the latter view is the better view because even the Report of Code Commission cited in *Madeja* refers to civil actions that are absolutely separate and independent. The same view is likewise consistent with the purpose of independent civil actions explained by the Code Commission in this wise:

> Under the present laws, a citizen who suffers damage or injury through the wrongful act of another must rely upon the action of the prosecuting attorney if the offense is criminal. The proposed Civil Code lessens (but does not abolish) this dependence of the aggrieved party upon the criminal action. Here are some illustrations:

(1) The independent civil action when one's civil liberties have been tampered with. *(Art. 36).* This subject has been discussed.

(2) Article 28 which grants a cause of action when one's dignity, personality, privacy or peace of mind is violated or offended. This subject has also been commented upon.

(3) Article 37 which creates an independent civil action in case of defamation, fraud, or physical injuries. This separate civil action is similar to the action in tort for libel or slander, deceit, and assault and battery under the American law.

(4) Article 33 which authorizes the bringing of a civil action after the acquittal of the accused in a criminal prosecution upon the ground that his guilt has not been proven beyond reasonable doubt. This matter has just been discussed in this report.

(5) Separate civil actions for damages may be brought by private persons against public officials for neglect of duty. *(Arts. 29, 30, and 38).*

The underlying purpose of the principle under consideration is to allow the citizen to enforce his rights in a private action brought by him, regardless of the action of the State attorney. It is not conducive to civic spirit and to individual self-reliance and initiative to habituate the citizens to depend upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provisions cited, a criminal prosecution is proper, but it should be remembered that while the State is the complainant in the criminal case, it is he who has suffered directly. He should be permitted to demand reparation for the wrong which peculiarly affects him.

In England and the United States, the individual may bring an action in tort for assault and battery, false imprisonment, libel and slander, deceit, trespass, malicious prosecution, and other acts which also fall within then criminal statutes. This independent civil action is in keeping with the spirit of individual initiative and the intense awareness of one's individual rights in those countries.

Something of that same sense of self-reliance in the enforcement of one's rights is sought to be nurtured by the Project of Civil Code. Freedom and civic courage thrive best in such an atmosphere, rather than under a paternalistic system of law."

2. ARTICLE 32: VIOLATION OF CIVIL AND POLITICAL RIGHTS

Article 32 of the New Civil Code provides for an independent civil action for damages for violation of civil and political rights. The

law provides:

> Art. 32. Any public officer or employee, or any private individual, who directly or indirectly obstructs, defeats, violates or in any manner impedes or impairs any of the following rights and liberties of another person shall be liable to the latter for damages:
>
> (1) Freedom of religion;
>
> (2) Freedom of speech;
>
> (3) Freedom to write for the press or to maintain a periodical publication;
>
> (4) Freedom from arbitrary or illegal detention;
>
> (5) Freedom of suffrage;
>
> (6) The right against deprivation of property without due process of law;
>
> (7) The right to a just compensation when private property is taken for public use;
>
> (8) The right to the equal protection of the laws;
>
> (9) The right to be secure in one's person, house, papers, and effects against unreasonable searches and seizures;
>
> (10) The liberty of abode and of changing the same;
>
> (11) The privacy of communication and correspondence;
>
> (12) The right to become a member of associations or societies for purposes not contrary to law;
>
> (13) The right to take part in a peaceable assembly to petition the Government for redress of grievances;
>
> (14) The right to be free from involuntary servitude in any form;
>
> (15) The right of the accused against excessive bail;
>
> (16) The right of the accused to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witness in his behalf;
>
> (17) Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make such confession, except when the person confessing becomes a State witness;

(18) Freedom from excessive fines, or cruel and unusual punishment, unless the same is imposed or inflicted in accordance with a statute which has not been judicially declared unconstitutional; and

(19) Freedom of access to the courts.

In any of the cases referred to in this article, whether or not the defendant's act or omission constitutes a criminal offense, the aggrieved party has a right to commence an entirely separate and distinct civil action for damages, and for other relief. Such civil action shall proceed independently of any criminal prosecution (if the latter be instituted), and may be proved by a preponderance of evidence.

The indemnity shall include moral damages. Exemplary damages may also be adjudicated.

The responsibility herein set forth is not demandable from a judge unless his act or omission constitutes a violation of the Penal Code or other penal statute.

A. RATIONALE.

The Code Commission explained in its Report why Article 32 was included in the New Civil Code:

"The creation of an absolutely separate and independent civil action for the violation of civil liberties is essential to the effective maintenance of democracy, for these reasons:

(1) In most cases, the threat to freedom originates from abuses of power by government officials and peace officers. Heretofore, the citizen has had to depend upon the prosecuting attorney for the institution of criminal proceedings, in order that the wrongful act might be punished under the Penal Code and the civil liability exacted. But not infrequently, because the Fiscal was burdened with too many cases or because he believed the evidence was insufficient, or as to a few fiscals, on account of a disinclination to prosecute a fellow public official, especially when he is of high rank, no criminal action was filed by the prosecuting attorney. The aggrieved citizen was thus, left without redress. In this way, many individuals, whose freedom had been tampered with, have been unable to reach the courts, which are the bulwark of liberty.

(2) Even when the prosecuting attorney filed a criminal action, the requirement of proof beyond reasonable doubt often prevented the appropriate punishment. On the other hand, an independent civil action, as proposed in the Project of Civil Code, would afford the proper remedy by a preponderance of evidence.

(3) Direct and open violations of the Penal Code trampling upon the freedom named are not so frequent as those subtle, clever and indirect ways which do not come within the pale of the penal law. It is in these cunning devices of suppressing or curtailing freedom, which are not criminally punishable, where the greatest danger to democracy lies. The injured citizen will always have, under the Project of Civil Code, adequate civil remedies before the courts because of the independent civil action, even in those instances where the act or omission complained of does not constitute a criminal offense.

B. HOW COMMITTED.

Although Article 32 normally involves intentional acts, the tort of violation of civil and political rights can also be committed through negligence. In addition, the rule is that good faith on the part of the defendant does not necessarily excuse such violation. The Supreme Court explained in *Delfin Lim and Jikil Taha vs. Francisco Ponce De Leon, et al.* [G.R. No. L-22554. August 29, 1975]:

Defendant-appellee Fiscal Ponce de Leon wanted to wash his hands of the incident by claiming that "he was in good faith, without malice and without the slightest intention of inflicting injury to plaintiff-appellant, Jikil Taha" when he ordered the seizure of the motor launch. We are not prepared to sustain his defense of good faith. To be liable under Article 32 of the New Civil Code it is enough that there was a violation of the constitutional rights of the plaintiffs and it is not required that defendants should have acted with malice or bad faith. Dr. Jorge Bocobo, Chairman of the Code Commission, gave the following reasons during the public hearings of the Joint Senate and House Committees, why good faith on the part of the public officer or employee is immaterial. Thus:

"DEAN BOCOBO. Article 32, regarding individual rights, Attorney Cirilo Paredes proposes that Article 32 he so amended as to make a public official liable for violation of another person's constitutional rights only if the public official acted maliciously or in bad faith. The Code Commission opposes this suggestion for these reasons:

"The very nature of Article 3219 that the wrong may be civil or criminal. It is not necessary therefore that there should be malice or bad faith. To make such a requisite would defeat the main purpose of Article 32 which is the effective protection of individual rights. Public officials in the past have abused their powers on the pretext of justifiable motives or good faith in the performance of their duties. Precisely, the object of the Article is to put an end to official abuse by the plea of good faith. In the

United States this remedy is in the nature of a tort.

> "Mr. Chairman, this article is firmly one of the fundamental articles introduced in the New Civil Code to implement democracy. There is no real democracy if a public official is abusing and we made the article so strong and so comprehensive that it concludes an abuse of individual rights even if done in good faith, that official is liable. As a matter of fact, we know that there are very few public officials who openly and definitely abuse the individual rights of the citizens. In most cases, the abuse is justified on a plea of desire to enforce the law to comply with one's duty. And so, if we should limit the scope of this article, that would practically nullify the object of the article. Precisely, the opening object of the article is to put an end to abuses which are justified by a plea of good faith, which is in most cases the plea of officials abusing individual rights."

C. PERSONS LIABLE.

The provisions in the Bill of Rights and the recognition of the rights specified therein are normally directed against government abuse. Hence, the tort of violation of constitutional rights in common law is directed against public officers or employees. In this jurisdiction, the coverage of this tort was expanded to cover even private individuals. The law expressly imposes liability on private individuals who obstruct, defeat, violate or in any manner impede or impair the rights and liberties of another.

In addition, the law provides that a person may be held liable whether his participation is direct or indirect. For instance, a fiscal or a prosecutor may be held liable if he issues an order of seizure even if he is not authorized by the constitution, law or the rules of court to issue such order. *(Delfin Lim, et al. vs. Francisco Ponce de Leon, et al., 66 SCRA 299 [1975]).*

In another case, the Court explained that persons who indirectly violate constitutional rights include persons who instigate such violation. For example, in *MPH Garments, Inc. vs. Court of Appeals* (236 SCRA 227 [1994]), the Supreme Court sustained the award of damages against the petitioner who caused the raid to be conducted on the establishment of the private respondents who were selling scouting materials. (Petitioner was the one who caused such raid because it had an exclusive franchise to sell and distribute official Boy Scouts uniforms, supplies, badges, and insignias. Under their agreement with the Boy Scouts of the Philippines, the petitioner was given the authority to undertake or cause to be undertaken the prosecution in court of all illegal sources of scout uniforms and other scouting sup-

plies.) Later, the cases against the respondents were dismissed and the petitioner was ordered to return the materials which were taken from the petitioner. The seized items were not immediately returned and even then not all the seized items were returned. The other items returned were of inferior quality. Private respondents then filed an action for damages. One of the grounds relied upon by the petitioner in trying to escape liability is that it was the Philippine Constabulary that conducted the raid and petitioner's participation was only to report the alleged illegal activity of the private respondents. The Supreme Court rejected the argument stating that:

> Applying the aforecited provisions and leading cases, the respondent court correctly granted damages to private respondents. Petitioners were indirectly involved in transgressing the right of private respondents against unreasonable search and seizure. Firstly, they instigated the raid pursuant to their covenant in the Memorandum Agreement to undertake the prosecution in court of all illegal sources of scouting supplies. As correctly observed by respondent court:
>
> "Indeed, the acts committed by the PC soldiers of unlawfully seizing appellees' (respondents') merchandise and of filing the criminal complaint for unfair competition against appellees (respondents) were for the protection and benefit of appellant (petitioner) corporation. Such being the case, it is, thus, reasonably fair to infer from those acts that it was upon appellant (petitioner) corporation's instance that the PC soldiers conducted the raid and effected the illegal seizure. These circumstances should answer the trial court's query — posed in its decision now under consideration — as to why the PC soldiers immediately turned over the seized merchandise to appellant (petitioner) corporation."
>
> The raid was conducted with the active participation of their employee. Larry de Guzman did not lift a finger to stop the seizure of the boy and girl scouts items. By standing by and apparently assenting thereto, he was liable to the same extent as the officers themselves. So with the petitioner corporation which even received for safekeeping the goods unreasonably seized by the PC raiding team and de Guzman, and refused to surrender them for quite a time despite the dismissal of its complaint for unfair competition.
>
> Secondly, Letter of Instruction No. 1299 was precisely crafted on March 9, 1983 to safeguard not only the privilege of franchise holder of scouting items but also the citizen's constitutional rights, to wit:
>
> "TITLE : APPREHENSION OF UNAUTHORIZED MANUFACTURERS AND DISTRIBUTORS OF SCOUT

PARAPHERNALIA AND IMPOUNDING OF SAID PARAPHERNALIA.

ABSTRACT:

Directs all law enforcement agencies of the Republic of the Philippines, to apprehend immediately unauthorized manufacturers and distributors of Scout paraphernalia, upon proper application by the Boy Scouts of the Philippines and/or Girl Scouts of the Philippines for warrant of arrest and/or search warrant with a judge, or such other responsible officer as may be authorized by law; and to impound the said paraphernalia to be used as evidence in court or other appropriate administrative body. Orders the immediate and strict compliance with the Instructions."

Under the above provision and as afore-discussed, petitioners miserably failed to report the unlawful peddling of scouting goods to the Boy Scouts of the Philippines for the proper application of a warrant. Private respondents' rights are immutable and cannot be sacrificed to transient needs. Petitioners did not have the unbridled license to cause the seizure of respondents' goods without any warrant.

And thirdly, if petitioners did not have a hand in the raid, they should have filed a third-party complaint against the raiding team for contribution or any other relief, in respect of respondents' claim for Recovery of Sum of Money with Damages. Again, they did not."

a. Superior Officers.

Other individuals who can be held liable under Article 32 for having indirectly violated the constitutional right of another against unreasonable searches and seizure are the superior officers of the law enforcement officers who conducted the raid. Under Article 32, it is not the actor alone who must answer for damages. In *Aberca vs. Ver* (160 SCRA 590, 606 [1988]), the Supreme Court explained that with the provisions of Article 32, "the principles of accountability of public officials under the Constitution acquires added meaning and assumes a larger dimension. No longer may a superior official relax his vigilance or abdicate his duty to supervise his subordinates, secure in thought that he does not have to answer the transgressions committed by the latter against the constitutionally protected rights and liberties of the citizen."

Damages were likewise awarded to the plaintiffs under Article 32 of the New Civil Code in *Obra, et al. vs. Court of Appeals, et al.*

(G.R. No. 120852, October 28, 1999). The plaintiffs in said case were accused of having been engaged in illegal mining. A letter was sent to the Regional Director of the Bureau of Mines and Geo-Sciences requesting the said director to stop the alleged illegal mining activity. On the same day the letter was sent, the Regional Director wrote the commanding general of the Regional Command of the Philippine Constabulary requesting assistance in apprehending the truck of the plaintiffs. The commanding general indorsed the letter to a subordinate office. Forthwith, the plaintiffs' truck was impounded and was prevented from leaving the mining area. When sued for damages, the commanding general alleged that it was his ministerial duty to indorse the request of the Regional Director. However, the Supreme Court rejected the argument stating that when the general indorsed the letter, there could not have been any other foreseeable consequence but the eventual seizure of the truck. Furthermore, the Court explained that under Article 32, it is not the actor alone who is liable but also any person who indirectly violated the Constitutional right of the plaintiff.

b. Subordinate Officers.

The persons who actually conducted the illegal search and seizure are liable under Article 32. However, the Supreme Court ruled in *Delfin Lim, et al. vs. Ponce de Leon, et al.* (*supra*, at p. 310), that a subordinate officer who actually impounded the personal property of the complainant upon the orders of his superior officer is not liable because he was reluctant to enforce the order; he was led to believe that there was legal basis and authority to impound the property and that he was faced with a possible disciplinary action from his commander. The Supreme Court explained:

> "But defendant-appellee Orlando Maddela cannot be held accountable because he impounded the motor launch upon the order of his superior officer. While a subordinate officer may be held liable for executing unlawful orders of his superior officer, there are certain circumstances which would warrant Maddela's exculpation from liability. The records show that after Fiscal Ponce de Leon made his first request to the Provincial Commander on June 15, 1962 Maddela was reluctant to impound the motor launch despite repeated orders from his superior officer. It was only after he was furnished a copy of the reply of Fiscal Ponce de Leon, dated June 26, 1962, to the letter of the Provincial Commander, justifying the necessity of the seizure of the motor launch on the ground that the subsequent sale of the launch to Delfin Lim could not prevent the court from taking custody of the same, that he impounded the motor launch on July 6, 1962. With

> said letter coming from the legal officer of the province, Maddela was led to believe that there was a legal basis and authority to impound the launch. Then came the order of his superior officer to explain for the delay in the seizure of the motor launch. Faced with a possible disciplinary action from his commander, Maddela was left with no alternative but to seize the vessel. In the light of the above circumstances. We are not disposed to hold Maddela answerable for damages."

D. STATE IMMUNITY.

A public officer who is the defendant in a case for damages under Article 32 cannot escape liability under the doctrine of state immunity. The doctrine of state immunity applies only if the acts involved are acts done by officers in the performance of official duties within the ambit of their powers. *(Aberca, et al. vs. Ver, supra).* Obviously, officers do not act within the ambit of their powers if they would violate the constitutional rights of other persons.

E. SUSPENSION OF THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS.

In a case decided under the 1973 Constitution, the Supreme Court ruled that the suspension of the privilege of *habeas corpus* does not destroy every person's right and cause of action for damages for illegal arrest and detention and other violations of his constitutional right. What is suspended is merely the right of the individual to seek release from his detention through the writ of *habeas corpus* as a speedy means of obtaining his liberty. *(Aberca vs. Ver, supra., pp. 604-605).* Consequently, the suspension of the writ cannot be used as a defense in cases involving Article 32 of the New Civil Code.

The rule is further strengthened under the 1987 Constitution. In fact, under the 1987 Constitution, even if martial law is already in force, the civil liberties of every person still has to be respected and the courts of justice still remain open.

F. EXAMPLES OF VIOLATIONS.

a. Due Process.

An injured person can file an action for damages if he was deprived of his property without due process of law. (par. 6). Casebooks are replete with citations of jurisprudence involving this constitutional right, the most common example of which is dismissal of employee

without due process of law. Liability is imposed on the theory that the right of an employee to his work is a property right that cannot be taken without due process.

It has been repeatedly ruled that a person who deprives another of his job without giving him a chance to defend himself is liable under Article 32 of the Civil Code. *(Better Buildings, Inc. vs. NLRC, 283 SCRA 242, 250 [1997])*. However, the weight of jurisprudence allowing the award of damages under Article 32 in illegal dismissal cases is now questionable because of the *en banc* decision of the Supreme Court in *Ruben Serrano vs. National Labor Relations Commision* (G.R. No. 117040, January 27, 2000). The Supreme Court explained in said case that the violation of the notice requirement under the Labor Code is not a denial of due process. It explained that not all notice requirements are requirements of the due process clause. Some are simply part of a procedure to be followed before a right granted to a party can be exercised. The Court offered the following ratiocination:

> "x x x There are three reasons why, on the other hand, violation by the employer of the notice requirement cannot be considered a denial of due process resulting in the nullity of the employee's dismissal or layoff.
>
> The first is that the Due Process Clause of the Constitution is a limitation on governmental powers. It does not apply to the exercise of private power, such as the termination of employment under the Labor Code. This is plain from the text of Art. III, of the Constitution, *viz.*: "No person shall be deprived of life, liberty, or property without due process of law . . . ." The reason is simple: Only the State has authority to take the life, liberty, or property of the individual. The purpose of the Due Process Clause is to ensure that the exercise of this power is consistent with what are considered civilized methods.
>
> The second reason is that notice and hearing are required under the Due Process Clause before the power of organized society are brought to bear upon the individual. This is obviously not the case of termination of employment under Art. 283. Here, the employee is not faced with an aspect of the adversary system. The purpose for requiring a 30-day written notice before an employee is laid off is not to afford him an opportunity to be heard on any charge against him, for there is none. The purpose is to give him time to prepare for the eventual loss of his job and the DOLE an opportunity to determine whether economic causes do exist justifying the termination of his employment.
>
> x x x
>
> The third reason why the notice requirement under Art. 283

> can not be considered a requirement of the Due Process Clause is that the employer cannot really be expected to be entirely an impartial judge of his own cause. This is also the case in termination of employment for a just cause under Art. 282 (*i.e.*, serious misconduct or willful disobedience by the employee of the lawful orders of the employer, gross and habitual neglect of duties, fraud or willful breach of trust of the employer, commission of crime against the employer or the latter's immediate family or duly authorized representatives, or other analogous cases)."

Nevertheless, the Supreme Court also observed in *Serrano* that the notice requirement in Articles 282 and 283 of the Labor Code is simply an application of the Justinian precept embodied in Article 19 of the Civil Code to act with justice, give everyone his due, and observe honesty and good faith toward one's fellowmen. Hence, actions for damages by the dismissed-employed can be premised on Article 19 of the New Civil Code.

b. Right Against Searches and Seizure.

Another right that is often violated is the right of every citizen against unreasonable searches and seizure. The Constitutional provision which protects this right is Section 2, Article III of the 1987 Constitution.

The law is clear (or should be clear to law enforcers). Sadly, there are still many law enforcers who, if not actually disdain the Constitution, give every appearance of doing so. As what Justice Cruz said in *Alih vs. Castro* (151 SCRA 279 [1987]): "this is truly regrettable for it was incumbent on them, especially during those tense and tindery times, to encourage rather than undermine respect for the law, which it was their duty to uphold." Consequently, there are still cases filed against erring law enforcers who violate the constitutionally protected right against unreasonable searches and seizure.

CASE:

ROGELIO ABERCA, et al. vs. MAJ. GEN. FABIAN VER, et al.
G.R. No. L-69866, April 15, 1988

This petition for *certiorari* presents vital issues not heretofore passed upon by this Court. It poses the question whether the suspension of the privilege of the writ of *habeas corpus* bars a civil action for damages for illegal searches conducted by military personnel and other violations of rights and liberties guaranteed under the Constitution. If such action for damages may be maintained, who can be held liable for such violations: only the military personnel directly involved and/or their superiors as well.

This case stems from alleged illegal searches and seizures and other violations of the rights and liberties of plaintiffs by various intelligence suits of the Armed Forces of the Philippines, known as Task Force Makabansa (TFM), ordered by General Fabian Ver "to conduct pre-emptive strikes against known communist-terrorist (CT) underground houses in view of increasing reports about CT plans to sow disturbances in Metro Manila." Plaintiffs allege, among others, that complying with said order, elements of the TFM raided several places, employing in most cases defectively issued judicial search warrants; that during these raids, certain members of the raiding party confiscated a number of purely personal items belonging to plaintiffs; that plaintiffs were arrested without proper warrants issued by the courts; that for some period after their arrest, they were denied visits of relatives and lawyers; that plaintiffs were interrogated in violation of their rights to silence and counsel; that military men who interrogated them employed threats, tortures and other forms of violence on them in order to obtain incriminatory information or confessions and in order to punish them; that all violations of plaintiffs' constitutional rights were part of a concerted and deliberate plan to forcibly extract information and incriminatory statements from plaintiffs and to terrorize, harass and punish them, said plans being previously known to and sanctioned by defendants.

Plaintiffs sought actual/compensatory damages amounting to P39,030.00; moral damages in the amount of at least P150,000.00 each or a total of P3,000,000.00; exemplary damages in the amount of at least P150,000.00 each or a total of P3,000,000.00; and attorney's fees amounting to not less than P200,000.00.

[A motion to dismiss was filed by defendants, through their counsel, then Solicitor-General Estelito Mendoza, alleging that: (1) plaintiffs may not cause a judicial inquiry into the circumstances of their detention in the guise of a damage suit because, as to them, the privilege of the writ of habeas corpus is suspended; (2) assuming that the courts can entertain the present action, defendants are immune from liability for acts done in the performance of their official duties; and (3) the complaint states no cause of action against the defendants. The trial court granted the motion to dismiss. On certiorari, the Supreme Court found the petition meritorious and gave it due course citing Article 32 of the Civil Code.]

x x x

It is obvious that the purpose of the above codal provision is to provide a sanction to the deeply cherished rights and freedoms enshrined in the Constitution. Its message is clear; no man may seek to violate those sacred rights with impunity. In times of great upheaval or of social and political stress, when the temptation is strongest to yield — borrowing the words of Chief Justice Claudio Teehankee — to the law of force rather than the force of law, it is necessary to remind ourselves that certain basic rights and liberties are immutable and cannot be sacrificed to the transient needs or imperious demands of the ruling power. The rule of law must prevail, or else liberty

will perish. Our commitment to democratic principles and to the rule of law compels us to reject the view which reduces law to nothing but the expression of the will of the predominant power in the community. "Democracy cannot be a reign of progress, of liberty, of justice, unless the law is respected by him who makes it and by him for whom it is made. Now this respect implies a maximum of faith, a minimum of idealism. On going to the bottom of the matter, we discover that life demands of us a certain residuum of sentiment which is not derived from reason, but which reason nevertheless controls."

Seeking to justify the dismissal of plaintiffs' complaint, the respondents postulate the view that as public officers they are covered by the mantle of state immunity from suit for acts done in the performance of official duties or functions. In support of said contention, respondents maintain that —

"Respondents are members of the Armed Forces of the Philippines. Their primary duty is to safeguard public safety and order. The Constitution no less provides that the President may call them "to prevent or suppress lawless violence, invasion, insurrection or rebellion, or imminent danger thereof." (Constitution, Article VII, Section 9).

On January 17, 1981, the President issued Proclamation No. 2045 lifting martial law but providing for the continued suspension of the privilege of the writ of *habeas corpus* in view of the remaining dangers to the security of the nation. The proclamation also provided "that the call to the Armed Forces of the Philippines to prevent or suppress lawless violence, insurrection, rebellion and subversion shall continue to be in force and effect."

Petitioners allege in their complaint that their causes of action proceed from respondent General Ver's order to Task Force Makabansa to launch preemptive strikes against communist terrorist underground houses in Metro Manila. Petitioners claim that this order and its subsequent implementation by elements of the task force resulted in the violation of their constitutional rights against unlawful searches, seizures and arrest, rights to counsel and to silence, and the right to property and that, therefore, respondents Ver and the named members of the task force should be held liable for damages.

But, by launching a preemptive strike against communist-terrorists, respondent members of the armed forces merely performed their official and constitutional duties. To allow petitioners to recover from respondents by way of damages for acts performed in the exercise of such duties run contrary to the policy considerations to shield respondents as public officers from undue interference with their duties and from potentially disabling threats of liability *(Aarlon vs. Fitzgerald, 102 S. Ct. 2731; Forbes vs. Chuoco Tiaco, 16 Phil. 534),* and upon the necessity of protecting the performance of governmental and public functions from being harassed unduly or constantly interrupted by private suits. *(McCallan vs. State, 35 Cal. App. 605; Metran v. Paredes, 79 Phil. 819).*

x x x x x x x x x

The immunity of public officers from liability arising from the perfor-

mance of their duties is now a settled jurisprudence. *(Alzua vs. Johnson, 21 Phil. 308; Zulueta vs. Nicolas, 102 Phil. 944; Spalding vs. Vilas, 161 US 483, 40 L. Ed. 738, 16 S. Ct. 631; Barr vs. Mateo, 360; Butz vs. Economon, 438 US 478, 57 L. Ed. 2d 895, 98 S. Ct. 2894; Scheuer vs. Rhodes, 416 US 232; Forbes vs. Chuoco Tiaco, supra; Miller vs. de Leune, 602 F. 2d 198; Sami vs. US, 617 F. 2d 755).*

Respondents-defendants who merely obeyed the lawful orders of the President and his call for the suppression of the rebellion involving petitioners enjoy such immunity from suit."

We find respondents' invocation of the doctrine of state immunity from suit totally misplaced. The cases invoked by respondents actually involved acts done by officers in the performance of official duties within the ambit of their powers. As held in *Forbes, etc. vs. Chuoco Tiaco and Crossfield:*

"No one can be held legally responsible in damages or otherwise for doing in a legal manner what he had authority, under the law, to do. Therefore, if the Governor-General had authority, under the law to deport or expel the defendants, and circumstances justifying the deportation and the method of carrying it out are left to him, then he cannot be held liable in damages for the exercise of this power. Moreover, if the courts are without authority to interfere in any manner, for the purpose of controlling or interferring with the exercise of the political powers vested in the chief executive authority of the Government, then it must follow that the courts cannot intervene for the purpose of declaring that he is liable in damages for the exercise of this authority."

It may be that the respondents, as members of the Armed Forces of the Philippines, were merely responding to their duty, as they claim, "to prevent or suppress lawless violence, insurrection, rebellion and subversion" in accordance with Proclamation No. 2054 of President Marcos, despite the lifting of martial law on January 27, 1981, and in pursuance of such objective, to launch pre-emptive strikes against alleged communist terrorist underground houses. But this cannot be construed as a blanket license or a roving commission untramelled by any constitutional restraint, to disregard or transgress upon the rights and liberties of the individual citizen enshrined in and protected by the Constitution. The Constitution remains the supreme law of the land to which all officials, high or low, civilian or military, owe obedience and allegiance at all times.

Article 32 of the Civil Code which renders any public officer or employee or any private individual liable in damages for violating the Constitutional rights and liberties of another, as enumerated therein, does not exempt the respondents from responsibility. Only judges are excluded from liability under the said article, provided their acts or omissions do not constitute a violation of the Penal Code or other penal statute.

This is not to say that military authorities are restrained from pursuing their assigned task or carrying out their mission with vigor. We have no quarrel with their duty to protect the Republic from its enemies, whether

of the left or of the right, or from within or without, seeking to destroy or subvert our democratic institutions and imperil their very existence. What we are merely trying to say is that in carrying out this task and mission, constitutional and legal safeguards must be observed, otherwise, the very fabric of our faith will start to unravel. In the battle of competing ideologies, the struggle for the mind is just as vital as the struggle of arms. The linchpin in that psychological struggle is faith in the rule of law. Once that faith is lost or compromised, the struggle may well be abandoned.

We do not find merit in respondents' suggestion that plaintiffs' cause of action is barred by the suspension of the privilege of the writ of *habeas corpus*. Respondents contend that "Petitioners cannot circumvent the suspension of the privilege of the writ by resorting to a damage suit aimed at the same purpose — a judicial inquiry into the alleged illegality of their detention. While the main relief they ask by the present action is indemnification for alleged damages they suffered, their causes of action are inextricably based on the same claim of violations of their constitutional rights that they invoked in the *habeas corpus* case as grounds for release from detention. Were the petitioners allowed the present suit, the judicial inquiry barred by the suspension of the privilege of the writ will take place. The net result is that what the courts cannot do, *i.e.,* override the suspension ordered by the President, petitioners will be able to do by the mere expedient of altering the title of their action."

We do not agree. We find merit in petitioners' contention that the suspension of the privilege of the writ of *habeas corpus* does not destroy petitioners' right and cause of action for damages for illegal arrest and detention and other violations of their constitutional rights. The suspension does not render valid an otherwise illegal arrest or detention. What is suspended is merely the right of the individual to seek release from detention through the writ of *habeas corpus* as a speedy means of obtaining his liberty.

Moreover, as pointed out by petitioners, their right and cause of action for damages are explicitly recognized in P.D. No. 1755 which amended Article 1146 of the Civil Code by adding the following to its text:

"However, when the action (for injury to the rights of the plaintiff or for a quasi-delict) arises from or out of any act, activity or conduct of any public officer involving the exercise of powers or authority arising from Martial Law including the arrest, detention and/or trial of the plaintiff, the same must be brought within one (1) year."

Petitioners have a point in contending that even assuming that the suspension of the privilege of the writ of *habeas corpus* suspends petitioners' right of action for damages for illegal arrest and detention, it does not and cannot suspend their rights and causes of action for injuries suffered because of respondents' confiscation of their private belongings, the violation of their right to remain silent and to counsel and their right to protection against unreasonable searches and seizures and against torture and other cruel and inhuman treatment.

However, we find it unnecessary to address the constitutional issue

pressed upon us. On March 25, 1986, President Corazon C. Aquino issued Proclamation No. 2, revoking Proclamation Nos. 2045 and 2045-A and lifting the suspension of the privilege of the writ of *habeas corpus*. The question therefore has become moot and academic.

This brings us to the crucial issue raised in this petition. May a superior officer under the notion of respondent superior be answerable for damages, jointly and severally with his subordinates, to the person whose constitutional rights and liberties have been violated?

Respondents contend that the doctrine of respondeat superior is inapplicable to the case. We agree. The doctrine of respondeat superior has been generally limited in its application to principal and agent or to master and servant (*i.e.,* employer and employee) relationship. No such relationship exists between superior officers of the military and their subordinates.

Be that as it may, however, the decisive factor in this case, in our view, is the language of Article 32. The law speaks of an officer or employee or person "directly" or "indirectly" responsible for the violation of the constitutional rights and liberties of another. Thus, it is not the actor alone (*i.e.,* the one directly responsible) who must answer for damages under Article 32; the person indirectly responsible has also to answer for the damages or injury caused to the aggrieved party.

By this provision, the principle of accountability of public officials under the Constitution acquires added meaning and assumes a larger dimension. No longer may a superior official relax his vigilance or abdicate his duty to supervise his subordinates, secure in the thought that he does not have to answer for the transgressions committed by the latter against the constitutionally protected rights and liberties of the citizen. Part of the factors that propelled people power in February 1986 was the widely held perception that the government was callous or indifferent to, if not actually responsible for, the rampant violations of human rights. While it would certainly be too naive to expect that violators of human rights would easily be deterred by the prospect of facing damage suits, it should nonetheless be made clear in no uncertain terms that Article 32 of the Civil Code makes the persons who are directly, as well as indirectly, responsible for the transgression joint tortfeasors.

In the case at bar, the trial court dropped defendants General Fabian Ver, Col. Fidel Singson, Col. Rolando Abadilla, Col. Gerardo Lantoria, Jr., Col. Galileo Kintanar, Col. Panfilo Lacson, Capt. Danilo Pizarro, 1st Lt. Pedro Tango, Lt. Romeo Ricardo and Lt. Ricardo Bacalso from the complaint on the assumption that under the law, they cannot be held responsible for the wrongful acts of their subordinates. Only Major Rodolfo Aguinaldo and Master Sgt. Bienvenido Balaba were kept as defendants on the ground that they alone "have been specifically mentioned and identified to have allegedly caused injuries on the persons of some of the plaintiffs, which acts of alleged physical violence constitute a delict or wrong that gave rise to a cause of action." But such finding is not supported by the record, nor is it in accord with

law and jurisprudence.

Firstly, it is wrong to limit the plaintiffs' action for damages to "acts of alleged physical violence" which constituted delict or wrong. Article 32 clearly specifies as actionable the act of violating or in any manner impeding or impairing any of the constitutional rights and liberties enumerated therein, among others —

1. Freedom from arbitrary arrest or illegal detention;
2. The right against deprivation of property without due process of law;
3. The right to be secure in one's person, house, papers and effects against unreasonable searches and seizures;
4. The privacy of communication and correspondence;
5. Freedom from being compelled to be a witness against one's self, or from being forced to confess guilt, or from being induced by a promise of immunity or reward to make a confession, except when the person confessing becomes a state witness.

The complaint in this litigation alleges facts showing with abundant clarity and details, how plaintiffs' constitutional rights and liberties mentioned in Article 32 of the Civil Code were violated and impaired by defendants. The complaint speaks of, among others, searches made without search warrants or based on irregularly issued or substantially defective warrants; seizures and confiscation, without proper receipts, of cash and personal effects belonging to plaintiffs and other items of property which were not subversive and illegal nor covered by the search warrants; arrest and detention of plaintiffs without warrant or under irregular, improper and illegal circumstances; detention of plaintiffs at several undisclosed places of "safehouses" where they were kept *incommunicado* and subjected to physical and psychological torture and other inhuman, degrading and brutal treatment for the purpose of extracting incriminatory statements. The complaint contains a detailed recital of abuses perpetrated upon the plaintiffs violative of their constitutional rights.

Secondly, neither can it be said that only those shown to have participated "directly" should be held liable. Article 32 of the Civil Code encompasses within the ambit of its provisions those directly, as well as indirectly, responsible for its violation.

The responsibility of the defendants, whether direct or indirect, is amply set forth in the complaint. It is well established in our law and jurisprudence that a motion to dismiss on the ground that the complaint states no cause of action must be based on what appears on the face of the complaint. To determine the sufficiency of the cause of action, only the facts alleged in the complaint, and no others, should be considered. For this purpose, the motion to dismiss must hypothetically admit the truth of the facts alleged in the complaint.

Applying this test, it is difficult to justify the trial court's ruling, dismissing for lack of cause of action the complaint against all defendants, except Major Rodolfo Aguinaldo and Master Sgt. Bienvenido Balaba. The complaint contained allegations against all the defendants which, if admitted hypothetically, would be sufficient to establish a cause or causes of action against all of them under Article 32 of the Civil Code.

This brings us to the last issue. Was the trial court correct in dismissing the complaint with respect to plaintiffs Rogelio Aberca, Danilo de la Fuente, Marco Palo, Alan Jazminez, Alex Marcelino, Elizabeth Protacio-Marcelino, Alfredo Mansos and Rolando Salutin, on the basis of the alleged failure of said plaintiffs to file a motion for reconsideration of the court's resolution of November 8, 1983, granting the respondent's motion to dismiss?

It is undisputed that a timely motion to set aside said order of November 8, 1983 was filed by "plaintiffs, through counsel." True, the motion was signed only by Atty. Joker P. Arroyo, counsel for Benjamin Sesgundo; Atty. Antonio Rosales, counsel for Edwin Lopez and Manuel Martin Guzman; Atty. Pedro B. Ella, Jr., counsel for Nestor Bodino and Carlos Palma; Atty. Arno V. Sanidad, counsel for Arturo Tabara; Atty. Felicitas S. Aquino, counsel for Joseph Olayer; and Atty. Alexander Padilla, counsel for Rodolfo Benosa.

But the body of the motion itself clearly indicated that the motion was filed on behalf of all the plaintiffs. And this must have been also the understanding of defendants' counsel himself for when he filed his comment on the motion, he furnished copies thereof, not just to the lawyers who signed the motion, but to all the lawyers of plaintiffs, to wit: Attys. Jose W. Diokno, Procopio Beltran, Rene Sarmiento, Efren Mercado, Augusto Sanchez, Antonio Rosales, Pedro Ella, Jr., Arno Sanidad, Alexander Padilla, Joker Arroyo, Rene Saguisag, Ramon Esguerra and Felicitas S. Aquino.

In filing the motion to set aside the resolution of November 8, 1983, the signing attorneys did so on behalf of all the plaintiffs. They needed no specific authority to do that. The authority of an attorney to appear for and in behalf of a party can be assumed, unless questioned or challenged by the adverse party or the party concerned, which was never done in this case. Thus, it was grave abuse on the part of respondent judge to take it upon himself to rule that the motion to set aside the order of November 8, 1953 dismissing the complaint was filed only by some of the plaintiffs, when by its very language it was clearly intended to be filed by and for the benefit of all of them. It is obvious that the respondent judge took umbrage under a contrived technicality to declare that the dismissal of the complaint had already become final with respect to some of the plaintiffs whose lawyers did not sign the motion for reconsideration. Such action tainted with legal infirmity cannot be sanctioned.

Accordingly, we grant the petition and annul and set aside the resolution of the respondent court, dated November 8, 1983, its order dated May 11, 1984 and its resolution dated September 21, 1984. Let the case be remanded to the respondent court for further proceedings. With Costs against private

respondents.

Separate Opinions

TEEHANKEE, *C.J.*, concurring:

The Court's judgment at bar makes clear that all persons, be they public officers or employees, or members of the military or police force or private individuals who directly or indirectly obstruct, defeat, violate or in any manner impede or impair the constitutional rights and civil liberties of another person, stand liable and may be sued in court for damages as provided in Art. 32 of the Civil Code.

The case at bar specifically upholds and reinstates the civil action for damages filed in the court below by petitioners-plaintiffs for illegal searches conducted by military personnel and other violations of their constitutional rights and liberties. At the same time it rejects the automatic application of the principle of respondent superior or command responsibility that would hold a superior officer jointly and severally accountable for damages, including moral and exemplary, with his subordinates who committed such transgressions. However, the judgment gives the *caveat* that a superior officer must not abdicate its duty to properly supervise his subordinates for he runs the risk of being held responsible for gross negligence and of being held under the cited provision of the Civil Code as indirectly and solidarily accountable with the tortfeasor.

The rationale for this rule of law was best expressed by Brandeis in this wise: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent omnipresent teacher. For good or ill, it teaches the whole people by example. Crime is contagious. If the government becomes the law breaker, it breeds contempt for the law, it invites every man to become a law unto himself, it invites anarchy. To declare that in the administration of criminal law the end justifies the means . . . . would bring terrible retribution."

As the writer stressed in *Hildawa vs. Enrile* which was an action to enjoin the operations of the dreaded secret marshals during the past regime, "In a democratic state, you don't stop to the level of criminals. If we stoop to what they do, then we're no better than they . . . there would be no difference." . . . The Supreme Court stands as the guarantor of the Constitutional and human rights of all persons within its jurisdiction and cannot abdicate its basic role under the Constitution that these rights be respected and enforced. The spirit and letter of the Constitution negates as contrary to the basic precepts of human rights and freedom that a person's life be snuffed out without due process in a split second even if he is caught *in flagrante delicto* — unless it was called for as an act of self-defense by the law agents using reasonable means to prevent or repel an unlawful aggression on the part of the deceased."

Needless to say, the criminal acts of the "Sparrow Units" or death

squads of the NPA which have infiltrated the cities and suburbs and performed their despicable killings of innocent civilians and military and police officers constitute an equally perverse violation of the sanctity of human life and must be severely condemned by all who adhere to the Rule of Law.

It need only be pointed out that one of the first acts of the present government under President Corazon C. Aquino after her assumption of office in February, 1986 was to file our government's ratification and access to all human rights instruments adopted under the auspices of the United Nations, declaring thereby the government's commitment to observe the precepts of the United Nations Charter and the Universal Declaration of Human Rights. More than this, pursuant to our Constitution which the people decisively ratified on February 2, 1987, the independent office of the Commission on Human Rights has been created and organized with ample powers to investigate human rights violations and take remedial measures against all such violations by the military as well as by the civilian groups.

3. ART. 33: DEFAMATION, FRAUD AND PHYSICAL INJURIES

Article 33 of the New Civil Code provides that in case of defamation, fraud or physical injuries, an action separate and distinct from the criminal action may be maintained by the injured party. The Code Commission explained that this action is similar to the action in tort for libel or slander, deceit, and assault and battery under the American law.

A. DEFAMATION.

a. Definitions.

Prosser defines defamation as an invasion of the interest in reputation and good name, by communication to others which tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinion against him. *(Prosser, Handbook on the Law on Torts, p. 572).* Professor Winfield succinctly defined defamation as the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally or which tends to make them shun or avoid that person. *(cited in Elliot and Quinn, p. 73; Oxford Dictionary of Law, 1997 4th Ed., p. 131).* It was likewise explained in one case that a statement is defamatory if it tends to injure the plaintiff in his trade, profession, or community standing, or lower him in the estimation of the community. *(Liberty Lobby, Inc. vs. Dow Jones & Co., 838 F.2d 1287, D.C. Cir., citing Howard Univ. vs. Best [1984]).*

Defamation in this jurisdiction includes the crimes of libel and slander. Libel is written defamation while slander is oral defamation. The Revised Penal Code considers a statement defamatory if it is an

imputation of circumstance "tending to cause the dishonor, discredit, or contempt of a natural or juridical person or to blacken the memory of the one who is dead." The Code provides:

> "Art. 353. *Definition of libel.* — A libel is public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.
>
> Art. 355. *Libel means by writings or similar means.* — A libel committed by means of writing, printing, lithography, engraving, radio, phonograph, painting, theatrical exhibition, cinematographic exhibition, or any similar means, shall be punished by *prision correccional* in its minimum and medium periods or a fine ranging from 200 to 6,000 pesos, or both, in addition to the civil action which may be brought by the offended party.
>
> Art. 356. *Threatening to publish and offer to present such publication for a compensation.* — The penalty of *arresto mayor* or a fine from 200 to 2,000 pesos, or both, shall be imposed upon any person who threatens another to publish a libel concerning him or the parents, spouse, child, or other members of the family of the latter or upon anyone who shall offer to prevent the publication of such libel for a compensation or money consideration.
>
> Art. 358. *Slander.* — Oral defamation shall be punished by *arresto mayor* in its maximum period to *prision correccional* in its minimum period if it is of a serious and insulting nature; otherwise, the penalty shall be *arresto menor* or a fine not exceeding 200 pesos.
>
> Art. 359. *Slander by deed.* — The penalty of *arresto mayor* in its maximum period to *prision correccional* in its minimum period or a fine ranging from 200 to 1,000 pesos shall be imposed upon any person who shall perform any act not included and punished in this title, which shall cast dishonor, discredit or contempt upon another person. If said act is not of a serious nature, the penalty shall be *arresto menor* or a fine not exceeding 200 pesos.

b. Reason for liability.

The liability imposed for defamation is brought about by the desire to protect the reputation of every individual. The enjoyment of reputation is one of those rights necessary to human society that underlie the whole scheme of civilization. It is as much a constitutional right as the possession of life, liberty or property. *(Worcester vs. Ocampo, 22 Phil. 42 [1912]).* The importance of protecting one's reputation is best reflected in Iago's line in Shakespeare's Othello

(Act III, Scene II, lines 156-160):

"Good name in a man and woman, dear my Lord,

Is the immediate jewel of their souls;

Who steals my purse steals trash; 'tis something, nothing;

'Twas mine, 'tis his, and has been slave to thousands;

But he that filches from me my good name

Robs me of that which not enriches him,

And make me poor indeed."

c. Requisites.

The following requisites must be present before one can be held liable for defamatory imputations: (1) it must be defamatory; (2) it must be malicious; (3) it must be given publicity; and (4) the victim must be identifiable. *(Alonzo vs. Court of Appeals, 241 SCRA 51 [1995], citing People vs. Monton, 6 SCRA 801 [1962]; Fernando Sason y Ramos vs. Court of Appeals, et al., G.R. No. 120715, March 29, 1996).* Stated differently, the "elements of libel are: 1) The imputation of a discreditable act or condition to another; 2) publication of the imputation; 3) identity of the person defamed; and 4) existence of malice." *(Lope Dazo vs. The Honorable Court of Appeals, Oct. 31, 1990).*

(1) The imputation is defamatory.

The defamatory character of the imputation may be established by showing that the statement is defamatory as a matter of law. Thus, the statement is defamatory as a matter of law where imputation is the commission of a crime, the defamation is so plain that the charge is automatically deemed libelous. *(John J. Watkins, The Mass Media and the Law, 1990 Ed., p. 56).* If the statement is not defamatory as a matter of law, the Court must then make a determination on the defamatory capability of the statement. In doing so, the judge "must consider the allegedly libelous passages in the context of the entire article and evaluate the words as they are commonly understood. Put another way, he must put himself in the shoes of the 'average' reader and decide whether such a reader would interpret the message as libelous." *(ibid.).*

The test used by the Supreme Court in determining the defamatory character of the words used is stated as follows:

> "Words calculated to induce suspicion are sometimes more effective to destroy reputation than false charges directly made. Ironical and metaphorical language is favored vehicle of slander. A charge is sufficient if the words are calculated to induce the hearers to suppose and understand that the person or persons against whom they were uttered were guilty of certain offense, or are sufficient to impeach their honesty, virtue, or reputation, or to hold the person or persons up to public ridicule. x x x" *(Sason vs. Court of Appeals, supra).*

Personal hurt or embarrassment or offense, even if real, is not, however, automatically equivalent to defamation. The law against defamation protects one's interest in acquiring, retaining and enjoying a reputation "as good as one's character and conduct warrant" in the community and it is to community standards — not personal or family standards — that a court must refer in evaluating a publication claimed to be defamatory. The term "community" may of course be drawn as narrowly or as broadly as the user of the term and his purposes may require. The reason why for purposes of the law on libel the more general meaning of community must be adopted in the ascertainment of relevant standards, is rooted deep in our constitutional law. That reason relates to the fundamental public interest in the protection and promotion of free speech and expression, an interest shared by all members of the body politic and territorial community. *(Manila Bulletin Corporation, et al. vs. Hon. Apolonio Batalla, et al., G.R. No. 76565, November 9, 1988).*

Sweeping, exaggerated, unreasonable and absurd statements in the material will not by themselves make the statements defamatory. *(Newsweek, Inc. vs. Court of Appeals, 142 SCRA 171 [1986]).*

Article 353 of the Revised Penal Code states that defamation may consists of imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstance tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead.

Thus, there is defamatory imputation if there is a statement that a public official is guilty of misconduct in public office, bribery, malversation of public funds, graft and corruption. The gravity of the imputations is sufficient to impeach the public official's hon- esty, virtue, integrity and reputation as a public official. *(Lope Dazo vs. The Hon. Court of Appeals, October 31, 1990).*

The imputation is likewise defamatory if the president of a homeowner's association in a subdivision published an article in their newsletter calling the complainant *"mandurugas"* and other terms

such as *"mag-ingat sa panlilinlang," "matagal na tayong niloloko," "mastermind sa paninirang puri"* and other similar terms. *(Fernando Sason y Ramos vs. Court of Appeals, supra).*

There is also malicious imputation if the defendant circulated a letter and published an article in a newsletter calling the plaintiff the *de facto* president which was tantamount to "saying that he is a pretender, a fraud, and impostor and he is arrogating unto himself certain powers, rights, and privileges to which he is not entitled." *(Pedro S. Lacsa vs. Hon. Intermediate Appellate Court, G.R. No. 74907, May 23, 1988).* The Supreme Court likewise explained in *Lacsa*:

> Six decades ago, in the case of *U.S. vs. O'Connell*, the Court laid down the test for libelous meaning:
>
> x x x x x x x x x
>
> Defendant has imputed nothing wrong to the complainants in certain and express terms. But this is not necessary. Words calculated to induce suspicion are sometimes more effective to destroy reputation than false charges directly made. Ironical and metaphorical language is a favored vehicle for slander. A charge is sufficient if the words are calculated to induce the hearers to suppose and understand that the person or persons against whom they were uttered were guilty of certain offenses, or are sufficient to impeach their honesty, virtue, or reputation, or to hold the person or persons up to public ridicule. Said Chief Justice Shaw of the Supreme Court of Massachusetts: The rule is a sound one that the law cannot shut its eyes to what all the rest of the world can see; and let the slanderer disguise his language, and wrap up his meaning in ambiguous givings out, as he will, and it shall not avail him, because courts will understand language, in whatever form it is used, as all mankind understands it." *(Carter vs. Andrews [1834], 16 Pick. [Mass.], 1).*
>
> Said another court much more recently:
>
> "The test of libelous meanings is not the analysis of a sentence into component phrases with the meticulous care of the grammarian or stylist, but the import conveyed by the entirety of the language to the ordinary reader." *(Miller vs. O'Connell, City Ct., 57 L. J., 1768, Sept. 12, 1917).*
>
> x x x x x x x x x
>
> The rule was further elucidated in *U.S. vs. Sotto* where we stated:
>
> x x x x x x x x x
>
> In the case of *Jimenez vs. Reyes* (27 Phil. Rep., 52), at page 59, Justice Trent, writing the opinion of the court, laid down the

> rule that for the purpose of determining the meaning of any publication alleged to be libelous "that construction must be adopted which will give to the matter such a meaning as is natural and obvious in the plain and ordinary sense in which the public would naturally understand what was uttered. The published matter alleged to be libelous must be construed as a whole. In applying these rules to the language of an alleged libel, the court will disregard any subtle or ingenious explanation offered by the publisher on being called to account. The whole question being the effect the publication had upon the minds of the readers, and they not having been assisted by the offered explanation in reading the article, it comes too late to have the effect of removing the sting, if any there be, from the word used in the publication."

(2) Publication.

The second element is publication — communication of the defamatory information to third persons. Such communication may be done by publishing or printing the libelous material in a newspaper, magazine, newsletter or others of similar kind to the public. Dissemination to a number of people is, however, not required and communication to a single individual is sufficient. For instance, there is sufficient publication if he made one imputation in a letter sent to another. *(United States vs. Crame, 10 Phil. 35).*

In civil actions for damages, no liability will result if the defamatory matter is not seen or heard by anyone except the defendant and the plaintiff. Damages to character or reputation of the plaintiff is the estimate which others hold him and not what he himself thinks. *(People vs. Silvela, 103 Phil. 773; United States vs. Grino, 36 Phil. 738).*

The Supreme Court explained in one case:

> "Publication means 'to make public; to make known to people in general; to bring before the public.' Specifically put, publication in the law of libel means the making known of the defamatory matter, after it has been written. If the statement is sent straight to a person of whom it is written there is no publication of it. The reason for this is that [a] communication of the defamatory matter to the person defamed cannot injure his reputation though it may wound his self-esteem. A man's reputation is not the good opinion he has of himself, but the estimation in which others hold him. *(Alonzo vs. Court of Appeals, supra at 531, pp. 60-61).*

(3) Malice.

There is malice when the author of the imputation is prompted by personal ill-will or spite and speaks not in response to a duty but merely to injure the reputation of the person who claims to have been defamed. *(Alonzo vs. Court of Appeals, ibid.)*.

It is well to note that the existence of malice in fact may be shown by extrinsic evidence that the defendant bears a grudge against the offended party, or that there is rivalry or ill feeling between them (which existed at the date of the publication of the defamatory imputation), Plaintiff may also establish that the defendant had an intention to injure the reputation of the offended party by relying on the words used by the defendant and the circumstances attending the publication of the defamatory imputation. *(Sason vs. Court of Appeals, supra)*.

Malice may be malice in law contemplated in Article 354 of the Revised Penal Code which provides that "every defamatory imputation is presumed to be malicious, even if it is true, if no good intention and justifiable motive for making it is shown." This is what is called malice in law which establishes a presumption of malice. In other words, if the imputation is defamatory, the plaintiff or the prosecution need not prove malice on the part of the defendant, for the law already presumes that the defendant's imputation is malicious. The burden is on the side of the defendant to show good intention and justifiable motive in order to overcome the legal inference of malice. *(Sazon vs. Court of Appeals, 255 SCRA 692, 700 [1996])*.

There are two exceptions provided for in Article 345 for the presumption of malice. In these two cases, malice is not presumed and must be proved as a fact. If there is such proof, the author, editor or managing editor are still liable. *(Article 362, RPC)*. Articles 345 and 362 provides:

> "Art. 354. *Requirement for publicity*. — Every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown, except in the following cases:
>
> 1. A private communication made by any person to another in the performance of any legal, moral or social duty; and
>
> 2. A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.

> Art. 362. *Libelous remarks.* — Libelous remarks or comments connected with the matter privileged under the provisions of Article 354, if made with malice, shall not exempt the author thereof nor the editor or managing editor of a newspaper from criminal liability.

(4) Identification of the defamed.

The plaintiffs or the complainants in defamation cases include both natural and juridical persons. To be successful, the plaintiff must establish that the defamatory statement referred to him. "In order to maintain a libel suit, it is essential that the victim be identifiable although it is not necessary that he be named. It is also not sufficient that the offended party recognized himself as the person attacked or defamed, but it must be shown that at least a third person could identify him as the object of the libelous publication. *(Arturo Borjal vs. Court of Appeals; Corpus vs. Cuaderno, Sr., 16 SCRA 807 [1966]; People vs. Monton, 6 SCRA 801 [1966]).*

So long as sufficient circumstances are present which establish that the offending statements refer to the plaintiff, the requirement that the defamed is identified is satisfied. The Supreme Court explained in *Worcester vs. Ocampo:*

> In the case of *Russell vs. Kelley* (44 Cal., 641, 642), the same question was raised and the court, in its decision, said:
>
> "The rule laid down in 2 Stockey on Slander (p. 51) is that the application of the slanderous words to the plaintiff and the extrinsic matters alleged in the declaration may be shown by the testimony of witnesses who knew the parties and circumstances and who can state their judgment and opinion upon the application and meaning of the terms used by the defendant: It is said that where the words are ambiguous on the face of the libel, to whom it was intended to be applied, the judgment and opinion of witnesses, who from their knowledge of the parties and circumstances are able to form a conclusion as to the defendant's intention and application of the libel is evidence for the information of the jury."
>
> Mr. Odgers, in his work on Libel and Slander (p. 567), says:
>
> "The plaintiff may also call at the trial his friends or others acquainted with the circumstances, to state that, in reading the libel, they at once concluded it was aimed at the plaintiff. It is not necessary that all the world should understand the libel. It is sufficient if those who know the plaintiff can make out that he is the person meant." *(See also Falkard's Stockey on Libel and*

Slander, 4th English edition, 589.)

The correctness of this rule is not only established by the weight of authority but is supported by every consideration of justice and sound policy. The lower court committed no error in admitting the opinion of witnesses offered during the trial of the cause. One's reputation is the sum or composite of the impressions spontaneously made by him from time to time, and in one way or another, upon his neighbors and acquaintances. The effect of a libelous publication upon the understanding of such persons, involving necessarily the identity of the person libeled is of the very essence of the wrong. The issue in a libel case concerns not only the sense of the publication, but, in a measure its effect upon a reader acquainted with the person referred to. The correctness of the opinion of the witnesses as to the identity of the person meant in the libelous publication may always be tested by cross-examination. *(Enquirer Co. vs. Johnston, 72 Fed. Rep., 443; 2nd Greenleaf on Evidence, 417; Nelson vs. Barchenius, 52 Ill., 236; Smith vs. Miles, 15 Vt., 245; Miller vs. Butler, 6 Cushing [Mass.], 71.)"*

The person of the defamed may likewise be identified using another publication in the same newspaper on a separate date. In such a case, there is only one offense committed. *(United States vs. Vicente Sotto, G.R. No. 11067, March 6, 1917).*

(4.1) Group Libel.

One of the problems relating to the identification of the defamed involves statements directed against a fairly large group. The issue was addressed in *Newsweek, Inc. vs. Court of Appeals* (142 SCRA 171 [1986]) which involved an action for damages filed by incorporated associations of sugarcane planters in Negros Occidental who claimed to have 8,500 members and several individual sugar planters in their own behalf and/or as a class suit in behalf of all sugarcane planters in the province of Negros Occidental. The complaint alleged that the petitioner and the other defendants committed libel against them by the publication of the article "An Island of Fear" in the February 23, 1981 issue of petitioner's weekly news magazine Newsweek. The article supposedly portrayed the island province of Negros Occidental as a place dominated by big landowners or sugarcane planters who not only exploited the impoverished and underpaid sugarcane workers/laborers, but also brutalized and killed them with impunity. Complainants alleged that said article, taken as a whole, showed a deliberate and malicious use of falsehood, slanted presentation and/or misrepresentation of facts intended to put them (sugarcane planters) in bad light, expose them to public ridicule, discredit and humilia-

tion here in the Philippines and abroad, and make them objects of hatred, contempt and hostility of their agricultural workers and of the public in general. The Supreme Court ruled that the plaintiffs were not sufficiently identified in the article published by the petitioner. The Court sustained petitioner's submission that if libel was allegedly committed against a group, there is actionable defamation only if the libel can be said to reach beyond the mere collectivity to do damage to a specific individual group member's reputation. The Supreme Court explained:

> "In the case of *Corpus vs. Cuaderno, Sr.* (16 SCRA 807) this Court ruled that "in order to maintain a libel suit, it is essential that the victim be identifiable *(People vs. Monton, L-16772, November 30, 1962)*, although it is not necessary that he be named (19 A.L.R. 116)." In an earlier case, this Court declared that ". . . defamatory matter which does not reveal the identity of the person upon whom the imputation is cast, affords no ground of action unless it be shown that the readers of the libel could have identified the personality of the individual defamed." *(Kunkle vs. Cablenews — American and Lyons, 42 Phil. 760).*
>
> This principle has been recognized to be of vital importance, especially where a group or class of persons, as in the case at bar, claim to have been defamed, for it is evident that the larger the collectivity, the more difficult it is for the individual member to prove that the defamatory remarks apply to him. *(Cf. 70 ALR 2d. 1384).*
>
> In the case of *Uy Tioco vs. Yang Shu Wen, 32 Phil. 624,* this Court held as follows:
>
> "Defamatory remarks directed at a class or group of persons in general language only, are not actionable by individuals composing the class or group unless the statements are sweeping; and it is very probable that even then no action would be where the body is composed of so large a number of persons that common sense would tell those to whom the publication was made that there was room for persons connected with the body to pursue an upright and law abiding course and that it would be unreasonable and absurd to condemn all because of the actions of a part." *(supra, p. 628).*
>
> It is evident from the above ruling that where the defamation is alleged to have been directed at a group or class, it is essential that the statement must be so sweeping or all-embracing as to apply to every individual in that group or class, or sufficiently specific so that each individual in the class or group can prove that the defamatory statement specifically pointed to him, so that he can bring the action separately, if need be."

x x x

We note that private respondents filed a "class suit" in representation of all the 8,500 sugarcane planters of Negros Occidental. Petitioner disagrees and argues that the absence of any actionable basis in the complaint cannot be cured by the filing of a class suit on behalf of the aforesaid sugar planters.

We find petitioner's contention meritorious.

The case at bar is not a class suit. It is not a case where one or more may sue for the benefit of all *(Mathay vs. Consolidated Bank and Trust Company, 58 SCRA 559)* or where the representation of class interest affected by the judgment or decree is indispensable to make each member of the class an actual party. *(Borlaza vs. Polistico, 47 Phil. 348)*. We have here a case where each of the plaintiffs has a separate and distinct reputation in the community. They do not have a common or general interest in the subject matter of the controversy.

The disputed portion of the article which refers to plaintiff Sola and which was claimed to be libelous never singled out plaintiff Sola as a sugar planter. The news report merely stated that the victim had been arrested by members of a special police unit brought into the area by Pablo Sola, the mayor of Kabankalan. Hence, the report, referring as it does to an official act performed by an elective public official, is within the realm of privilege and protected by the constitutional guarantees of free speech and press.

The article further stated that Sola and the commander of the special police unit were arrested. The Court takes judicial notice of this fact. *(People vs. Sola, 103 SCRA 393)."*

(4.2) Deceased.

In common law, no friend or relative can sue for imputation against a dead person. The right to sue dies with each individual; the right to protect one's reputation is considered a personal right which cannot be inherited by the heirs. In this jurisdiction, the rule is that relatives of the deceased can file an action for damage to the reputation of the latter. Article 353 expressly provides that defamatory statements include those which tend to blacken the memory of one who is dead.

d. Persons Liable.

Article 360 of the Revised Penal Code identifies the persons who may be held guilty of the crimes of libel and provides the procedure for its prosecution:

Art. 360. *Persons responsible.* — Any person who shall publish, exhibit, or cause the publication or exhibition of any defamation in writing or by similar means, shall be responsible for the same.

The author or editor of a book or pamphlet, or the editor or business manager of a daily newspaper, magazine or serial publication, shall be responsible for the defamations contained therein to the same extent as if he were the author thereof.

The criminal and civil action for damages in cases of written defamations as provided for in this chapter, shall be filed simultaneously or separately with the Court of First Instance of the province or city where the libelous article is printed and first published or where any of the offended parties actually resides at the time of the commission of the offense: *Provided, however*, That where one of the offended parties is a public officer whose office is in the City of Manila at the time of the commission of the offense, the action shall be filed in the Court of First Instance of the City of Manila, or of the city or province where the libelous article is printed and first published, and in case such public officer does not hold office in the City of Manila, the action shall be filed in the Court of First Instance of the province or city where he held office at the time of the commission of the offense or where the libelous article is printed and first published and in case one of the offended parties is a private individual, the action shall be filed in the Court of First Instance of the province or city where he actually resides at the time of the commission of the offense or where the libelous matter is printed and first published: *Provided, further*, That the civil action shall be filed in the same court where the criminal action is filed and vice versa: *Provided, furthermore*, That the court where the criminal action or civil action for damages is first filed, shall acquire jurisdiction to the exclusion of other courts: *And, provided, finally*, That this amendment shall not apply to cases of written defamations, the civil and/or criminal actions which have been filed in court at the time of the effectivity of this law.

Preliminary investigation of criminal action for written defamations as provided for in the chapter shall be conducted by the provincial or city fiscal of the province or city, or by the municipal court of the city or capital of the province where such action may be instituted in accordance with the provisions of this article.

No criminal action for defamation which consists in the imputation of a crime which cannot be prosecuted *de oficio* shall be brought except at the instance of and upon complaint expressly filed by the offended party. *(As amended by RA 1289, approved*

June 15, 1955, RA 4363, approved June 19, 1965).

e. Proof of Truth.

In English and American law, proof of truth may exculpate the defendant in a defamation case. The rule in this jurisdiction is provided for in Article 361 of the Revised Penal Code:

> Art. 361. *Proof of the truth.* — In every criminal prosecution for libel, the truth may be given in evidence to the court and if it appears that the matter charged as libelous is true, and, moreover, that it was published with good motives and for justifiable ends, the defendants shall be acquitted.
>
> Proof of the truth of an imputation of an act or omission not constituting a crime shall not be admitted, unless the imputation shall have been made against Government employees with respect to facts related to the discharge of their official duties.
>
> In such cases if the defendant proves the truth of the imputation made by him, he shall be acquitted.

It should likewise be noted that under Article 354 of the Revised Penal Code, every defamatory imputation is presumed to be malicious even if it be true.

f. Defenses.

In order to escape liability, the defendant or accused in a defamation case may claim that the statements made are privileged. Privileged statements may include those which are absolutely or conditionally privileged. The Supreme Court explained in *United States vs. Felipe Bustos* (37 Phils. 731 [1918]; see also *Orfanel vs. People,* 30 SCRA 819 [1969]) the difference between the two kinds of privileged communications:

> Public policy, the welfare of society, and the orderly administration of government have demanded protection for public opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege.
>
> "The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.'" *(Abbott vs. National Bank of Commerce, Tacoma [1899], 175 U. S., 409, 411).*
>
> Privilege is classified as either absolute or qualified. With

the first, we are not concerned. As to qualified privilege, it is as the words suggest a *prima facie* privilege which may be lost by proof of malice. The rule is thus stated by Lord Campbell, *C. J.*:

"A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which without this privilege would be slanderous and actionable." *(Harrison vs. Bush, 5 E. & B., 344; 1 Jur. [N.S.], 846; 25 L. J. Q. B., 25; 3 W. R., 474; 85 E. C. L., 344).*

A pertinent illustration of the application of qualified privilege is a complaint made in good faith and without malice in regard to the character or conduct of a public official when addressed to an officer or a board having some interest or duty in the matter. Even when the statements are found to be false, if there is probable cause for belief in their truthfulness and the charge is made in good faith, the mantle of privilege may still cover the mistake of the individual. But the statements must be made under an honest sense of duty; a self-seeking motive is destructive. Personal injury is not necessary. All persons have an interest in the pure and efficient administration of justice and of public affairs. The duty under which a party is privileged is sufficient if it is social or moral in its nature and this person in good faith believe he is acting in pursuance thereof although in fact he is mistaken. The privilege is not defeated by the mere fact that the communication is made in intemperate terms. A further element of the law of privilege concerns the person to whom the complaint should be made. The rule is that if a party applies to the wrong person through some natural and honest mistake as to the respective functions of various officials such unintentional error will not take the case out of the privilege.

In the usual case malice can be presumed from defamatory words. Privilege destroy that presumption. The onus of proving malice then lies on the plaintiff. The plaintiff must bring home to the defendant the existence of malice as the true motive of his conduct. Falsehood and the absence of probable cause will amount to proof of malice. *(See White vs. Nicholls [1845], 3 How., 266).*

A privileged communication should not be subjected to microscopic examination to discover grounds of malice or falsity. Such excessive scrutiny would defeat the protection which the law throws over privileged communications. The ultimate test is that of *bona fides. (See White vs. Nicholls [1845], How., 266; Bradley vs. Heath [1831], 12 Pick. [Mass.], 163; Kent vs. Bongartz [1885], 15 R. L., 72; Street, Foundations of Legal Liability, vol. 1, pp. 308, 309; Newell, Slander and Libel, various citations; 25 Cyc. pages 385 et seq.).*

The Supreme Court likewise explained in *Art Borjal vs. Court of Appeals* (G.R. No. 126466, January 14, 1999) that:

> "A privileged communication may either be absolutely privileged or qualifiedly privileged. Absolutely privileged communications are those which are not actionable even if the author has acted in bad faith. An example is found in Sec. 11, Art. VI, of the 1987 Constitution which exempts a member of Congress from liability for any speech or debate in the Congress or in any Committee thereof. Upon the other hand, qualifiedly privileged communications containing defamatory imputations are not actionable unless found to have been made without good intention or justifiable motive. To this genre belong "private communications" and "fair and true report without any comments or remarks."

In the case of qualifiedly privileged communications, the test in determining whether or not the same can be considered protected is the *bona fides* test or the test of good faith. *(United States vs. Bustos, 37 Phil. 731 [1918], cited in Ponce vs. Legaspi, 208 SCRA 377, 392 [1992]).* Even if the statement is untrue, the same may not be considered defamatory under the test of good faith. *(ibid.).*

(1) Absolutely Privileged Matters.

An example of statements which is absolutely privileged is that which is provided for in Section 11 of Article VI of the 1987 Constitution. The press can invoke freedom of the press and free speech in trying to escape liability. Consequently, courts usually try to balance the competing interest of the parties concerned, *i.e.,* the defendant's freedom and the plaintiff's right to have his reputation protected.

Although the courts value the constitutional rights of individuals, the courts are likewise always on the guard on transgressions of the press. It was explained in one case that:

> This decision, in helping or making it easier for media people to meet their occupational hazard of libel suits, should by no means be viewed as encouraging irresponsible or licentious publications.
>
> Public officers and private individuals who are wronged through an inordinate exercise by newspapermen or media of freedom of speech and of the press have every right to avail themselves of the legal remedies for libel. Media cannot hide behind the constitutional guarantee of a free press to maliciously and recklessly malign the persons and reputations of public or private figures through the publication of falsehoods or fabrications, the

> sordid distortion of half-truths, or the playing up of human frailties for no justifiable end but to malign and titillate.
>
> At the same time, the Court should be vigilant against all attempts to harass or persecute an independent press or to restrain and chill the free expression of opinions. In this case, the intent of the amendment is to avoid the harassment of media persons through libel suits instituted in distant or out-of-the-way towns by public officers who could more conveniently file cases in their places of work. *(Marcelo Soriano vs. Intermediate Appellate Court, et al., G.R. No. 72383, November 9, 1988).*

(2) Qualified Privilege.

Article 354 provides for matters (considered non-constitutional privileged statements) which are qualifiedly or conditionally privileged in nature. The provision states that in the following cases, the imputations can still be shown to be malicious by proof of actual malice or malice in fact: (1) A private communication made by any person to another in the performance of any legal, moral or social duty; and (2) A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement, report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.

The two exceptions provided for under Article 354 are based on the wider guarantee of freedom of expression as an institution of all republican societies. Freedom of expression, in turn, is predicated on the proposition that the ordinary citizen has a right and a duty to involve himself in matters that affect the public welfare and, for this purpose, to inform himself of such matters. *(Esteban Manuel vs. The Hon. Ernani Cruz Pano, et al., G.R. No. L-46079, April 17, 1989).*

Justice Malcolm explained further in *United States vs. Felipe Bustos (supra)* that:

> Turning to the pages of history, we state nothing new when we set down the freedom of speech as cherished in democratic countries was unknown in the Philippine Islands before 1900. A prime cause for revolt was consequently ready made. Jose Rizal in *"Filipinas Despues de Cien Años" (The Philippines a Century Hence, pages 62 et seq.)* describing "the reforms *sine quibus non*," which the Filipinos insist upon, said:
>
> "The minister, . . . who wants his reforms to be reforms, must begin by declaring the press in the Philippines free and by instituting Filipino delegates."

The Filipino patriots in Spain, through the columns of "La Solidaridad" and by other means invariably in exposing the wants of the Filipino people demanded." *(See Mabini, La Revolucion Filipina).* The Malolos Constitution, the work of the Revolutionary Congress, in its Bill of Rights, zealously guarded freedom of speech and press and assembly and petition.

Mention is made of the foregoing data only to deduce the proposition that a reform so sacred to the people of these Islands and won at so dear as one would protect and preserve the covenant of liberty itself.

Next comes the period of American-Filipino cooperative effort. The Constitution of the United States and the State constitutions guarantee the right of freedom of speech and press and the right of assembly and petition. We are therefore, not surprised to find President McKinley in that Magna Carta of Philippine Liberty, the Instruction to the Second Philippine Commission, of April 7, 1900, laying down the inviolable rule "That no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the Government for a redress of grievances."

The Philippine Bill, the Act of Congress of July 1, 1902, and the Jones Law, the Act of Congress of August 29, 1916, in the nature of organic acts for the Philippines, continued this guaranty. The words quoted are not unfamiliar to students of Constitutional Law, for they are the counterpart of the first amendment to the Constitution of the United States, which the American people demanded before giving their approval to the Constitution.

We mention the foregoing facts only to deduce the proposition never to be forgotten for an instant that the guaranties mentioned are part and parcel of the Organic Law — of the Constitution — of the Philippines Islands.

These paragraphs found in the Philippine Bill of Rights are not threadbare verbiage. The language carries with it all the applicable jurisprudence of great English and American Constitutional cases. *(Kepner vs. U. S. [1904], 195 U.S., 100; Serra vs. Mortiga [1907], 204 U. S., 470).* And what are these principles? Volumes would inadequately answer. But included are the following:

The interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and an unjust accusation; the wound can be assuaged with the balm of a clear conscience. A public officer must not be too thin-skinned

with reference to comment upon his official acts. Only thus can the intelligence and dignity of the individual be exalted. Of course, criticism does not authorized defamation. Nevertheless, as the individual is less than the State, so must expected criticism be born for the common good. Rising superior to any official, or set of officials, to the Chief Executive, to the Legislature, to the Judiciary — to any or all the agencies of Government — public opinion should be the constant source of liberty and democracy. (See the well considered cases of *Wason vs. Walter, 4 L.R. 4 Q. B., 73; Seymour vs. Butterworth, 3 F. & F., 372; The Queen vs. Sir R. Garden, 5 Q. B. D., 1).*

The guaranties of a free speech and a free press include the right to criticize judicial conduct. The administration of the law is a matter of vital public concern. Whether the law is wisely or badly enforced is, therefore, a fit subject for proper comment. If the people cannot criticize a justice of the peace or a judge the same as any other public officer, public opinion will be effectively muzzled. Attempted terrorization of public opinion on the part of the judiciary would be tyranny of the basest sort. The sword of Damocles in the hands of a judge does not hang suspended over the individual who dares to assert his prerogative as a citizen and to stand up bravely before any official. On the contrary, it is a duty which every one owes to society or to the State to assist in the investigation of any alleged misconduct. It is further the duty of all know of any official dereliction on the part of a magistrate or the wrongful act of any public officer to bring the facts to the notice of those whose duty it is to inquire into and punish them. In the words of Mr. Justice Gayner, who contributed so largely to the law of libel. "The people are not obliged to speak of the conduct of their officials in whispers or with bated breath in a free government, but only in a despotism." *(Howarth vs. Barlow [1906], 113 App. Div., N. Y., 510).*

The right to assemble and petition is the necessary consequence of republican institutions and the complement of the right of free speech. Assembly means a right on the part of citizens to meet peaceably for consultation in respect to public affairs. Petition means that any person or group of persons can apply, without fear of penalty, to the appropriate branch or office of the government for a redress of grievances. The persons assembling and petitioning must, of course, assume responsibility for the charges made.

Public policy, the welfare of society, and the orderly administration of government have demanded protection for public opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege.

> "The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may in some instances afford an immunity to the evil-disposed and malignant slanderer.'" *(Abbott vs. National Bank of Commerce, Tacoma [1899], 175 U.S., 409, 411).*

(2.1) Complaints against public officials.

A complaint against public officials addressed to proper authorities is qualifiedly privileged within the purview of paragraph 1 of Article 354 because the filing thereof is being done in the performance of one's duty as a citizen. "A communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which without this privilege would be slanderous and actionable." *(Harrison vs. Bush, 5E. & B. 344; 1 Jur. [N.S.], 846; 25 L.J.W.Q.B., 25, cited in Mercado vs. Court of First Instance, G.R. No. L-38753, August 25, 1982, 116 SCRA 93).*

However, a written letter containing libelous matter cannot be classified as privileged when it is published and circulated among the public. *(Lacsa v. IAC, G.R. No. 74907, May 23, 1988, 161 SCRA 427).*

As a rule, it is the right and duty of a citizen to make a complaint of any misconduct on the part of public officials, which comes to his notice, to those charged with supervision over them. Such a communication is qualifiedly privileged and the author is not guilty of libel. The rule on privilege, however, imposes an additional requirement. Such complaints should be addressed solely to some official having jurisdiction to inquire into the charges, or power to redress the grievance or has some duty to perform or interest in connection therewith. *(US v. Galeza, 31 Phil. 365).* In the instant case, none of the persons to whom the letter was sent, was vested with the power of supervision over the mayor or the authority to investigate the charges made against the latter. *(Lope O. Daez vs. The Hon. Court of Appeals, G.R. No. 47971, October 31, 1990).*

(2.2) Report to a Superior Officer.

Another matter which is conditionally privileged is a report submitted by a subordinate public officer to his or her superior. The Supreme Court explained in *Deano vs. Godinez* (12 SCRA 483, 487 [1964], cited in *Alonzo vs. Court of Appeals*): "Indeed, the communication now denounced by plaintiff as defamatory is one sent by defendant to his immediate superior in the performance of a legal

duty, or in the nature of a report submitted in the exercise of official function. He sent it as an explanation of a matter contained in an indorsement sent to him by his superior officer. It is a report submitted in obedience to a lawful duty, though in doing so defendant employed a language somewhat harsh and uncalled for. But such is excusable in the interest of public policy." As already stated earlier, the privilege may be negated only by proof of malice; the test in such a case is that of *bona fides*.

The privilege is negated if the report is circulated to other persons. Thus, in one case, the letter report lost its character as a qualified privileged communication when the defendant furnished copies thereof to several provincial and national government agencies which had no interest, right or duty to prosecute said charges. *(Pastor T. Bravo vs. Court of Appeals, G.R. No. L-48772, May 8, 1992)*.

(2.3) Allegations in Pleadings.

Allegations and averments in pleadings filed in court are absolutely privileged as long as they are relevant or pertinent to the issues. *(Ponce vs. Legaspi, 208 SCRA 377, 392 [1992])*. The test to break through the protective barrier of an absolutely privileged communication is not *bona fides* but relevance. *(ibid.)*. There is no liability so long as the averments are relevant to the issues involved in the case.

The Court explained in *Justiniani vs. Castillo* (G.R. No. L-41114, June 21, 1988):

> "The prevailing jurisprudence in this jurisprudence, particularly in the case of *Sison vs. David* [G.R. No. L-11268, Jan. 28, 1961] is that statements made in a pleading in a civil action are absolutely privileged and no action for libel may be founded thereon provided such statements are pertinent and relevant to the subject under inquiry, however false and malicious they may be. In *People vs. Aquino* [L-23908, October 29, 1966, 18 SCRA 555, 558], We held that the person who freely articulated himself while exercising his duty under the express authority of law, may he be the judge, lawyer or witness, does not expose himself to the risk of criminal prosecution or of an action for damages.
>
> "If the rule were otherwise, the courts would be flooded with libel suits from irate litigants who will be suing each other on the basis of each and every pleading. Such a rule will breed endless vexatious litigations contrary to public policy and the orderly administration of justice."

(2.4) Publication of a Pleading.

Is the publication of a complaint filed in court or any quasi-judicial agency before any judicial action is taken thereon, privileged as a report of a judicial proceeding? The Supreme Court took the affirmative stance in its decision in *Nanerico D. Santos vs. The Court of Appeals* (G.R. No. L-45031, October 21, 1991) where it ruled that:

> "Petitioner now insists that the published article is privileged, being a fair and true report of a judicial proceeding, without comments or remarks, and therefore not punishable. He maintains that the alleged libelous news report which came out in the Manila Daily Bulletin was merely lifted from a complaint word for word, except for the last innocuous paragraph which he added to the effect that "(i)nvestors and Sison's fellow brokers are eagerly awaiting developments on these charges." Moreover, he contends that the cited rulings in the cases of *Barreto vs. Philippine Publishing Co.*, 30 Phil. 88 and *Choa Tek Hee vs. Philippine Publishing Co.*, 34 Phil. 447, are no longer valid. Petitioner's arguments are well-taken.
>
> It must be recalled that in holding petitioner liable for libel, both the trial court and the Appellate Court applied the doctrine established in the aforementioned 1915-1916 cases. Briefly:
>
> "An answer to a complaint filed in court, containing libelous matter, is not privileged so as to exempt a newspaper from prosecution under the Libel Act for a publication thereof, no action having been taken by the court thereon. *(Barretto vs. Philippine Publishing Co., supra).*
>
> "Publishing an article based upon a complaint filed in a Court of First Instance before any judicial action is taken thereon is not privileged as a report of a judicial proceeding." *(Choa Tek Hee vs. Philippine Publishing Co., supra).*
>
> The Court, through Justice Moreland, gave the rationale:
>
> "The foundation of the right of the public to know what is going on in the courts is not the fact that the public, or a portion of it, is curious, or that what goes on in the court is news, or would be interesting, or would furnish topics of conversation; but is simply that it has a right to know whether a public officer is properly performing his duty. In other words, the light of the public to be informed of the proceedings in court is not founded in the desire or necessity of people to know about the doings of others, but in the necessity of knowing whether its servant, the judge, is properly performing his duty. Only clear provisions of law can justify a newspaper, or an individual, in spreading baseless charges of fraud or corruption made by one man against another, wherever such charges may be found, The fact that such charges are contained in a paper filed in court gives no inherent right to

an individual to peddle its contents from door to door or spread them broadcast; and a newspaper has no more privileges than an individual. Between the newspaper and the individual there is no difference of right. The real difference between them lies in the ability of the one to spread the publication more quickly, more extensively, and more thoroughly than the other. Unless, therefore, the statute plainly confers that right, the publication of such charges is actionable unless justified. . . .

"It is generally agreed that the privilege, the right to publish without liability for damages, does not extend to mere pleadings filed in court, as, for example, bills in equity, upon which there has been no action. (Cited cases). The reason for this rule is thus stated in *Park vs. Detroit Free Press Co.*: 'There is no rule of law which authorizes any but the parties interested to handle the files or publish the contents of their matters in litigation. The parties, and none but the parties, control them. One of the reasons why parties are privileged from suit for accusations made in their pleadings is that the pleadings are addressed to courts where the facts can be fairly tried, and to no other readers. If pleadings and the documents can be published to the world by any one who gets access to them, no more effectual way of doing malicious mischief with impunity could be devised than filing papers containing false and scurrilous charges, and getting these printed as news. . . . .' *(Barreto vs. Philippine Publishing Co., supra, pp. 92-93, 105-106).*

However, it would seem that the passage of time has worked to petitioner's great advantage. In 1976, the doctrine so fervently and eloquently espoused by Justice Moreland in the Barreto case was overturned by this Court through *Justice Esguerra in Cuenco vs. Cuenco*, No. L-29560, March 31, 1976, 70 SCRA 212, 234-235. Thus:

"The reason for the rule that pleadings in judicial proceedings are considered privileged is not only because said pleadings have become part of public record open to the public to scrutinize, but also due to the undeniable fact that said pleadings are presumed to contain allegations and assertions lawful and legal in nature, appropriate to the disposition of issues ventilated before the courts for the proper administration of justice and, therefore, of general public concern. Moreover, pleadings are presumed to contain allegations substantially true because they can be supported by evidence presented in good faith, the contents of which would be under the scrutiny of courts, and therefore, subject to be purged of all improprieties and illegal statements contained therein.

"We are firmly convinced that the correct role on the matter should be that a fair and true report of a complaint filed in court without remarks nor comments even before an answer is filed or

a decision promulgated should be covered by the privilege."

In *Manuel vs. Pano, supra,* the Court, speaking through Justice Cruz, categorically stated that the publication of a complaint, being a true and fair report of a judicial proceeding, made in good faith and without comments or remarks, is privileged and comes under Item 2 of Article 354. It is no longer correct to state that Article 354 is not applicable because the published complaint as filed would not by itself constitute a judicial proceeding, as the issues have not as yet been joined. That doctrine established in the *Barretto* and *Choa Tek Hee* cases is no longer controlling and has been superseded by the Cuenco case. Moreover, it could also be argued that the complaint, by itself, is a public record and may be published as such under Rule 135, Section 2 of the Rules of Court unless the court directs otherwise in the interest of morality or decency.

We now come to the all-important consideration of whether the prosecution, in an effort to remove the protection of privilege, was able to establish that the columnist charged with libel was in fact motivated by malice.

It is plainly evident from a reading of the published article itself that it is but a faithful reproduction of a pleading filed before a quasi-judicial body. There are no embellishments, wild imputations, distortions or defamatory comments calculated to damage the reputation of the offended parties and expose them to public contempt. What petitioner has done was to simply furnish the readers with the information that a complaint has been filed against a brokerage firm. Then he proceeded to reproduce that pleading verbatim in his column. Now, this is decidedly part and parcel of petitioner's job as a columnist whose "beat" happens to be the stock market. He is obligated to keep the public abreast of the current news in that particular field. On this crucial point, the Court is inclined to resolve all doubts in favor of petitioner and declare that there is no libel. It may be well for us to keep in mind that the rule on privileged communications in defamation cases developed because "public policy, the welfare of society and the orderly administration of justice" have demanded protection for public opinion. Therefore, they should not be subjected to microscopic examination to discover grounds of malice and falsehood. Such excessive scrutiny would defeat the protection which the law throws over privileged communications.

The controversial publication being a fair and true report of a judicial proceeding and made without malice, we find the author entitled to the protection and immunity of the rule on privileged matters under Article 354(2). It follows that he cannot be held criminally liable for libel."

(2.5) Fair Comment.

A rule that is often invoked is the rule enunciated by the United States Supreme Court in *New York Times vs. Sullivan* (376 US 254). An explanation of the background and ruling in the case is found in *Borjal*:

> "*New York Times v. Sullivan* was decided by the U.S. Supreme Court in the 1960's at the height of the bloody rioting in the American South over racial segregation. The then City Commissioner L. B. Sullivan of Montgomery, Alabama, sued *New York Times* for publishing a paid political advertisement espousing racial equality and describing police atrocities committed against students inside a college campus. As commissioner having charge over police actions Sullivan felt that he was sufficiently identified in the ad as the perpetrator of the outrage; consequently, he sued *New York Times* on the basis of what he believed were libelous utterances against him.
>
> "The U.S. Supreme Court speaking through Mr. Justice William J. Brennan, Jr. ruled against Sullivan holding that honest criticisms on the conduct of public officials and public figures are insulated from libel judgments. The guarantees of freedom of speech and press prohibit a public official or public figure from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, *i.e.*, with knowledge that it was false or with reckless disregard of whether it was false or not.
>
> "The *raison d'etre* for *New York Times* doctrine was that to require critics of official conduct to guarantee the truth of all their factual assertions on pain of libel judgments would lead to self-censorship, since would-be critics would be deterred from voicing out their criticisms even if such were believed to be true, or were in fact true, because of doubt whether it could be proved or because of fear the expense of having to prove it."

However, despite repeated reference to *New York Times*, the force of the doctrine is being weakened by reliance on the presumption of malice under Article 354 of the Revised Penal Code. An eminent constitutional law authority was prompted to comment that since malice is presumed, any reference to New York Time*s* is largely lip service. *(Joaquin G. Bernas, The 1987 Constitution of the Republic of the Philippines: A Commentary 1996 Ed., p. 259).*

Nevertheless, the Supreme Court continues to cite the ruling in *New York Times*. It remains to be seen, however, if the spirit of the ruling will be consistently applied in this jurisdiction.

In *Arturo Borjal vs. Court of Appeals,* the Supreme Court clari-

fied that writings may still be considered privileged even if they are not within the exceptions of Article 354 of the Revised Penal Code, that is, even if they are neither "private communications" nor "fair and true report without any comments or remarks." The enumeration under Article 354 is not an exclusive list of qualifiedly privileged communications.

The Supreme Court reiterated the rule to the effect that fair commentaries on matters of public interest are privileged and constitute a valid defense in an action for libel or slander. The doctrine of fair comment means that while in general every discreditable imputation publicly made is deemed false, because every man is presumed innocent until his guilt is judicially proved, and every false imputation is deemed malicious, nevertheless, when the discreditable imputation is directed against a public person in his public capacity, it is not necessarily actionable.

More importantly, the Court postulated that while, generally, malice can be presumed from defamatory words, the privileged character of a communication destroys the presumption of malice. The onus of proving actual malice then lies on plaintiff. The plaintiff must bring home to the defendant, the existence of malice as the true motive of his conduct. *(Borjal vs. Court of Appeals, ibid.).*

The Supreme Court explained further:

> "x x x To be sure, the enumeration under Article 354 is not an exclusive list of qualifiedly privileged communications since fair *commentaries on matters of public interest* are likewise privileged. The rule on privileged communications had its genesis not in the nation's penal code but in the Bill of Rights of the Constitution guaranteeing freedom of speech and of the press. As early as 1918, in *United States vs. Canete*, this Court ruled that publications which are privileged for reasons of public policy are protected by the constitutional guarantee of freedom of speech. This constitutional right cannot be abolished by the mere failure of the legislature to give it express recognition in the statute punishing libels.
>
> The concept of privileged communications is implicit in the freedom of the press. As held in *Elizalde vs. Gutierrez* and reiterated in *Santos vs. Court of Appeals* —
>
> To be more specific, no culpability could be imputed to petitioners for the alleged offending publication without doing violence to the concept of privileged communications implicit in the freedom of the press. As was so well put by Justice Malcolm in *Bustos:* 'Public policy, the welfare of society, and the orderly administration of government have demanded protection of public

> opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege.'
>
> The doctrine formulated in these two (2) cases resonates the rule that privileged communications must, *sui generis,* be protective of public opinion. This closely adheres to the democratic theory of free speech as essential to collective self-determination and eschews the strictly libertarian view that it is protective solely of self-expression which, in the words of Yale Sterling Professor Owen Fiss, makes its appeal to the individualistic ethos that so dominates our popular and political culture. It is therefore clear that the restrictive interpretation vested by the Court of Appeals on the penal provision exempting from liability only private communications and fair and true report without comments or remarks defeats, rather than promotes, the objective of the rule on privileged communications, sadly contriving as it does, to suppress the healthy effloresence of public debate and opinion as shining linchpins of truly democratic societies."

It should be noted that the Supreme Court ruled in *Borjal* case that a public figure within the purview of the *New York Times* ruling is the public figure defined in *Ayers Production Pty. Ltd. vs. Capulong* (160 SCRA 861 [1988]). He is any person who, by his accomplishments, fame, mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a public personage.

Vasquez vs. Court of Appeals (G.R. No. 118971, September 15, 1999) involved an article of the petitioner that reported that charges have been filed against a barangay official that the latter illegally obtained title to several lots. In acquitting the accused, the Supreme Court applied the "actual malice" rule in *New York Times*. It ruled that the prosecution failed to prove not only that the charges made by the petitioner were false but also that petitioner made them with knowledge of their falsity or with reckless disregard of whether they were false or not.

CASES:

MVRS PUBLICATIONS, INC.,ET. AL. vs. ISLAMIC DA'WAH COUNCIL OF THE PHILIPPINES, INC., ET AL.
[G.R. No. 135306. January 28, 2003.]

BELLOSILLO, J.:

I may utterly detest what you write, but I shall fight to the death to make it possible for you to continue writing it. — Voltaire

VOLTAIRE'S PONTIFICAL VERSE bestirs once again the basic liber-

ties to free speech and free press — liberties that belong as well, if not more, to those who question, who do not conform, who differ. For the ultimate good which we all strive to achieve for ourselves and our posterity can better be reached by a free exchange of ideas, where the best test of truth is the power of the thought to get itself accepted in the competition of the free market — not just the ideas we desire, but including those thoughts we despise.

ISLAMIC DA'WAH COUNCIL OF THE PHILIPPINES, INC., a local federation of more than seventy (70) Muslim religious organizations, and individual Muslims ABDULRAHMAN R.T. LINZAG, IBRAHIM F.P. ARCILLA, ABDUL RASHID DE GUZMAN, AL-FARED DA SILVA and IBRAHIM B.A. JUNIO, filed in the Regional Trial Court of Manila a complaint for damages in their own behalf and as a class suit in behalf of the Muslim members nationwide against MVRS PUBLICATIONS, INC., MARS C. LACONSAY, MYLA C. AGUJA and AGUSTINO G. BINEGAS, JR., arising from an article published in the 1 August 1992 issue of Bulgar, a daily tabloid. The article reads:

> *"ALAM BA NINYO?*
>
> *Na ang mga baboy at kahit anong uri ng hayop sa Mindanao ay hindi kinakain ng mga Muslim?*
>
> *Para sa kanila ang mga ito ay isang sagradong bagay. Hindi nila ito kailangang kainin kahit na sila pa ay magutom at mawalan ng ulam sa tuwing sila ay kakain. Ginagawa nila itong Diyos at sinasamba pa nila ito sa tuwing araw ng kanilang pangingilin lalung-lalo na sa araw na tinatawag nilang 'Ramadan.'"*

The complaint alleged that the libelous statement was insulting and damaging to the Muslims; that these words alluding to the pig as the God of the Muslims was not only published out of sheer ignorance but with intent to hurt the feelings, cast insult and disparage the Muslims and Islam, as a religion in this country, in violation of law, public policy, good morals and human relations; that on account of these libelous words Bulgar insulted not only the Muslims in the Philippines but the entire Muslim world, especially every Muslim individual in non-Muslim countries.

MVRS PUBLICATIONS, INC., and AGUSTINO G. BINEGAS, JR., in their defense, contended that the article did not mention respondents as the object of the article and therefore were not entitled to damages; and, that the article was merely an expression of belief or opinion and was published without malice nor intention to cause damage, prejudice or injury to Muslims.

[The trial court dismissed the complaint holding that the plaintiffs failed to establish their cause of action since the persons allegedly defamed by the article were not specifically identified. The Court of Appeals reversed the decision of the trial court.]

Hence, the instant petition for review assailing the findings of the appellate court (a) on the existence of the elements of libel, (b) the right of

respondents to institute the class suit, and, (c) the liability of petitioners for moral damages, exemplary damages, attorney's fees and costs of suit.

Defamation, which includes libel and slander, means the offense of injuring a person's character, fame or reputation through false and malicious statements. It is that which tends to injure reputation or to diminish the esteem, respect, good will or confidence in the plaintiff or to excite derogatory feelings or opinions about the plaintiff. It is the publication of anything which is injurious to the good name or reputation of another or tends to bring him into disrepute. Defamation is an invasion of a relational interest since it involves the opinion which others in the community may have, or tend to have, of the plaintiff.

It must be stressed that words which are merely insulting are not actionable as libel or slander per se, and mere words of general abuse however opprobrious, ill-natured, or vexatious, whether written or spoken, do not constitute a basis for an action for defamation in the absence of an allegation for special damages. The fact that the language is offensive to the plaintiff does not make it actionable by itself.

Declarations made about a large class of people cannot be interpreted to advert to an identified or identifiable individual. Absent circumstances specifically pointing or alluding to a particular member of a class, no member of such class has a right of action 11 without at all impairing the equally demanding right of free speech and expression, as well as of the press, under the Bill of Rights. 12 Thus, in Newsweek, Inc. v. Intermediate Appellate Court, 13 we dismissed a complaint for libel against Newsweek, Inc., on the ground that private respondents failed to state a cause of action since they made no allegation in the complaint that anything contained in the article complained of specifically referred to any of them. Private respondents, incorporated associations of sugarcane planters in Negros Occidental claiming to have 8,500 members and several individual members, filed a class action suit for damages in behalf of all sugarcane planters in Negros Occidental. The complaint filed in the Court of First Instance of Bacolod City alleged that Newsweek, Inc., committed libel against them by the publication of the article "Island of Fear" in its weekly newsmagazine allegedly depicting Negros Province as a place dominated by wealthy landowners and sugar planters who not only exploited the impoverished and underpaid sugarcane workers but also brutalized and killed them with impunity. Private respondents alleged that the article showed a deliberate and malicious use of falsehood, slanted presentation and/or misrepresentation of facts intended to put the sugarcane planters in a bad light, expose them to public ridicule, discredit and humiliation in the Philippines and abroad, and make them the objects of hatred, contempt and hostility of their agricultural workers and of the public in general. We ratiocinated —

> . . . where the defamation is alleged to have been directed at a group or class, it is essential that the statement must be so sweeping or all-embracing as to apply to every individual in that group or class, or sufficiently specific so that each individual

> in the class or group can prove that the defamatory statement specifically pointed to him, so that he can bring the action separately, if need be . . . The case at bar is not a class suit. It is not a case where one or more may sue for the benefit of all, or where the representation of class interest affected by the judgment or decree is indispensable to make each member of the class an actual party. We have here a case where each of the plaintiffs has a separate and distinct reputation in the community. They do not have a common or general interest in the subject matter of the controversy.

In the present case, there was no fairly identifiable person who was allegedly injured by the Bulgar article. Since the persons allegedly defamed could not be identifiable, private respondents have no individual causes of action; hence, they cannot sue for a class allegedly disparaged. Private respondents must have a cause of action in common with the class to which they belong to in order for the case to prosper.

An individual Muslim has a reputation that is personal, separate and distinct in the community. Each Muslim, as part of the larger Muslim community in the Philippines of over five (5) million people, belongs to a different trade and profession; each has a varying interest and a divergent political and religious view — some may be conservative, others liberal. A Muslim may find the article dishonorable, even blasphemous; others may find it as an opportunity to strengthen their faith and educate the non-believers and the "infidels." There is no injury to the reputation of the individual Muslims who constitute this community that can give rise to an action for group libel. Each reputation is personal in character to every person. Together, the Muslims do not have a single common reputation that will give them a common or general interest in the subject matter of the controversy.

In *Arcand v. The Evening Call Publishing Company*, the United States Court of Appeals held that one guiding principle of group libel is that defamation of a large group does not give rise to a cause of action on the part of an individual unless it can be shown that he is the target of the defamatory matter.

The rule on libel has been restrictive. In an American case, a person had allegedly committed libel against all persons of the Jewish religion. The Court held that there could be no libel against an extensive community in common law. In an English case, where libel consisted of allegations of immorality in a Catholic nunnery, the Court considered that if the libel were on the whole Roman Catholic Church generally, then the defendant must be absolved. 16 With regard to the largest sectors in society, including religious groups, it may be generally concluded that no criminal action at the behest of the state, or civil action on behalf of the individual, will lie.

In another case, the plaintiffs claimed that all Muslims, numbering more than 600 million, were defamed by the airing of a national televi-

sion broadcast of a film depicting the public execution of a Saudi Arabian princess accused of adultery, and alleging that such film was "insulting and defamatory" to the Islamic religion. The United States District Court of the Northern District of California concluded that the plaintiffs' prayer for $20 Billion in damages arising from "an international conspiracy to insult, ridicule, discredit and abuse followers of Islam throughout the world, Arabs and the Kingdom of Saudi Arabia" bordered on the "frivolous," ruling that the plaintiffs had failed to demonstrate an actionable claim for defamation. The California Court stressed that the aim of the law on defamation was to protect individuals; a group may be sufficiently large that a statement concerning it could not defame individual group members.

Philip Wittenberg, in his book "Dangerous Words: A Guide to the Law of Libel," discusses the inappropriateness of any action for tortious libel involving large groups, and provides a succinct illustration:

> There are groupings which may be finite enough so that a description of the body is a description of the members. Here the problem is merely one of evaluation. Is the description of the member implicit in the description of the body, or is there a possibility that a description of the body may consist of a variety of persons, those included within the charge, and those excluded from it?
>
> A general charge that the lawyers in the city are shysters would obviously not be a charge that all of the lawyers were shysters. A charge that the lawyers in a local point in a great city, such as Times Square in New York City, were shysters would obviously not include all of the lawyers who practiced in that district; but a statement that all of the lawyers who practiced in a particular building in that district were shysters would be a specific charge, so that any lawyer having an office within that building could sue.
>
> If the group is a very large one, then the alleged libelous statement is considered to have no application to anyone in particular, since one might as well defame all mankind. Not only does the group as such have no action; the plaintiff does not establish any personal reference to himself. At present, modern societal groups are both numerous and complex. The same principle follows with these groups: as the size of these groups increases, the chances for members of such groups to recover damages on tortious libel become elusive. This principle is said to embrace two (2) important public policies: first, where the group referred to is large, the courts presume that no reasonable reader would take the statements as so literally applying to each individual member; and second, the limitation on liability would satisfactorily safeguard freedom of speech and expression, as well as of the press, effecting a sound compromise between the conflicting

fundamental interests involved in libel cases.

In the instant case, the Muslim community is too vast as to readily ascertain who among the Muslims were particularly defamed. The size of the group renders the reference as indeterminate and generic as a similar attack on Catholics, Protestants, Buddhists or Mormons would do. The word "Muslim" is descriptive of those who are believers of Islam, a religion divided into varying sects, such as the Sunnites, the Shiites, the Kharijites, the Sufis and others based upon political and theological distinctions. "Muslim" is a name which describes only a general segment of the Philippine population, comprising a heterogeneous body whose construction is not so well defined as to render it impossible for any representative identification.

The Christian religion in the Philippines is likewise divided into different sects: Catholic, Baptist, Episcopalian, Presbyterian, Lutheran, and other groups the essence of which may lie in an inspired charlatan, whose temple may be a corner house in the fringes of the countryside. As with the Christian religion, so it is with other religions that represent the nation's culturally diverse people and minister to each one's spiritual needs. The Muslim population may be divided into smaller groups with varying agenda, from the prayerful conservative to the passionately radical. These divisions in the Muslim population may still be too large and ambiguous to provide a reasonable inference to any personality who can bring a case in an action for libel.

The foregoing are in essence the same view scholarly expressed by Mr. Justice Reynato S. Puno in the course of the deliberations in this case. We extensively reproduce hereunder his comprehensive and penetrating discussion on group libel —

> Defamation is made up of the twin torts of libel and slander — the one being, in general, written, while the other in general is oral. In either form, defamation is an invasion of the interest in reputation and good name. This is a "relational interest" since it involves the opinion others in the community may have, or tend to have of the plaintiff.
>
> The law of defamation protects the interest in reputation — the interest in acquiring, retaining and enjoying one's reputation as good as one's character and conduct warrant. The mere fact that the plaintiff's feelings and sensibilities have been offended is not enough to create a cause of action for defamation. Defamation requires that something be communicated to a third person that may affect the opinion others may have of the plaintiff. The unprivileged communication must be shown of a statement that would tend to hurt plaintiff's reputation, to impair plaintiff's standing in the community.
>
> Although the gist of an action for defamation is an injury to reputation, the focus of a defamation action is upon the alleg-

edly defamatory statement itself and its predictable effect upon third persons. A statement is ordinarily considered defamatory if it "tend[s] to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace. . . ." The Restatement of Torts defines a defamatory statement as one that "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."

Consequently as a prerequisite to recovery, it is necessary for the plaintiff to prove as part of his prima facie case that the defendant (1) published a statement that was (2) defamatory (3) of and concerning the plaintiff.

The rule in libel is that the action must be brought by the person against whom the defamatory charge has been made. In the American jurisdiction, no action lies by a third person for damages suffered by reason of defamation of another person, even though the plaintiff suffers some injury therefrom. For recovery in defamation cases, it is necessary that the publication be "of and concerning the plaintiff." Even when a publication may be clearly defamatory as to somebody, if the words have no personal application to the plaintiff, they are not actionable by him. If no one is identified, there can be no libel because no one's reputation has been injured . . .

In fine, in order for one to maintain an action for an alleged defamatory statement, it must appear that the plaintiff is the person with reference to whom the statement was made. This principle is of vital importance in cases where a group or class is defamed since, usually, the larger the collective, the more difficult it is for an individual member to show that he was the person at whom the defamation was directed.

If the defamatory statements were directed at a small, restricted group of persons, they applied to any member of the group, and an individual member could maintain an action for defamation. When the defamatory language was used toward a small group or class, including every member, it has been held that the defamatory language referred to each member so that each could maintain an action. This small group or class may be a jury, persons engaged in certain businesses, professions or employments, a restricted subdivision of a particular class, a society, a football team, a family, small groups of union officials, a board of public officers, or engineers of a particular company.

In contrast, if defamatory words are used broadly in respect to a large class or group of persons, and there is nothing that points, or by proper colloquium or innuendo can be made to apply, to a particular member of the class or group, no member

has a right of action for libel or slander. Where the defamatory matter had no special, personal application and was so general that no individual damages could be presumed, and where the class referred to was so numerous that great vexation and oppression might grow out of the multiplicity of suits, no private action could be maintained. This rule has been applied to defamatory publications concerning groups or classes of persons engaged in a particular business, profession or employment, directed at associations or groups of association officials, and to those directed at miscellaneous groups or classes of persons.

Distinguishing a small group — which if defamed entitles all its members to sue from a large group — which if defamed entitles no one to sue — is not always so simple. Some authorities have noted that in cases permitting recovery, the group generally has twenty five (25) or fewer members. However, there is usually no articulated limit on size. Suits have been permitted by members of fairly large groups when some distinguishing characteristic of the individual or group increases the likelihood that the statement could be interpreted to apply individually. For example, a single player on the 60 to 70 man Oklahoma University football team was permitted to sue when a writer accused the entire team of taking amphetamines to "hop up" its performance; the individual was a fullback, *i.e.*, a significant position on the team and had played in all but two of the team's games.

A prime consideration, therefore, is the public perception of the size of the group and whether a statement will be interpreted to refer to every member. The more organized and cohesive a group, the easier it is to tar all its members with the same brush and the more likely a court will permit a suit from an individual even if the group includes more than twenty five (25) members. At some point, however, increasing size may be seen to dilute the harm to individuals and any resulting injury will fall beneath the threshold for a viable lawsuit.

. . . There are many other groupings of men than those that are contained within the foregoing group classifications. There are all the religions of the world, there are all the political and ideological beliefs; there are the many colors of the human race. Group defamation has been a fertile and dangerous weapon of attack on various racial, religious and political minorities. Some states, therefore, have passed statutes to prevent concerted efforts to harass minority groups in the United States by making it a crime to circulate insidious rumors against racial and religious groups. Thus far, any civil remedy for such broadside defamation has been lacking.

There have been numerous attempts by individual members to seek redress in the courts for libel on these groups, but very few

> have succeeded because it felt that the groups are too large and poorly defined to support a finding that the plaintiff was singled out for personal attack . . . (citations omitted).

Our conclusion therefore is that the statements published by petitioners in the instant case did not specifically identify nor refer to any particular individuals who were purportedly the subject of the alleged libelous publication. Respondents can scarcely claim to having been singled out for social censure pointedly resulting in damages.

[The Supreme Court went on to explain the tort of intentional infliction of emotional distress. It concluded that the action cannot likewise be maintained under said theory because no particular individual was identified in the questioned newspaper article.]

x x x

In this connection, the doctrines in Chaplinsky and Beauharnais had largely been superseded by subsequent First Amendment doctrines. Back in simpler times in the history of free expression the Supreme Court appeared to espouse a theory, known as the Two-Class Theory, that treated certain types of expression as taboo forms of speech, beneath the dignity of the First Amendment. The most celebrated statement of this view was expressed in Chaplinsky:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Today, however, the theory is no longer viable; modern First Amendment principles have passed it by. American courts no longer accept the view that speech may be proscribed merely because it is "lewd," "profane," "insulting" or otherwise vulgar or offensive. Cohen v. California is illustrative: Paul Robert Cohen wore a jacket bearing the words "Fuck the Draft" in a Los Angeles courthouse in April 1968, which caused his eventual arrest. Cohen was convicted for violating a California statute prohibiting any person from "disturb[ing] the peace . . . by offensive conduct." The U.S. Supreme Court conceded that Cohen's expletive contained in his jacket was "vulgar," but it concluded that his speech was nonetheless protected by the right to free speech. It was neither considered an "incitement" to illegal action nor "obscenity." It did not constitute insulting or "fighting" words for it had not been directed at a person who was likely to retaliate or at someone who could

not avoid the message. In other words, no one was present in the Los Angeles courthouse who would have regarded Cohen's speech as a direct personal insult, nor was there any danger of reactive violence against him.

No specific individual was targeted in the allegedly defamatory words printed on Cohen's jacket. The conviction could only be justified by California's desire to exercise the broad power in preserving the cleanliness of discourse in the public sphere, which the U.S. Supreme Court refused to grant to the State, holding that no objective distinctions can be made between vulgar and nonvulgar speech, and that the emotive elements of speech are just as essential in the exercise of this right as the purely cognitive. As Mr. Justice Harlan so eloquently wrote: "[O]ne man's vulgarity is another man's lyric . . . words are often chosen as much for their emotive as their cognitive force." With Cohen, the U.S. Supreme Court finally laid the Constitutional foundation for judicial protection of provocative and potentially offensive speech.

Similarly, libelous speech is no longer outside the First Amendment protection. Only one small piece of the Two-Class Theory in Chaplinsky survives — U.S. courts continue to treat "obscene" speech as not within the protection of the First Amendment at all. With respect to the "fighting words" doctrine, while it remains alive it was modified by the current rigorous clear and present danger test. Thus, in Cohen the U.S. Supreme Court in applying the test held that there was no showing that Cohen's jacket bearing the words "Fuck the Draft" had threatened to provoke imminent violence; and that protecting the sensibilities of onlookers was not sufficiently compelling interest to restrain Cohen's speech.

Beauharnais, which closely followed the Chaplinsky doctrine, suffered the same fate as Chaplinsky. Indeed, when Beauharnais was decided in 1952, the Two-Class Theory was still flourishing. While concededly the U.S. High Tribunal did not formally abandon Beauharnais, the seminal shifts in U.S. constitutional jurisprudence substantially undercut Beauharnais and seriously undermined what is left of its vitality as a precedent. Among the cases that dealt a crushing impact on Beauharnais and rendered it almost certainly a dead letter case law are Brandenburg v. Ohio, and, again, Cohen v. California. These decisions recognize a much narrower set of permissible grounds for restricting speech than did Beauharnais.

In Brandenburg, appellant who was a leader of the Ku Klux Klan was convicted under the Ohio Criminal Syndicalism Statute for advocating the necessity, duty and propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reforms; and for voluntarily assembling with a group formed to teach or advocate the doctrines of criminal syndicalism. Appellant challenged the statute and was sustained by the U.S. Supreme Court, holding that the advocacy of illegal action becomes punishable only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. Except in unusual instances, Brandenburg protects the advocacy of lawlessness as long as such speech is not translated into action.

The importance of the Brandenburg ruling cannot be overemphasized.

Prof. Smolla affirmed that "Brandenburg must be understood as overruling Beauharnais and eliminating the possibility of treating group libel under the same First Amendment standards as individual libel." It may well be considered as one of the lynchpins of the modern doctrine of free speech, which seeks to give special protection to politically relevant speech.

[The Supreme Court reinstated the Order of the trial court dismissing the case.]

ARTURO BORJAL vs. COURT OF APPEALS
G.R. No. 126466, January 14, 1999

"The question is not so much as who was aimed at as who was hit." *(Pound, J., in Corrigan v. Bobbs-Merill Co., 228 N .Y . 58 [1920]).*

BELLOSILLO, *J.*:

Perpetually Hagridden as the public is about losing one of the most basic yet oft hotly contested freedoms of man, the issue of the right of free expression bestirs and presents itself time and again, in cyclic occurrence, to inveigle, nay, challenge the courts to re-survey its ever shifting terrain, explore and furrow its heretofore uncharted moors and valleys and finally redefine the metes and bounds of its controversial domain. This, prominently, is one such case.

Perhaps, never in jurisprudential history has any freedom of man undergone radical doctrinal metamorphoses than his right to freely and openly express his views. Blackstone's pontifical comment that "where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by English law . . . the liberty of the press, properly understood, is by no means infringed or violated," found kindred expression in the landmark opinion of England's Star Chamber in the Libelis Famosis case in 1603. That case established two major propositions in the prosecution of defamatory remarks: *first*, that libel against a public person is a greater offense than one directed against an ordinary man, and *second*, that it is immaterial that the libel be true.

Until republicanism caught fire in early America, the view from the top on libel was no less dismal. Even the venerable Justice Holmes appeared to waffle as he swayed from the concept of criminal libel liability under the clear and present danger rule, to the other end of the spectrum in defense of the constitutionally protected status of unpopular opinion in free society.

Viewed in modern times and the current revolution in information and communication technology, libel principles formulated at one time or another have waxed and waned through the years in the constant ebb and flow of judicial review. At the very least, these principles have lost much of their flavor, drowned and swamped as they have been by the ceaseless cacophony and din of thought and discourse emanating from just about every source and direction, aided no less by an increasingly powerful and irrepressible

mass media. Public discourse, laments Knight, has been devalued by its utter commonality; and we agree, for its logical effect is to benumb thought and sensibility on what may be considered as criminal illegitimate encroachments on the right of persons to enjoy a good, honorable and reputable name. This may explain the imperceptible demise of criminal prosecutions for libel and the trend to rely instead on indemnity suits to repair any damage on one's reputation.

In this petition for review, we are asked to reverse the Court of Appeals in *"Francisco Wenceslao v. Arturo Borjal and Maximo Soliven,"* CA-G.R. No. 40496, holding on 25 March 1996 that petitioners Arturo Borjal and Maximo Soliven are solidarily liable for damages for writing and publishing certain articles claimed to be derogatory and offensive to private respondent Francisco Wenceslao.

Petitioners Arturo Borjal and Maximo Soliven are among the incorporators of Philippines Today, Inc. (PTI), now PhilSTAR Daily, Inc., owner of The Philippine Star, a daily newspaper. At the time the complaint was filed, petitioner Borjal was its President while Soliven was (and still is) Publisher and Chairman of its Editorial Board. Among the regular writers of The Philippine Star is Borjal who runs the column Jaywalker.

Private respondent Francisco Wenceslao, on the other hand, is a civil engineer, businessman, business consultant and journalist by profession. In 1988, he served as a technical adviser of Congressman Fabian Sison, then Chairman of the House of Representatives Sub-Committee on Industrial Policy.

During the congressional hearings on the transport crisis sometime in September 1988 undertaken by the House Sub-Committee on Industrial Policy, those who attended agreed to organize the First National Conference on Land Transportation (FNCLT) to be participated in by the private sector in the transport industry and government agencies concerned in order to find ways and means to solve the transportation crisis. More importantly, the objective of the FNCLT was to draft an omnibus bill that would embody a long-term land transportation policy for presentation to Congress. The conference which, according to private respondent, was estimated to cost around P1,815,000.00 would be funded through solicitations from various sponsors such as government agencies, private organizations, transport firms, and individual delegates or participants.

On 28 February 1989, at the organizational meeting of the FNCLT, private respondent Francisco Wenceslao was elected Executive Director. As such, he wrote numerous solicitation letters to the business community for the support of the conference.

Between May and July 1989, a series of articles written by petitioner Borjal was published on different dates in his column Jaywalker. The articles dealt with the alleged anomalous activities of an "organizer of a conference" without naming or identifying private respondent. Neither did it refer to the FNCLT as the conference therein mentioned. Quoted hereunder are excerpts

from the articles of petitioner together with the dates they were published:

31 May 1989

"Another self-proclaimed 'hero' of the EDSA Revolution goes around organizing 'seminars and conferences' for a huge fee. This is simply a ploy coated in jazzy letterheads and slick prose. The 'hero' has the gall to solicit fees from anybody with bucks to spare. Recently, in his usual straightforward style, Transportation Secretary Rainerio 'Ray' Reyes, asked that his name be stricken off from the letterheads the 'hero' has been using to implement one of his pet 'seminars.' Reyes said: 'I would like to reiterate my request that you delete my name.' Note that Ray Reyes is an honest man who would confront anybody eyeball to eyeball without blinking."

9 June 1989

Another questionable portion of the so-called conference is its unauthorized use of the names of President Aquino and Secretary Ray Reyes. The conference program being circulated claims that President Aquino and Reyes will be main speakers in the conference. Yet, the word is that Cory and Reyes have not accepted the invitation to appear in this confab. Ray Reyes even says that the conference should be unmasked as a moneymaking gimmick.

19 June 1989

. . . some 3,000 fund solicitation letters were sent by the organizer to every Tom, Dick and Harry and to almost all government agencies. And the letterheads carried the names of Reyes and Periquet. Agrarian Reform Secretary on leave Philip Juico received one, but he decided to find out from Reyes himself what the project was all about. Ray Reyes, in effect, advised Juico to put the fund solicitation letter in the waste basket. Now, if the 3,000 persons and agencies approached by the organizer shelled out 1,000 each, that's easily P3 million to a project that seems so unsophisticated. But note that one garment company gave P100,000, after which the Garments Regulatory Board headed by Trade and Industry Undersecretary Gloria Maca-pagal-Arroyo was approached by the organizer to expedite the garment license application of the P100,000 donor.

21 June 1989

A 'conference organizer' associated with shady deals seems to have a lot of trash tucked inside his closet. The Jaywalker continues to receive information about the man's dubious deals. His notoriety, according to reliable sources, has reached the Premier Guest House where his name is spoken like dung.

x x x x x x x x x

The first information says that the 'organizer' tried to mulct half a mil-

lion pesos from a garment producer and exporter who was being investigated for violation of the rules of the Garments, Textile, Embroidery and Apparel Board. The 'organizer' told the garment exporter that the case could be fixed for a sum of P500,000.00. The organizer got the shock of his life when the exporter told him: 'If I have that amount, I will hire the best lawyers, not you.' The organizer left in a huff, his thick face very pale.

x x x x x x x x x

Friends in government and the private sector have promised the Jaywalker more 'dope' on the 'organizer.' It seems that he was not only indiscreet; he even failed to cover his tracks. You will be hearing more of the 'organizer's' exploits from this corner soon.

22 June 1989

The scheming 'organizer' we have been writing about seems to have been spreading his wings too far. A congressional source has informed the Jaywalker that the schemer once worked for a congressman from the North as some sort of a consultant on economic affairs. The first thing the "organizer" did was to initiate hearings and round-the-table discussions with people from the business, export and — his favorite — the garments sector.

x x x x x x x x x

The 'organizer's' principal gamely went along, thinking that his 'consultant' had nothing but the good of these sectors in mind. It was only later that he realized that the 'consultant' was acting with a burst of energy 'in aid of extortion.' The 'consultant' was fired.

x x x x x x x x x

There seems to be no end to what a man could do to pursue his dubious ways. He has tried to operate under a guise of a well-meaning reformist. He has intellectual pretensions — and sometimes he succeeds in getting his thoughts in the inside pages of some newspapers, with the aid of some naive newspaper people. He has been turning out a lot of funny-looking advice on investments, export growth, and the like.

x x x x x x x x x

A cabinet secretary has one big wish. He is hoping for a broad power to ban crooks and influence-peddlers from entering the premises of his department. But the Cabinet man might not get his wish. There is one 'organizer' who, even if physically banned, can still concoct ways of doing his thing. Without a tinge of remorse, the 'organizer' could fill up his letterheads with names of Cabinet members, congressmen, and reputable people from the private sector to shore up his shady reputation and cover up his notoriety.

3 July 1989

A supposed conference on transportation was a big failure. The attendance was very poor and the few who participated in the affair were mostly leaders of jeepney drivers' groups. None of the government officials involved in regulating public transportation was there. The big names in the industry also did not participate. With such a poor attendance, one wonders why the conference organizers went ahead with the affair and tried so hard to convince 3,000 companies and individuals to contribute to the affair.

x x x x x x x x x

The conference was doomed from the start. It was bound to fail. The personalities who count in the field of transportation refused to attend the affair or withdrew their support after finding out the background of the organizer of the conference. How could a conference on transportation succeed without the participation of the big names in the industry and government policy-makers?

Private respondent reacted to the articles. He sent a letter to The Philippine Star insisting that he was the "organizer" alluded to in petitioner Borjal's columns. In a subsequent letter to The Philippine Star, private respondent refuted the matters contained in petitioner Borjal's columns and openly challenged him in this manner:

"To test if Borjal has the guts to back up his holier than thou attitude, I am prepared to relinquish this position in case it is found that I have misappropriated even one peso of FNCLT money. On the other hand, if I can prove that Borjal has used his column as a 'hammer' to get clients for his PR Firm, AA Borjal Associates, he should resign from the STAR and never again write a column. Is it a deal?"

Thereafter, private respondent filed a complaint with the National Press Club (NPC) against petitioner Borjal for unethical conduct. He accused petitioner Borjal of using his column as a form of leverage to obtain contracts for his public relations firm, AA Borjal Associates. In turn, petitioner Borjal published a rejoinder to the challenge of private respondent not only to protect his name and honor but also to refute the claim that he was using his column for character assassination.

Apparently not satisfied with his complaint with the NPC, private respondent filed a criminal case for libel against petitioners Borjal and Soliven, among others. However, in a Resolution dated 7 August 1990, the Assistant Prosecutor handling the case dismissed the complaint for insufficiency of evidence. The dismissal was sustained by the Department of Justice and later by the Office of the President.

On 31 October 1990, private respondent instituted against petitioners a civil action for damages based on libel subject of the instant case. In their answer, petitioners interposed compulsory counterclaims for actual, moral and exemplary damages, plus attorney's fees and costs. After due consideration, the trial court decided in favor of private respondent Wenceslao and ordered petitioners Borjal and Soliven to indemnify private respondent P1,000,000.00

for actual and compensatory damages, in addition to P200,000.00 for moral damages, P100,000.00 for exemplary damages, P200,000.00 for attorney's fees, and to pay the costs of suit.

The Court of Appeals affirmed the decision of the court *a quo* but reduced the amount of the monetary award to P110,000.00 actual damages, P200,000.00 moral damages and P75,000.00 attorney's fees plus costs. In a 20-page Decision promulgated 25 March 1996, the appellate court ruled *inter alia* that private respondent was sufficiently identifiable, although not named, in the questioned articles; that private respondent was in fact defamed by petitioner Borjal by describing him variously as a "self-proclaimed hero," "a conference organizer associated with shady deals who has a lot of trash tucked inside his closet," "thick face," and "a person with dubious ways;" that petitioner's claim of privilege communication was unavailing since the privileged character of the articles was lost by their publication in a newspaper of general circulation; that petitioner could have performed his office as a newspaperman without necessarily transgressing the rights of Wenceslao by calling the attention of the government offices concerned to examine the authority by which Wenceslao acted, warning the public against contributing to a conference that, according to his perception, lacked the univocal indorsement of the responsible government officials, or simply informing the public of the letters Wenceslao wrote and the favors he requested or demanded; and, that when he imputed dishonesty, falsehood and misrepresentation, shamelessness and intellectual pretensions to Wenceslao, petitioner Borjal crossed the thin but clear line that separated fair comment from actionable defamation.

Private respondent manifested his desire to appeal that portion of the appellate court's decision which reduced the amount of damages awarded him by filing with this Court a Petition for Extension of Time to File Petition and a Motion for Suspension of Time to File Petition. However, in a Resolution dated 27 May 1996, the Second Division denied both motions: the first, for being premature, and the second, for being a wrong remedy.

On 20 November 1996 when the First Division consolidated and transferred the present case to the Second Division, there was no longer any case thereat with which to consolidate this case since G.R. No. 124396 had already been disposed of by the Second Division almost six (6) months earlier.

On their part, petitioners filed a motion for reconsideration but the Court of Appeals denied the motion in its Resolution of 12 September 1996. Hence, the instant petition for review. The petitioners contend that the Court of Appeals erred: (a) in ruling that private respondent Wenceslao was sufficiently identified by petitioner Borjal in the questioned articles; (b) in refusing to accord serious consideration to the findings of the Department of Justice and the Office of the President that private respondent Wenceslao was not sufficiently identified in the questioned articles, this notwithstanding that the degree of proof required in a preliminary investigation is merely *prima facie* evidence which is significantly less than the preponderance of

evidence required in civil cases; (c) in ruling that the subject articles do not constitute qualifiedly privileged communication; (d) in refusing to apply the "public official doctrine" laid down in *New York Times vs. Sullivan*; (e) in ruling that the questioned articles lost their privileged character because of their publication in a newspaper of general circulation; (f) in ruling that private respondent has a valid cause of action for libel against petitioners although he failed to prove actual malice on their part, and that the prosecutors of the City of Manila, the Department of Justice, and eventually, the Office of the President, had already resolved that there was no sufficient evidence to prove the existence of libel; and, (g) assuming *arguendo* that Borjal should be held liable, in adjudging petitioner Soliven solidarily liable with him. Thus, petitioners pray for the reversal of the appellate court's ruling, the dismissal of the complaint against them for lack of merit, and the award of damages on their counterclaim.

The petition is impressed with merit. In order to maintain a libel suit, it is essential that the victim be identifiable although it is not necessary that he be named. It is also not sufficient that the offended party recognized himself as the person attacked or defamed, but it must be shown that at least a third person could identify him as the object of the libelous publication. Regrettably, these requisites have not been complied with in the case at bar.

In ruling for private respondent, the Court of Appeals found that Borjal's column writings sufficiently identified Wenceslao as the "conference organizer." It cited the First National Conference on Land Transportation, the letterheads used listing different telephone numbers, the donation of P100,000.00 from Juliano Lim and the reference to the "organizer of the conference" — the very same appellation employed in all the column items — as having sufficiently established the identity of private respondent Wenceslao for those who knew about the FNCLT who were present at its inception, and who had pledged their assistance to it.

We hold otherwise. These conclusions are at variance with the evidence at hand. The questioned articles written by Borjal do not identify private respondent Wenceslao as the organizer of the conference. The first of the Jaywalker articles which appeared in the 31 May 1989 issue of The Philippine Star yielded nothing to indicate that private respondent was the person referred to therein. Surely, as observed by petitioners, there were millions of "heroes" of the EDSA Revolution and anyone of them could be "self-proclaimed" or an "organizer of seminars and conferences." As a matter of fact, in his 9 June 1989 column petitioner Borjal wrote about the "so-called First National Conference on Land Transportation whose principal organizers are not specified." (emphasis supplied). Neither did the FNCLT letterheads disclose the identity of the conference organizer since these contained only an enumeration of names where private respondent Francisco Wenceslao was described as Executive Director and Spokesman and not as a conference organizer. The printout and tentative program of the conference were devoid of any indication of Wenceslao as organizer. The printout which contained an article entitled "Who Organized the NCLT ?" did not even mention private respondent's name, while the tentative program only denominated private

respondent as "Vice Chairman and Executive Director," and not as organizer.

No less than private respondent himself admitted that the FNCLT had several organizers and that he was only a part of the organization, thus:

"I would like to clarify for the record that I was only a part of the organization. I was invited then because I was the head of the technical panel of the House of Representatives Sub-Committee on Industrial Policy that took care of congressional hearings."

Significantly, private respondent himself entertained doubt that he was the person spoken of in Borjal's columns. The former even called up columnist Borjal to inquire if he (Wenceslao) was the one referred to in the subject articles. His letter to the editor published in the 4 June 1989 issue of The Philippine Star even showed private respondent Wenceslao's uncertainty:

"Although he used a subterfuge, I was almost certain that Art Borjal referred to the First National Conference on Land Transportation (June 29-30) and me in the second paragraph of his May 31 column . . ."

Identification is grossly inadequate when even the alleged offended party is himself unsure that he was the object of the verbal attack. It is well to note that the revelation of the identity of the person alluded to came not from petitioner Borjal but from private respondent himself when he supplied the information through his 4 June 1989 letter to the editor. Had private respondent not revealed that he was the "organizer" of the FNCLT referred to in the Borjal articles, the public would have remained in blissful ignorance of his identity. It is therefore clear that on the element of identifiability alone, the case falls.

The above disquisitions notwithstanding, and on the assumption *arguendo* that private respondent has been sufficiently identified as the subject of Borjal's disputed comments, we now proceed to resolve the other issues and pass upon the pertinent findings of the courts *a quo*.

The third, fourth, fifth and sixth assigned errors all revolve around the primary question of whether the disputed articles constitute privileged communications as to exempt the author from liability.

The trial court ruled that petitioner Borjal cannot hide behind the proposition that his articles are privileged in character under the provisions of Art. 354 of The Revised Penal Code which state:

ARTICLE 354. *Requirement for publicity*. — Every defamatory imputation is presumed to be malicious, even if it be true, if no good intention and justifiable motive for making it is shown, except in the following cases:

1) A private communication made by any person to another in the performance of any legal, moral or social duty; and

2) A fair and true report, made in good faith, without any comments or remarks, of any judicial, legislative or other official proceedings which are not of confidential nature, or of any statement,

> report or speech delivered in said proceedings, or of any other act performed by public officers in the exercise of their functions.

Respondent court explained that the writings in question did not fall under any of the exceptions described in the above-quoted article since these were neither "private communications" nor "fair and true report . . . without any comments or remarks." But this is incorrect.

A privileged communication may be either absolutely privileged or qualifiedly privileged. Absolutely privileged communications are those which are not actionable even if the author has acted in bad faith. An example is found in Sec. 11, Art. VI, of the 1987 Constitution which exempts a member of Congress from liability for any speech or debate in the Congress or in any Committee thereof. Upon the other hand, qualifiedly privileged communications containing defamatory imputations are not actionable unless found to have been made without good intention or justifiable motive. To this genre belong "private communications" and "fair and true report without any comments or remarks."

Indisputably, petitioner Borjal's questioned writings are not within the exceptions of Art. 354 of The Revised Penal Code for, as correctly observed by the appellate court, they are neither private communications nor fair and true report without any comments or remarks. However, this does not necessarily mean that they are not privileged. To be sure, the enumeration under Art. 354 is not an exclusive list of qualifiedly privileged communications since fair commentaries on matters of public interest are likewise privileged. The rule on privileged communications had its genesis not in the nation's penal code but in the Bill of Rights of the Constitution guaranteeing freedom of speech and of the press. As early as 1918, in *United States vs. Cañete*, this Court ruled that publications which are privileged for reasons of public policy are protected by the constitutional guaranty of freedom of speech. This constitutional right cannot be abolished by the mere failure of the legislature to give it express recognition in the statute punishing libels.

The concept of privileged communications is implicit in the freedom of the press. As held in *Elizalde vs. Gutierrez* and reiterated in *Santos vs. Court of Appeals*:

To be more specific, no culpability could be imputed to petitioners for the alleged offending publication without doing violence to the concept of privileged communications implicit in the freedom of the press. As was so well put by Justice Malcolm in Bustos: 'Public policy, the welfare of society, and the orderly administration of government have demanded protection of public opinion. The inevitable and incontestable result has been the development and adoption of the doctrine of privilege.'

The doctrine formulated in these two (2) cases resonates the rule that privileged communications must, *sui generis*, be protective of public opinion. This closely adheres to the democratic theory of free speech as essential to collective self-determination and eschews the strictly libertarian view that it is protective solely of self-expression which, in the words of Yale Sterling Professor Owen Fiss, makes its appeal to the individualistic ethos that so

dominates our popular and political culture. It is therefore clear that the restrictive interpretation vested by the Court of Appeals on the penal provision exempting from liability only private communications and fair and true report without comments or remarks defeats, rather than promotes, the objective of the rule on privileged communications, sadly contriving as it does, to suppress the healthy efflorescence of public debate and opinion as shining linchpins of truly democratic societies.

To reiterate, fair commentaries on matters of public interest are privileged and constitute a valid defense in an action for libel or slander. The doctrine of fair comment means that while in general every discreditable imputation publicly made is deemed false, because every man is presumed innocent until his guilt is judicially proved, and every false imputation is deemed malicious, nevertheless, when the discreditable imputation is directed against a public person in his public capacity, it is not necessarily actionable. In order that such discreditable imputation to a public official may be actionable, it must either be a false allegation of fact or a comment based on a false supposition. If the comment is an expression of opinion, based on established facts, then it is immaterial that the opinion happens to be mistaken, as long as it might reasonably be inferred from the facts.

There is no denying that the questioned articles dealt with matters of public interest. In his testimony, private respondent spelled out the objectives of the conference thus:

> . . . The principal conference objective is to come up with a draft of an Omnibus Bill that will embody a long term land transportation policy for presentation to Congress in its next regular session in July. Since last January, the National Conference on Land Transportation (NCLT), the conference secretariat, has been enlisting support from all sectors to ensure the success of the project.

Private respondent likewise testified that the FNCLT was raising funds through solicitation from the public:

> Q: Now, in this first letter, you have attached a budget and it says here that in this seminar of the First National Conference on Land Transportation, you will need around One million eight hundred fifteen thousand pesos, is that right?
>
> A: That was the budget estimate, sir.
>
> Q: How do you intend as executive officer, to raise this fund of your seminar?
>
> A: Well, from sponsors such as government agencies and private sectors or organizations as well as individual transport firms and from individual delegates/participants.

The declared objective of the conference, the composition of its members and participants, and the manner by which it was intended to be funded no doubt lend to its activities as being genuinely imbued with public interest. An organization such as the FNCLT aiming to reinvent and reshape the trans-

portation laws of the country and seeking to source its funds for the project from the public at large cannot dissociate itself from the public character of its mission. As such, it cannot but invite close scrutiny by the media obliged to inform the public of the legitimacy of the purpose of the activity and of the qualifications and integrity of the personalities behind it.

This in effect is the strong message in *New York Times vs. Sullivan* which the appellate court failed to consider or, for that matter, to heed. It insisted that private respondent was not, properly speaking, a "public official" nor a "public figure," which is why the defamatory imputations against him had nothing to do with his task of organizing the FNCLT.

New York Times vs. Sullivan was decided by the U.S. Supreme Court in the 1960s at the height of the bloody rioting in the American South over racial segregation. The then City Commissioner L.B. Sullivan of Montgomery, Alabama, sued New York Times for publishing a paid political advertisement espousing racial equality and describing police atrocities committed against students inside a college campus. As commissioner having charge over police actions Sullivan felt that he was sufficiently identified in the ad as the perpetrator of the outrage; consequently, he sued New York Times on the basis of what he believed were libelous utterances against him.

The U.S. Supreme Court speaking through Mr. Justice William J. Brennan, Jr. ruled against Sullivan holding that honest criticisms on the conduct of public officials and public figures are insulated from libel judgments. The guarantees of freedom of speech and press prohibit a public official or public figure from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, *i.e.,* with knowledge that it was false or with reckless disregard of whether it was false or not.

The *raison d'etre* for the New York Times doctrine was that to require critics of official conduct to guarantee the truth of all their factual assertions on pain of libel judgments would lead to self-censorship, since would-be critics would be deterred from voicing out their criticisms even if such were believed to be true, or were in fact true, because of doubt whether it could be proved or because of fear of the expense of having to prove it.

In the present case, we deem private respondent a public figure within the purview of the New York Times ruling. At any rate, we have also defined "public figure" in *Ayers Production Pty., Ltd. vs. Capulong* as —

> . . . a person who, by his accomplishments, fame, mode of living, or by adopting a profession or calling which gives the public a legitimate interest in his doings, his affairs and his character, has become a 'public personage.' He is, in other words, a celebrity. Obviously, to be included in this category are those who have achieved some degree of reputation by appearing before the public, as in the case of an actor, a professional baseball player, a pugilist, or any other entertainer. The list is, however, broader than this. It includes public officers, famous

> inventors and explorers, war heroes and even ordinary soldiers, infant prodigy, and no less a personage than the Great Exalted Ruler of the lodge. It includes, in short, anyone who has arrived at a position where the public attention is focused upon him as a person.

The FNCLT was an undertaking infused with public interest. It was promoted as a joint project of the government and the private sector, and organized by top government officials and prominent businessmen. For this reason, it attracted media mileage and drew public attention not only to the conference itself but to the personalities behind as well. As its Executive Director and spokesman, private respondent consequently assumed the status of a public figure.

But even assuming *ex-gratia argumenti* that private respondent, despite the position he occupied in the FNCLT, would not qualify as a public figure, it does not necessarily follow that he could not validly be the subject of a public comment even if he was not a public official or at least a public figure, for he could be, as long as he was involved in a public issue. If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not voluntarily choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect and significance of the conduct, not the participant's prior anonymity or notoriety.

There is no denying that the questioned articles dealt with matters of public interest. A reading of the imputations of petitioner Borjal against respondent Wenceslao shows that all these necessarily bore upon the latter's official conduct and his moral and mental fitness as Executive Director of the FNCLT. The nature and functions of his position which included solicitation of funds, dissemination of information about the FNCLT in order to generate interest in the conference, and the management and coordination of the various activities of the conference demanded from him utmost honesty, integrity and competence. These are matters about which the public has the right to be informed, taking into account the very public character of the conference itself.

Concededly, petitioner Borjal may have gone overboard in the language employed describing the "organizer of the conference." One is tempted to wonder if it was by some mischievous gambit that he would also dare test the limits of the "wild blue yonder" of free speech in this jurisdiction. But no matter how intemperate or deprecatory the utterances appear to be, the privilege is not to be defeated nor rendered inutile for, as succinctly expressed by Mr. Justice Brennan in *New York Times vs. Sullivan,* "[D]ebate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on the government and public officials."

The Court of Appeals concluded that since malice is always presumed in the publication of defamatory matters in the absence of proof to the contrary,

the question of privilege is immaterial.

We reject this postulate. While, generally, malice can be presumed from defamatory words, the privileged character of a communication destroys the presumption of malice. The *onus* of proving actual malice then lies on plaintiff, private respondent Wenceslao herein. He must bring home to the defendant, petitioner Borjal herein, the existence of malice as the true motive of his conduct.

Malice connotes ill will or spite and speaks not in response to duly but merely to injure the reputation of the person defamed, and implies an intention to do ulterior and unjustifiable harm. Malice is bad faith or bad motive. It is the essence of the crime of libel.

In the milieu obtaining, can it be reasonably inferred that in writing and publishing the articles in question petitioner Borjal acted with malice?

Primarily, private respondent failed to substantiate by preponderant evidence that petitioner was animated by a desire to inflict unjustifiable harm on his reputation, or that the articles were written and published without good motives or justifiable ends. On the other hand, we find petitioner Borjal to have acted in good faith. Moved by a sense of civic duty and prodded by his responsibility as a newspaperman, he proceeded to expose and denounce what he perceived to be a public deception. Surely, we cannot begrudge him for that. Every citizen has the right to enjoy a good name and reputation, but we do not consider that petitioner Borjal has violated that right in this case nor abused his press freedom.

Furthermore, to be considered malicious, the libelous statements must be shown to have been written or published with the knowledge that they are false or in reckless disregard of whether they are false or not. "Reckless disregard of what is false or not" means that the defendant entertains serious doubt as to the truth of the publication, or that he possesses a high degree of awareness of their probable falsity.

The articles subject of the instant case can hardly be said to have been written with knowledge that these are false or in reckless disregard of what is false or not. This is not to say, however, that the very serious allegations of petitioner Borjal assumed by private respondent to be directed against him are true. But we nevertheless find these at least to have been based on reasonable grounds formed after the columnist conducted several personal interviews and after considering the varied documentary evidence provided him by his sources. Thus, the following are supported by documentary evidence: (a) that private respondent requested Gloria Macapagal-Arroyo, then head of the Garments and Textile Export Board (GTEB), to expedite the processing and release of the import approval and certificate of availability of a garment firm in exchange for the monetary contribution of Juliano Lim, which necessitated a reply from the office of Gloria Macapagal-Arroyo explaining the procedure of the GTEB in processing applications and clarifying that all applicants were treated equally; (b) that Antonio Periquet was designated Chairman of the

Executive Committee of the FNCLT notwithstanding that he had previously declined the offer; and, (c) that despite the fact that then President Aquino and her Secretary of Transportation Rainerio Reyes declined the invitation to be guest speakers in the conference, their names were still included in the printout of the FNCLT. Added to these are the admissions of private respondent that: (a) he assisted Juliano Lim in his application for a quota allocation with the GTEB in exchange for monetary contributions to the FNCLT; (b) he included the name of then Secretary of Transportation Rainerio Reyes in the promotional materials of the conference notwithstanding the latter's refusal to lend his name to and participate in the FNCLT; and (c) he used different letterheads and telephone numbers.

Even assuming that the contents of the articles are false, mere error, inaccuracy or even falsity alone does not prove actual malice. Errors or misstatements are inevitable in any scheme of truly free expression and debate. Consistent with good faith and reasonable care, the press should not be held to account, to a point of suppression, for honest mistakes or imperfections in the choice of language. There must be some room for misstatement of fact as well as for misjudgment. Only by giving them much leeway and tolerance can they courageously and effectively function as critical agencies in our democracy. In *Bulletin Publishing Corp. vs. Noel* we held:

> "A newspaper especially one national in reach and coverage, should be free to report on events and developments in which the public has a legitimate interest with minimum fear of being hauled to court by one group or another on criminal or civil charges for libel, so long as the newspaper respects and keeps within the standards of morality and civility prevailing within the general community."

To avoid the self-censorship that would necessarily accompany strict liability for erroneous statements, rules governing liability for injury to reputation are required to allow an adequate margin of error by protecting some inaccuracies. It is for the same reason that the New York Times doctrine requires that liability for defamation of a public official or public figure may not be imposed in the absence of proof of "actual malice" on the part of the person making the libelous statement.

At any rate, it may be salutary for private respondent to ponder upon the advice of Mr. Justice Malcolm expressed in *U.S. vs. Bustos*, that "the interest of society and the maintenance of good government demand a full discussion of public affairs. Complete liberty to comment on the conduct of public men is a scalpel in the case of free speech. The sharp incision of its probe relieves the abscesses of officialdom. Men in public life may suffer under a hostile and unjust accusation; the wound may be assuaged by the balm of a clear conscience. A public official must not be too thin-skinned with reference to comments upon his official acts."

The foregoing disposition renders the second and seventh assigned errors moot and academic, hence, we find no necessity to pass upon them.

We must, however, take this opportunity to likewise remind media

practitioners of the high ethical standards attached to and demanded by their noble profession. The danger of an unbridled irrational exercise of the right of free speech and press, that is, in utter contempt of the rights of others and in willful disregard of the cumbrous responsibilities inherent in it, is the eventual self-destruction of the right and the regression of human society into a veritable Hobbesian state of nature where life is short, nasty and brutish. Therefore, to recognize that there can be no absolute "unrestraint" in speech is to truly comprehend the quintessence of freedom in the marketplace of social thought and action, genuine freedom being that which is limned by the freedom of others. If there is freedom of the press, ought there not also be freedom from the press? It is in this sense that self-regulation as distinguished from self-censorship becomes the ideal mean for, as Mr. Justice Frankfurter has warned, "[W]ithout . . . a lively sense of responsibility, a free press may readily become a powerful instrument of injustice."

Lest we be misconstrued, this is not to diminish nor constrict that space in which expression freely flourishes and operates. For we have always strongly maintained, as we do now, that freedom of expression is man's birthright — constitutionally protected and guaranteed, and that it has become the singular role of the press to act as its *"defensor fidei"* in a democratic society such as ours. But it is also worth keeping in mind that the press is the servant, not the master, of the citizenry, and its freedom does not carry with it an unrestricted hunting license to prey on the ordinary citizen.

On petitioners' counterclaim for damages, we find the evidence too meager to sustain any award. Indeed, private respondent cannot be said to have instituted the present suit in abuse of the legal processes and with hostility to the press; or that he acted maliciously, wantonly, oppressively, fraudulently and for the sole purpose of harassing petitioners, thereby entitling the latter to damages. On the contrary, private respondent acted within his rights to protect his honor from what he perceived to be malicious imputations against him. Proof and motive that the institution of the action was prompted by a sinister design to vex and humiliate a person must be clearly and preponderantly established to entitle the victim to damages. The law could not have meant to impose a penalty on the right to litigate, nor should counsel's fees be awarded every time a party wins a suit.

For, concluding with the wisdom in *Warren vs. Pulitzer Publishing Co.* —

Every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, a judge with his jury, we are, all of us, the subject of public discussion. The view of our court has been thus stated: 'It is only in despotisms that one must speak sub rosa, or in whispers, with bated breath, around the corner, or in the dark on a subject touching the common welfare. It is the brightest jewel in the crown of the law to speak and maintain the golden mean between defamation, on one hand, and a healthy and robust right of free public discussion, on the other.

ESTEBAN C. MANUEL vs. THE HON. ERNANI CRUZ-PAÑO
G.R. No. L-46079, April 17, 1989

One wonders why the respondent judge did not immediately grant the petitioner's motion to quash the information on the obvious and valid ground that the facts charged did not constitute an offense. This decisive act could have avoided the needless molestation of one more citizen and cleared the clogged dockets of this Court of still another of the persecutions big and small so rampant during those days of martial law. More importantly, it would have affirmed once again the freedom of expression guaranteed in the Bill of Rights to which every one was entitled even under the 1973 Constitution.

This case goes back to April 21, 1976, when a raid was conducted by the agents of the now defunct Anti-Smuggling Action Center on two rooms in the Tokyo Hotel in Binondo, Manila, pursuant to a warrant of seizure and detention issued by the Acting Collector of Customs of Manila on April 20, 1976. The raid resulted in the seizure of several articles allegedly smuggled into the country by their owners, three of whom were tourists from Hongkong. These articles subsequently became the subject of seizure proceedings in the Bureau of Customs but most of them were ordered released upon proof that the customs duties and other charges thereon had been duly paid as evidenced by the corresponding official receipts. Only a few items "of no commercial value" were ordered confiscated.

While the seizure proceedings were pending, the petitioner, as counsel for the owners of the seized articles, sent a letter dated April 19, 1976, to the Chairman of the ASAC in which he complained about the conduct of the raid and demanded that the persons responsible therefore be investigated. The letter follows in full:
"ESTEBAN C. MANUEL
Attorney at Law

643 Carvajal Street
Binondo, Manila.
April 29, 1976.
The Chairman
ASAC, Camp Aguinaldo
Quezon City

Sir:

This is in behalf of my clients, Mrs. Ng Woo Hay and her son, Mr. Lee Kee Ming, who sought my help in reporting to your goodself their complaint about certain acts committed by ASAC men which, from all appearances, constitute criminal offenses. I am referring to the raid they conducted on April 21, 1976 at about 4:30 in the afternoon at Tokyo Hotel, Ongpin Street, Binondo, Manila, pursuant to a "Warrant of Seizure and Detention" (seizure Identification No. 14922) issued by the Acting Collector of Customs on April 20, 1976. The raiding team, about 10 in number and headed by one Amado

Tirol, took advantage of the fact that Mrs. Ng Woo Hay was alone in her hotel room. The ASAC agents, despite Mrs. Ng's protest and claim of innocence, forced their way into the room and ransacked the place for alleged untaxed goods. Not only did they take everything they could find in the room, but also forcibly took from her person the wrist watch and jade bracelet (gold plated) she was wearing at the time. They also forced open her handbag and divested her of her wallet containing 70 Hongkong dollars, as well as her necklace and her son's wrist watch which she had placed in said handbag. Mrs. Ng was also subjected to the indignities of being searched by a male person. After emptying the room of its contents, the raiding team presented to her a carbon copy of a list purporting to show the goods seized. The list, however, appears not only illegible but does not reflect all the goods that were taken away by the ASAC agents. What is more, said men, likewise taking advantage of the absence of Mrs. Ng's son, owner of some of the articles, falsified the signature of the latter by writing his name on the space designated as "owner," making it appear that he (Lee Kee Ming) had acknowledged that the list covers all the items seized.

The documents and other papers presented to me by my clients reveal that the articles seized were declared at the Manila International Airport upon arrival, and were properly appraised. The corresponding customs charges were likewise paid. It is evident, therefore, that my clients were victims of foul play masterminded by no less than law enforcers who prey on tourists, particularly Chinese, for obvious reasons.

I examined the records in the Bureau of Customs and found out that it was on the basis of an affidavit executed by ASAC Agent Rolando Gatmaitan and the letter-request sent by the Vice-Chairman of ASAC Brig. Gen. Ramon Z. Aguirre, to the Collector of Customs that prompted the latter to issue the warrant in question. In this connection, I must state, with all frankness, that there was undue haste in the request for the issuance of the warrant, because it is discernible from a mere reading of the affidavit that its contents are mere *pro-forma* and hearsay statements of the above-named ASAC agent. It could not have, as it now appears, justified the drastic action sought to be accomplished.

Needless to state, the incident complained of not only has caused considerable damage to my clients but to our country as well. It is for this reason that we demand for an immediate and full dress investigation of the ASAC officers and men who took part in or caused the issuance of the warrant, as well as those who participated in the raid, with the view of purging the government of undesirables; and that pending such investigation the said officers and men be suspended from further performing their duties.

Very truly yours,

(SGD.) ESTEBAN C. MANUEL

The Chairman of the ASAC ordered the investigation as demanded,

but the agents charged were all exonerated in a decision dated August 25, 1976. Not satisfied with what he later described as a "home town decision," the petitioner, on behalf of his clients, filed a complaint for robbery against the same agents with the Office of the City Fiscal of Manila. This was later withdrawn, however, on advice of the inquest fiscal who said that the case might come under the jurisdiction of the military tribunal. The petitioner says he then went to Camp Aguinaldo but was discouraged from filing the complaint there when he was told that it would take about a year to complete the preliminary investigation alone. The owners of the seized articles then instituted a civil complaint for damages which the petitioner filed for them in the Court of First Instance of Manila on June 7, 1976.

Three days later, there appeared in the June 10, 1976 issue of the Bulletin Today the following report:

TOURISTS SUE AGENTS, OFFICIAL

Four Chinese, three of whom were tourists from Hongkong, have filed a case for damages against a customs official and 11 agents of the government's anti-smuggling action center (ASAC) in connection with a raid conducted in their hotel rooms, more than a month ago.

The case was docketed in Manila's Court of First Instance (CFI) as Civil Case No. 102694.

The complaints also alleged they lost assorted materials amounting to P46,003.40.

Named respondents in the case were acting customs collector Ramon Z. Aguirre, Rolando Gatmaitan, Antonio Baranda, Amado M. Tirol, Francisco C. Santos, Edsel Labayen, Jose Robles, Nestor Eusebio, Freddie Ocnila, Renato Quiroz, Pedro Cunanan, Jr., and Enrique Perez, all of ASAC.

The acting customs collector was impleaded in the case in his official capacity for having issued the warrant that led to the criminal offenses complained of.

Aguirre, ASAC vice-chairman, was named as defendant for soliciting the issuance of a warrant of seizure and detention reportedly on the bag is of charges contained in an affidavit executed by Gatmaitan, another ASAC agent.

Esteban Manuel filed the case in behalf of the plaintiffs composed of Manila resident Ng Tee, and Hong Kong visitors Ng Woo Hay, Cheng Pik Ying, and Lee Kee Ming who came to the Philippines to visit their relatives and friends.

The agents allegedly subjected Ng Woo Hay to indignities and took her necklace, bracelet and wrist watch. They allegedly seized many articles valued at P27,000 which have remained

unaccounted for in the list submitted by the defendants as the inventory of the items confiscated.

On the basis of these antecedent facts, an information for libel was filed against the petitioner, Lee Kee Ming and Ng Woo Hay in the Court of First Instance of Rizal. A reading of the information does not show why the two Chinese were included in the charge; all it said was that they were the clients of the petitioner. As for the petitioner himself, it was alleged that he had committed the crime of libel by writing the letter of April 29, 1976 (which was quoted in full) and by causing the publication of the news item in the Bulletin Today.

The subject of this petition is the order of the respondent judge dated March 23, 1977, denying the motion to quash filed by the petitioner, who had claimed that his letter to the ASAC Chairman was not actionable because it was a privileged communication; that the news report in the Bulletin Today was not based on the letter-complaint; and that in any case it was a fair and true report of a judicial proceeding and therefore also privileged. His motion for reconsideration having been also denied in the order dated April 27, 1977, he now seeks relief from this Court against what he claims as the grave abuse of discretion committed by the respondent judge in sustaining the information.

It is perhaps indicative of the weakness of the respondents' position that when asked to comment on the petitioner's motion to quash, the city fiscal never did so during a period of more than ninety days. It was left to a private prosecutor to enter his own appearance thereafter, presumably because the fiscal did not seem to be very enthusiastic about the case, and to file the comment for the private respondents himself. Later, when the petitioner came to this Court and we required a comment from the Solicitor General, this official complied only after asking for (and getting) twenty-six extensions for a total of nine months and seven days, and at that the comment was only a half-hearted defense of the challenged orders. Despite the petitioners effective rebuttal in his reply, the Solicitor General did not ask for leave to file a rejoinder as if he had lost all taste for combat notwithstanding the many points raised by the petitioner that had to be refuted.

Perhaps it was just as well. Like a good general, the Solicitor General probably understood that the battle was lost.

Indeed it was. In fact, it should never have commenced.

From the purely procedural perspective, there is much to fault about the information. The two Chinese clients who were impleaded with the petitioner were charged with absolutely nothing, prompting the respondent judge to peremptorily dismiss the information as to them. Worse, the information imputed to the remaining accused two different offenses, to wit, writing the allegedly libelous letter and causing the publication of the allegedly libelous news report. This was not allowed under Rule 110, Section 12, of the Rules of Court, providing that "a complaint or information must charge but one

offense, except only in those cases in which existing laws prescribe a single punishment for various offenses." If libelous, the letter and the news report constituted separate offenses that should have been charged in separate informations. (However, not having been raised in the motion to quash, that ground was deemed waived under Rule 15, Section 8, of the Rules of Court).

From the viewpoint of substantive law, the charge is even more defective, if not ridiculous. Any one with an elementary knowledge of constitutional law and criminal law would have known that neither the letter nor the news account was libelous.

[The Court quoted Article 354 as the applicable provision.]

x x x

The letter comes under Item 1 as it was addressed by the petitioner to the ASAC Chairman to complain against the conduct of his men when they raided the Chinese tourists' rooms in the Tokyo Hotel. It was sent by the petitioner mainly in his capacity as a lawyer in the discharge of his legal duty to protect his clients. While his principal purpose was to vindicate his clients' interests against the abuses committed by the ASAC agents, he could also invoke his civic duty as a private individual to expose anomalies in the public service. The complaint was addressed to the official who had authority over them and could impose the proper disciplinary sanctions. Significantly, as an index of good faith, the letter was sent privately, directly to the addressee, without any fanfare or publicity.

As for the news report, it is difficult to believe that the petitioner, an ordinary citizen without any known ties to the newspapers, could have by himself caused the publication of such an explosive item. There is no *prima facie* showing that, by some kind of influence he had over the periodical, he succeeded in having it published to defame the ASAC agents. It does not appear either that the report was paid for like an advertisement. This looks instead to be the result of the resourcefulness of the newspaper in discovering matters of public interest for dutiful disclosure to its readers. It should be presumed that the report was included in the issue as part of the newspaper's coverage of important current events as selected by its editorial staff.

At any rate, the news item comes under Item 2 of the abovequoted article as it is a true and fair report of a judicial proceeding, made in good faith and without comments or remarks. This is also privileged. Moreover, it is not correct to say, as the Solicitor General does, that Article 354 is not applicable because the complaint reported as filed would not by itself alone constitute a judicial proceeding even before the issues are joined and trial is begun. The doctrine he invokes is no longer controlling. The case of *Choa Tek Hee vs. Philippine Publishing Co.*, which he cites, has been superseded by *Cuenco vs. Cuenco*, where the Court categorically held:

We are firmly convinced that the correct rule on the matter should be that a fair and true report of a complaint filed in court without remarks nor

comments even before an answer is filed or a decision promulgated should be covered by the privilege. (Emphasis provided).

It may also be argued that the complaint, standing by itself, is a public record and may be published as such under Rule 135, Section 2 of the Rules of Court unless the court directs otherwise in the interest of morality or decency.

It is true that the matters mentioned in Article 354 as exceptions to the general rule are not absolutely privileged and are still actionable. However, since what is presumed is not malice but in fact lack of malice, it is for the prosecution to overcome that presumption by proof that the accused was actually motivated by malice. Absent such proof, the charge must fail.

x x x

As has already been said by this Court: "As to the degree of relevancy even before an answer pertinency necessary to make alleged defamatory matter privileged, the courts are inclined to be liberal. The matter to which the privilege does not extend must be so palpably wanting in relation to the subject matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety." Having this in mind, it can not be said that the trial court committed a reversible error in this case of finding that the allegations in the information itself present a case of an absolutely privileged communication justifying the dismissal of the case.

The two exceptions provided for under Article 354 are based on the wider guarantee of freedom of expression as an institution of all republican societies. This in turn is predicated on the proposition that the ordinary citizen has a right and a duty to involve himself in matters that affect the public welfare and, for this purpose, to inform himself of such matters.

The vitality of republicanism derives from an alert citizenry that is always ready to participate in the discussion and resolution of public issues. These issues include the conduct of government functionaries who are accountable to the people in the performance of their assigned powers, which after all come from the people themselves. Every citizen has a right to expect from all public servants utmost fidelity to the trust reposed in them and the maximum of efficiency and integrity in the discharge of their functions. Every citizen has a right to complain and criticize if this hope is betrayed.

It is no less important to observe that this vigilance is not only a right but a responsibility of the highest order that should not be shirked for fear of official reprisal or because of mere civic lethargy. Whenever the citizen discovers official anomaly, it is his duty to expose and denounce it, that the culprits may be punished and the public service cleansed even as the rights violated are vindicated or redressed. It can never be overstressed that indifference to ineptness will breed more ineptness and that toleration of corruption will breed more corruption. The sins of the public service are imputable not only to those who actually commit them but also to those who by their silence or inaction permit and encourage their commission.

The responsibility to review the conduct of the government functionaries is especially addressed to the lawyer because his training enables him, better than most citizens, to determine if the law has been violated or irregularities have been committed, and to take the needed steps to remedy the wrong and punish the guilty.

The respondents contend that the letter was written by the petitioner to influence the seizure proceedings which were then pending. Even assuming that to be true, such purpose did not necessarily make the letter malicious, especially if it is considered that the complaint against the ASAC agents could not be raised in the said proceedings. The ASAC Chairman, not the Collector of Customs, had jurisdiction to discipline the agents.

It should also be noted, as further evidence of lack of malice, that even after the seizure proceedings had been concluded in favor of the petitioner's clients, he pursued their complaint against the ASAC agents in the fiscal's office in Manila and then with the military authorities in Camp Aguinaldo, ending with the filing of the civil case for damages in the court of first instance of Manila.

It would be a sad day indeed if for denouncing venality in government, the citizen could be called to task and be himself punished on the ground of malicious defamation. If every accuser were himself to be accused for discharging his duty as he sees it, then will the wrong-doer have been granted in effect, and by this Court no less, an undeserved immunity for his misdeeds or omissions. The private individual would be barred from complaining about public misconduct. Every criticism he makes would be tainted with malice and pronounced as criminal. The next step may well be a conspiracy among those in the government to cover up each other's faults and to insulate themselves from the legitimate efforts of the people to question their conduct.

The second exception is justified under the right of every citizen to be informed on matters of public interest, which, significantly, was first recognized in the 1973 Constitution. Even if it were not, the right would still be embraced in the broader safeguard of freedom of expression, for the simple reason that the right to speak intelligently on "matters that touch the existing order" necessarily imports the availability of adequate official information on such matters. Surely, the exercise of such right cannot inspire belief if based only on conjectures and rumors and half-truths because direct access to the facts is not allowed to the ordinary citizen.

This right is now effectively enjoyed with the help of the mass media, which have fortunately resumed their roles as an independent conduit of information between the government and the people. It is the recognized duty of the media to report to the public what is going on in the government, including the proceedings in any of its departments or agencies, save only in exceptional cases involving decency or confidentiality when disclosure may be prohibited. To protect them in the discharge of this mission, the law says that as long as the account is a fair and true report of such proceedings, and made without any remarks or comment, it is considered privileged and malice

is not presumed. Its publication is encouraged rather than suppressed or punished.

This is one reason why the Court looks with disapproval on censorship in general as an unconstitutional abridgment of freedom of expression. Censorship presumes malice at the outset. It prevents inquiry into public affairs and curtails their disclosure and discussion, leaving the people in the dark as to what is happening in the public service. By locking the public portals to the citizen, who can only guess at the goings-on in the forbidden precints, censorship separates the people from their government. This certainly should not be permitted. "A free press stands as one of the great interpreters between the government and the people," declared Justice Sutherland of the U.S. Supreme Court. "To allow it to be fettered is to fetter ourselves."

It is curious that the ones most obviously responsible for the publication of the allegedly offensive news report, namely, the editorial staff and the periodical itself, were not at all impleaded. The charge was leveled against the petitioner and, "curiouser" still, his clients who had nothing to do with the editorial policies of the newspaper. There is here a manifest effort to persecute and intimidate the petitioner for his temerity in accusing the ASAC agents who apparently enjoyed special privileges — and perhaps also immunities — during those oppressive times. The non-inclusion of the periodicals was a transparent hypocrisy, an ostensibly pious if not at all convincing pretense of respect for freedom of expression that was in fact one of the most desecrated liberties during the past despotism.

We are convinced that the information against the petitioner should never have been filed at all and that the respondent judge committed grave abuse of discretion in denying the motion to quash the information on the ground that the allegations therein did not constitute an offense. The petitioner is entitled to the relief he seeks from those who in the guise of law and through the instrumentality of the trial court would impose upon him this arrant tyranny.

B. FRAUD.

What Sir Francis Bacon said in his essay "Of Truth" provides one explanation for discountenancing fraud and imposing liability on those who commit the same:

> "To pass from the theological and philosophical truth, to the truth of civil business; it will be acknowledged even by those that practise it not, that clear and round dealing is the honour of man's nature; and that mixture of falsehood is allay in coin of gold and silver, which may make the metal work the better, but it embaseth it. For these winding and crooked courses are the goings of the serpent; which goeth basely upon the belly and not upon the feet. There is no vice that doth so cover a man with shame as to be found false and perfidious. And therefore, Montaigne saith

> prettily, when he inquired the reason, why the word of the lie should be such a disgrace and such an odious charge? Saith he, 'If it be well weighed, to say that a man lieth, is as much to say, as that he is brave towards God and a coward towards men.'"

The tort of fraud under Article 33 includes cases which constitute the tort of deceit in England and the United States. *(Report of the Code Commission, p. 47).* The elements of deceit in English law are as follows: (a) The defendant must have made false representation to the plaintiff; (b) The representation must be one of fact; (c) The defendant must know that the representation is false or be reckless about whether it is false; (d) The defendant must have acted on the false representation; (e) The defendant must have intended that the representation should be acted on; (f) The plaintiff must have suffered damage as a result of acting on the representation. *(Elliott and Quinn, Tort Law, 1996 Ed., p. 69).* Dean Prosser enumerated, more or less, the same requisites of deceit. *(Prosser, Handbook of the Law of Torts, 2nd Ed., 1955, p. 523).* In addition, he explained that with respect to the requirement of knowledge of the defendant, it is also enough that said defendant has no sufficient basis of information to make representation or what is known as *"scienter."*

False representation contemplated in the first requisite can be made by spoken or written words. It can also be made by conduct. A representation is not confined to words or positive assertions; it may consist as well of deeds, acts or artifices of a nature calculated to mislead another and thereby to allow the defendant to obtain undue advantage over them. *(Lindberg Cadilac Co. vs. Aron, 371 S.W. 2d., 651 [1963]; Jones vs. West Side Buick Auto Co., 231, Mo. App. 187, 93 S.W. 2d. 1083).*

Half-truths are likewise included. It is actionable if it is "such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false." *(Peek vs. Gurney, L.R. 6 H.L. 377 at 403, cited in Winfield and Jolowicz p. 357).* L.J. MacKinnon said: "A cocktail of truth, falsity and evasion is more powerful instrument of deception than undiluted falsehood." *(Smith New Court Securities Ltd. vs. Scrimgeour Vickers [Asset Management] Ltd., A.C. 254 at 274 [1997]).*

However, misrepresentation upon a mere matter of opinion is not an actionable deceit. *(Sonco vs. Sellner, 37 Phil. 254).* Nevertheless, Article 1341 of the Civil Code provides that a mere expression of opinion does not signify fraud, unless made by an expert and the other party has relied on the former's special knowledge.

Section 526 of the Restatement (Second) of Torts considers misreprentation fraudulent if the maker: (a) knows or believes that the matter is not as he represents it to be; (b) does not have the confidence in the accuracy of his representation that he states or implies; or (c) knows that he does not have the basis for his representation that he states or implies.

The second requisite removes representation of matters of law from the ambit of the tort of deceit. The reason for the rule is the view that propositions of law are generally matters of public record to which the plaintiff and defendant have equal access. The plaintiff could easily confirm those representations from an independent source if desired. Nevertheless, American case law exceptionally include representations of law if it is mixed with representations of fact. Legal writers likewise caution that "a great many statements which we should not hesitate to describe as statements of fact *involve inferences from legal rules. (Winfield and Jolowicz, p. 356)*. The statement in *Eaglesfield vs. Marquiz of Londonderry* (4 Ch.D. 693 at 703 [1876]) was cited thus:

> "There is not a single fact connected with personal status that does not, more or less, involve a question of law. If you state that a man is the eldest son of a marriage, you state a question of law, because you must know that there has been a valid marriage, and that the man was the first-born son after the marriage. . . Therefore, to state it is not a representation of fact seems to arise from a confusion of ideas. It is not less a fact because that fact involves some knowledge or relation of law."

The cases of fraud covered by Article 33 therefore include estafa under the Revised Penal Code. Fraud is broad enough to include cases when the defendant committed the crime of estafa under Article 315(2)(a to c) and (3) of the Revised Penal Code. They are estafa committed through false pretenses. Fraud also includes estafa for violation of the Trust Receipts Law (P.D. No. 115; *Prudential Bank v. IAC, 216 SCRA 257, 277 [1992]*).

Fraud likewise includes misrepresentations made by sellers and manufacturers. Thus, liability can be imposed under Article 33 if the seller fraudulently represented that his product is free from any side-effect although he knew for a fact that anybody who will use it repeatedly may become ill.

CASE:

ELENITA LEDESMA SILVA, et al. vs. ESTHER PERALTA
G.R. No. L-13114, November 25, 1960

The findings of fact of the lower court may be briefly summarized as follows:

At the outbreak of the war in 1941, the defendant Esther Peralta abandoned her studies as a student nurse at the Zamboanga General Hospital. In June of 1942, she resided with her sister, Mrs. Pedro Pia, in Maco, Tagum, Mabini, Davao. Saturnino Silva, then an American citizen and an officer of the United States Army and married to one Priscilla Isabel of Australia, had been ordered sent to the Philippines during the enemy occupation to help unite the guerrillas in their fight for freedom. In 1944, he was the commanding officer of the 130th Regiment, under the overall command of Colonel Claro Laureta of the 107th Division, with general headquarters at Magugpo, Tagum, Davao.

Some time during the year 1944, Florence, a younger sister of the defendant, was accused of having collaborated with the enemy, and for this she was arrested, and, accompanied by Esther, brought to Anibongan and later to the general headquarters at Magugpo for investigation. It was during said investigation that Silva first met Esther. Florence was exonerated of the charges made against her and was ordered released, but with the advice that she should not return to Maco for the time being. Heeding such advice, Florence and her sister, appellee herein, went to live with the spouses Mr. and Mrs. Camilo Doctolero at Tipas, Magugpo, Davao.

Silva started to frequent the house of the Doctoleros, and soon professed love for Esther. Having been made to believe that he was single, she accepted his marriage proposal; and the two were married on January 14, 1945 by one Father Cote on the occasion of a house blessing. No documents of marriage were prepared nor executed, allegedly because there were no available printed forms for the purpose. Hence, the lovers lived together as husband and wife. From the "marriage," a child, named Saturnino Silva, Jr., was born.

On May 8, 1945, Silva sustained serious wounds in the battle of Ising, for which reason, he was transferred to Leyte, and later to the United States, for medical treatment. While in the States, he divorced Priscilla Isabel and later, on May 9, 1948, contracted marriage with plaintiff Elenita Ledesma Silva.

Upon his return to the Philippines, appellee Esther Peralta demanded support for their child, and, upon his refusal, instituted a suit for support in the Court of First Instance of Manila. Thereupon, the present action was filed against Esther, and another suit against her was instituted in Cotabato.

Except for the statement that a marriage actually took place between Saturnino Silva and Esther Peralta the evidence on record fully supports the foregoing findings of fact of the lower court. No evidence was offered, other than the testimonies of the defendant herself and her counsel, Atty. Juan Quijano, to prove any such alleged marriage, although there is convincing proof

that the defendant and Saturnino Silva, for a time, actually lived together as common-law husband and wife. But the witnesses' asseverations regarding the marriage, taken by themselves and considered with other circumstances appearing on record, reveal too much uncertainty and incoherence as to be convincing.

x x x

All the foregoing circumstances, coupled with the admitted fact that no marriage documents of any kind prior to, during or after the marriage were ever prepared or executed by anybody, and that a vigorous denial of the supposed marriage was made by Saturnino Silva, the alleged consort, lead to the conclusion that no marriage had really taken place.

In the face of the evidence, we cannot give value on the presumption of the marriage under Section 69(bb) of the Rules of Court, especially because, at the time of the alleged marriage on January 14, 1945, Saturnino Silva was still married to one Priscilla Isabel, an Australian national.

In view of the non-existence of appellee's marriage with Saturnino Silva and the latter's actual marriage to plaintiff Ledesma, it is not proper for Esther to continue representing herself as the wife of Saturnino. Article 370 of the Civil Code of the Philippines authorizes a married woman to use the surname of her husband; impliedly, it also excludes others from doing likewise.

As to plaintiff Elenita Silva's claim for moral damages, the Court below has carefully analyzed the evidence in its decision and found (Rec. App., pp. 47-49) that her claims of humiliation and distress are not satisfactorily proved; and we have found no ground to disturb such findings, considering the trial judge's ample opportunity to observe the witnesses at the stand. The plaintiff's distress upon learning from her lawyer that her husband had a child by the defendant, and was being sued for its support, confers no right to claim damages, in the absence of proof that the suit was reckless or malicious. Although Article 2216 of the Civil Code expressly provided that "no proof of pecuniary loss is necessary in order that moral, nominal, . . . or exemplary damages may be adjudicated," and the assessment thereof, "is left to the discretion of the court, there should be a clear showing of the facts giving rise to such damages. (Art. 2217). This is particularly the case here, since it appears that appellee had acted in good faith, Silva having formerly introduced the appellee to other persons as Mrs. Silva, and sent her letters thus addressed (Exh. 2), implying authority to use the disputed appellation prior to his subsequent marriage to Elenita Ledesma.

Regarding the counterclaim for damages, the lower court awarded damages to the defendant appellee, stating in its decision:

> *"El Juzgado estima en P15,000.00, los daños que la demandada ha sufridi por haber perdido el puesto en la Davao Council, y por los sufrimientos moral que aquella ha sufrido, la suma de P15,000.00, mas la adicional de P5,000.00 por honorarios de abogado."*

This award is contested by appellants on the ground that defendant appellee's resignation from the Girl Scouts Davao Council was voluntary; according to her own letter Exhibit "S," she applied for an indefinite leave of absence to attend to a personal matter in Manila, which turned out to be the civil case that she had filed against Silva for the support for her child by him. Witness Felicidad Santos, asked about the reason why Esther Peralta left her position, testified:

> "She resigned. She told me there was a case. In fact that was the time when she told me that there was a case which (she) filed in Manila and to attend that case it will interfere too much of her activities as an Executive of the Davao Girl Scout." (t.s.n., pp. 245- 246, Restauro)

No great effort is needed to discern that Esther Peralta would never have agreed to live maritally with appellant Silva nor beget a child by him had not Silva concealed that he was already married; and in that case appellee Peralta would not have been compelled to relinquish her employment to attend to the litigation filed to obtain for the child the support that Silva refused. Wherefore, Esther's loss of employment is ultimately a result of Silva's deception and she should be indemnified therefor. It is well to note in this connection, that Silva's act in hiding from the appellee that he could not legally marry her, because he already had an Australian wife, was not mere negligence, but actual fraud *(dolo)* practiced upon the appellee. Consequently, he should stand liable for any and all damages arising therefrom, which included the expense of maintaining the offspring and the expenses of litigation to protect the child's rights, and the loss of the mother's own earnings. This is a liability that flows even from Articles 1902 and 1107 (par. 2) of 1889. (Arts. 2176 and 2202 of the New Code).

"ART. 1902. Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done."

"ART. 1107. In case of fraud *(dolo)* the debtor shall be liable for all losses and damages which clearly arise from the failure to fulfill the obligation."

Considering that the child was born on October 30, 1945, and has had to be supported exclusively by his mother since then up to the present, because the appellant Silva has refused to pay or even contribute to such support, and that appellee was earning P150.00 a month until she had to leave Davao to attend to her son's case, we can not say that P15,000.00 pecuniary damages awarded by the Court below are excessive or inequitable.

The lower court's award of moral damages is, likewise, assailed as unjustified and not allowable under the law and jurisprudence governing before the effectivity of the new Civil Code of the Philippines.

Granting *arguendo* the correctness of the proposition that, under the old law, no moral damages were allowable as a consequence of sexual relations outside of wedlock, still the evidence of record satisfies us that after the filing in May of 1954 of the first action by Esther Peralta against appellant

Saturnino Silva, seeking support of their minor child, said appellant managed to avoid the service of summons, which were still unserved on him until the case at bar was tried, and in addition exercised improper pressure upon the appellee to make her withdraw the suit; that to this effect, appellant's brother and one Mrs. Misa, Girl Scouts executive of Iloilo, went to see Esther Peralta to press her to drop the case, warning her of untoward consequences otherwise; and when she refused, appellants, through counsel, filed against her the present action in Davao and another one in the Court of First Instance of Cotabato, charging her with conversion of Silva's properties in addition to bringing to the attention of the higher authorities of the Girl Scouts organization (wherein Esther Peralta was then employed) appellee's claim to be the wife of Col. Saturnino Silva, to whom "she must have been wedded in contemplation" (sic, Exh. 22), and unchaining a series of investigations that brought to light her condition as an unwedded mother, there is apparent here an obvious pattern of harassment, with a view to forcing appellee into abandoning the interests of her child. That such deliberate maneuvers caused the mother mental anguish and even physical suffering (she actually became ill as a result), can be easily understood and needs no special demonstration beyond her testimony to that effect.

As this injury was inflicted upon the appellee from 1954 onwards, after the new Civil Code had become operative, it constitutes a justification for the award of moral damages (Art. 2217), claimed by appellee in the first counterclaim of her amended answer. (Record on Appeal, pp. 26-27). The court below, as already noted, awarded her P15,000.00 as moral damages and P5,000.00 attorney's fees; and taking all the circumstances of record, we are not inclined to disturb the award. However, we agree with appellants that it was error for the court to sentence both appellants to the solidary payment of the damages. The liability therefor should be exclusively shouldered by the husband Saturnino Silva.

As to the admission of the amended complaint, the same is discretionary in the trial court, and we do not see that the appellants were substantially prejudiced by the admission.

In view of the foregoing, the judgment appealed from is modified and defendant appellee Esther Peralta is enjoined from representing herself, directly or indirectly to be the wife of appellant Saturnino R. Silva; and appellant Saturnino R. Silva is in turn ordered to pay Esther Peralta the amount of P30,000.00 by way of pecuniary and moral damages, plus P5,000.00 as attorneys' fees. No costs.

C. PHYSICAL INJURIES.

The independent civil action for physical injuries under Article 33 of the New Civil Code include the crime of "battery" in American law. *(Report of the Code Commission, p. 47).* Battery is an intentional infliction of harmful or offensive bodily contact. Bodily contact is offensive if it offends a reasonable person's sense of dignity. It is

offensive even if the defendant's conduct is intended only as a joke or a compliment. *(Restatement [Second] of Torts, Section 19).* Battery should be distinguished from "assault" which is an intentional conduct by one person directed at another which places the latter in apprehension of immediate bodily harm or offensive act. However, the evident intent of the Code Commission is to provide for independent civil action even for "assault."

It has been ruled in this jurisdiction that the term "physical injuries" in Article 33 include bodily injuries causing death. *(Capuno and Capuno vs. Pepsi-cola Bottling Company of the Philippines, et al., G.R. No. L-19331, April 30, 1965, citing Dyogi vs. Yatco, G.R. No. L-9623, Jan. 22, 1957, Vol. 22, L.J., p. 175).*

However, there is an authority supporting the view that the term "physical injuries" do not include the cases where the crime committed is reckless imprudence resulting in homicide. Justice Capistrano, an eminent civilist, explained in *Corpus, et al. vs. Paje* (G.R. No. L-26737, July 31, 1969) that:

> Criminal negligence, that is, reckless imprudence, is not one of the three crimes mentioned in Article 33 of the Civil Code which authorizes the institution of an independent civil action, that is, of an entirely separate and distinct civil action for damages, which shall proceed independently of the criminal prosecution and shall be proved only by a preponderance of evidence. Said article mentions only the crimes of defamation, fraud, *(estafa)* and physical injuries. Although in the case of *Dyogi, et al. vs. Yatco, et al.,* G.R. No. L-9623, January 22, 1957, this Court held that the term "physical injuries" used in Article 33 of the Civil Code includes homicide, 1 it is to be borne in mind that the charge against Felardo Paje was for reckless imprudence resulting in homicide, and not for homicide and physical injuries. In the case of *People vs. Buan*, G.R. No. L-25366, March 29, 1968, Mr. Justice J.B.L. Reyes, speaking for the Supreme Court, said that the "offense criminal negligence under Article 365 of the Revised Penal Code lies in the execution of an imprudent or negligent act that, if intentionally done, would be punishable as a felony. The law penalizes thus the negligent or careless act, not the result thereof. The gravity of the consequences is only taken into account to determine the penalty; it does not qualify the substance of the offense." It is, therefore, clear that the charge against Felardo Paje was not for homicide but for reckless imprudence, that is, criminal negligence resulting in homicide (death of Clemente Marcia) and double physical injuries suffered by two other persons. As reckless imprudence or criminal negligence is not one of the three crimes mentioned in Article 33 of the Civil Code, there is no independ-

ent civil action for damages that may be instituted in connection with said offense. Hence, homicide through reckless imprudence or criminal negligence comes under the general rule that the acquittal of the defendant in the criminal action is a bar to his civil liability based upon the same criminal act notwithstanding that the injured party reserved his right to institute a separate civil action. *(Chantangco vs. Abaroa, supra)*. In the language of Rules of Court (Rule 111, Sec. 3), the extinction of the criminal action by acquittal of the defendant on the ground that the criminal act charged against him did not exist, necessarily extinguished also the civil action for damages based upon the same act.

Justice Capistrano further explained in one of the footnotes of said case that:

(a) The holding in the case of *Dyogi, et al. vs. Yatco, etc., et al., supra*, that the term "physical injuries" used in Article 33 of the Civil Code includes homicide or murder, is contrary to the letter and spirit of the law. I recall that when the draft of what is now Article 33 of the New Civil Code was presented for deliberation by Code Commission Chairman Dean Jorge C. Bocobo, a great civilian, before the Code Commission (then composed of, besides Chairman Bocobo, Professor Guillermo B. Guevarra, Dean Pedro Y. Ylagan, and Dean Francisco R. Capistrano, members), said Chairman made, in substance, the following remarks: In America the injured party in crime has the initiative, through his lawyer he immediately files a civil action for damages against the offender. In the Philippines, the offended party depends upon the fiscal to demand in the criminal action the damages he has suffered. I think it is about time to educate our people the American way by giving the injured party in crime the initiative to go to court through his lawyer to demand damages, and for this purpose we should give him an independent civil action for damages. Let us begin with just three crimes which are of common occurrence, namely, defamation, fraud and physical injuries. Depending upon the success of the experiment, when the new Civil Code may come up for revision about fifty (50) or one hundred (100) years from now, it will be up to our successors in the Code Commission to add more crimes to the three already mentioned or make the provision comprise all crimes causing damages to the injured party. This civil action, as in America, should proceed independently of the criminal action and should be proved only by preponderance of evidence. Defamation may be oral or written. Fraud comprises all forms of estafa Physical injuries is to be understood in its ordinary meaning and does not include homicide or murder because where physical injuries result in homicide or murder, the reason for the law (namely, to give the injured party personally the initiative to demand damages by

> an independent civil action) ceases, for the reason that a dead person can no longer personally, through his lawyer, institute an independent civil action for damages. (All the members of the Code Commission agreed with the Chairman and the draft of the article was unanimously approved.).
>
> In the Revised Penal Code, the crime of homicide is treated in Title Eight (Crimes Against Persons), Chapter One (Destruction of Life), while the crime of physical injuries is separately treated in Chapter Two of the same title. This shows that the two crimes are distinct from each other, that physical injuries is not included in homicide.

However, it was observed in one case that the well reasoned opinion of Justice Capistrano in *Corpus vs. Paje* is not the controlling doctrine. The Supreme Court observed in *Madeja vs. Caro* (126 SCRA 293 [1983]) that the ruling in *Corpus* is not authoritative. Of eleven justices in the Supreme Court at the time the case was decided, only nine took part in the decision and four of them merely concurred in the result. Consequently, the rule now is that physical injuries which resulted because of negligence or imprudence is not included in Article 33. They are already covered by Article 2176 of the Civil Code.

4. ART. 34: NEGLECT OF DUTY

Article 34 of the Civil Code provides that "when a member of a city or municipal police force refuses or fails to render aid or protection to any person in case of danger to life or property, such peace officer shall be primarily liable for damages and the city or municipality shall be subsidiarily responsible therefor." The provision likewise states that the civil action shall be independent of any criminal proceedings and a preponderance of evidence shall suffice to support such action.

Article 34 is intended to afford a remedy against police officers "who connive with bad elements, are afraid of them or are simply indifferent to duty." *(1 Capistrano 38).* The liability of policeman was explained by Judge Jarencio *(Jarencio, Torts and Damages, 1983 Ed., p. 205)* in this manner:

> "The policeman is the government official to whom the common man usually turns for protection when his life or property is threatened with danger. To him the policeman is the external symbol of government's power and authority. Thus, it is the primary duty of city and municipal policemen not only to preserve and maintain peace and order but also to render aid and protection to life and property in their jurisdictions. If policemen refuse or fail to render aid and protection to any person whose life or property is in danger, they are unfaithful to their duty and Art. 34 of the Civil Code properly grants to the person damaged a right action against a recreant policeman."

On the other hand, the subsidiary liability of cities and municipalities, is imposed so that they will exercise great care in selecting conscientious and duly qualified policeman and exercise supervision over them in the performance of their duties as peace officers. (Jarencio, ibid.; 1 Capistrano 38).

CHAPTER 9

CIVIL LIABILITY ARISING FROM DELICT

1. BASIS OF LIABILITY

The basic rule in this jurisdiction is that every person criminally liable for a felony is also civilly liable. *(Article 100, Revised Penal Code)*. Civil liability arising from criminal liability is expressly recognized as a source of obligation under the Civil Code although it provides that civil obligations arising from criminal offenses shall be governed by penal laws. *(Article 1161, Civil Code)*.

The underlying legal principle of such rule is the view that from the standpoint of its effects, a crime has a dual character. A crime is an offense against the State because of the disturbance of the social order and at the same time an offense against the private person injured by the crime. In the ultimate analysis, what gives rise to the civil liability is really the obligation of everyone to repair or to make whole the damage caused to another by reason of his act or omission, whether done intentionally or negligently and whether or not punishable by law. *(Occena vs. Icamina, 181 SCRA 328, 333 [1990])*.

It should be noted that the dual character of crimes is present not only in felonies defined under the Revised Penal Code but also in cases governed by special laws. *(Banal vs. Tadeo, 156 SCRA 325 [1987])*. For example, violation of Batas Pambansa Blg. 22 results in both criminal liability and civil liability. In fact, the Supreme Court recognized the existence of such civil liability in Supreme Court Circular No. 57-97 and Section 1 of Rule 111 of the 2000 Rules of Criminal Procedure which both provide that the criminal action for violation of Batas Pambansa Blg. 22 shall be deemed to include the corresponding civil action. The person injured by the crime is no longer allowed to reserve the right to file a separate civil action to pursue the civil liability.

However, not all offenses give rise to civil liability. Thus, begging in contravention of ordinances, violation of game laws, and infraction of the rules of traffic when nobody is hurt, do not produce

civil responsibility. *(Barredo vs. Garcia and Almario, G.R. No. 48006, July 8, 1942)*. Similarly, the crimes of treason, rebellion, espionage, contempt and other similar crimes do not result in civil liability. The absence of civil liability in those cases is the result of the fact that either there are no damages to be compensated or there is no private person injured by the crime. *(Occena vs. Icamina, supra)*.

The Supreme Court explained the basis of civil liability *ex delicto* in *Banal vs. Tadeo* in this wise:

> Generally, the basis of civil liability arising from crime is the fundamental postulate of our law that "Every man criminally liable is also civilly liable." *(Art. 100, The Revised Penal Code)*. Underlying this legal principle is the traditional theory that when a person commits a crime he offends two entities namely (1) the society in which he lives in or the political entity called the State whose law he had violated; and (2) the individual member of that society whose person, right, honor, chastity or property was actually or directly injured or damaged by the same punishable act or omission. However, this rather broad and general provision is among the most complex and controversial topics in criminal procedure. It can be misleading in its implications especially where the same act or omission may be treated as a crime in one instance and as a tort in another or where the law allows a separate civil action to proceed independently of the course of the criminal prosecution with which it is intimately intertwined. Many legal scholars treat as a misconception or fallacy the generally accepted notion that the civil liability actually arises from the crime when, in the ultimate analysis, it does not. While an act or omission is felonious because it is punishable by law, it gives rise to civil liability not so much because it is a crime but because it caused damage to another. Viewing things pragmatically, we can readily see that what gives rise to the civil liability is really the obligation and the moral duty of everyone to repair or make whole the damage caused to another by reason of his own act or omission, done intentionally or negligently, whether or not the same be punishable by law. In other words, criminal liability will give rise to civil liability only if the same felonious act or omission results in damage or injury to another and is the direct and proximate cause thereof. Damage or injury to another is evidently the foundation of the civil action. Such is not the case in criminal actions for, to be criminally liable, it is enough that the act or omission complained of is punishable, regardless of whether or not it also causes material damage to another. *(See Sangco, Philippine Law on Torts and Damages, 1978, Revised Edition, pp. 246-247)*.

Article 20 of the New Civil Code provides:

> "Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same."
>
> Regardless, therefore, of whether or not a special law so provides, indemnification of the offended party may be had on account of the damage, loss or injury directly suffered as a consequence of the wrongful act of another. The indemnity which a person is sentenced to pay forms an integral part of the penalty imposed by law for the commission of a crime. *(Quemel v. Court of Appeals, 22 SCRA 44, citing Bagtas v. Director of Prisons, 84 Phil. 692).* Every crime gives rise to a penal or criminal action for the punishment of the guilty party, and also to civil action for the restitution of the thing, repair of the damage, and indemnification for the losses. *(United States v. Bernardo, 19 Phil. 265).*
>
> Indeed, one cannot disregard the private party in the case at bar who suffered the offenses committed against her. Not only the State but the petitioner too is entitled to relief as a member of the public which the law seeks to protect. She was assured that the checks were good when she parted with money, property or services. She suffered with the State when the checks bounced.

It should be pointed out that the presence of civil liability in offenses is not determined by the fact that the crime is public or private. It is reasonable to assume that the offended party in the commission of a crime, public or private, is the party to whom the offender is civilly liable, in the light of Article 100 of the Revised Penal Code. *(Garcia vs. Court of Appeals, 266 SCRA 678, 690 [1997]).* In other words, there is civil liability even if the offense is a public offense, as in the case of bigamy. *(ibid.).*

2. PERSONS LIABLE

The persons who are criminally liable under the Revised Penal Code are the principals, accomplices and accessories defined under Articles 16 to 20 thereof. Consequently, the same persons are also civilly liable under Article 100 of the same law.

Death of the person liable after final judgment extinguishes the criminal liability but will not extinguish the civil liability. The obligation to make restoration or reparation for damages and indemnification for consequential damages devolves upon the heirs of the person liable. *(Article 108, Revised Penal Code).*

Article 109 of the Revised Penal Code provides that if there are two or more persons civilly liable for a felony, the courts shall

determine the amount for which each must respond. The law likewise provides for the rules regarding preference in payment of the obligations of the principals, accomplices and accessories of a felony.

> "Art. 110. *Several and subsidiary liability of principals, accomplices and accessories of a felony — Preference in payment.* — Notwithstanding the provisions of the next preceding article, the principals, accomplices, and accessories, each within their respective class, shall be liable severally *(in solidum)* among themselves for their quotas, and subsidiaries for those of the other persons liable.
>
> The subsidiary liability shall be enforced, first against the property of the principals; next, against that of the accomplices, and, lastly, against that of the accessories.
>
> Whenever the liability in solidum or the subsidiary liability has been enforced, the person by whom payment has been made shall have a right of action against the others for the amount of their respective shares."

Thus, if the principal and accessory concur, the court may fix the amount for which the principal is primarily liable and determine a separate amount of liability of the accessory. In such a case, the liability to be imposed by the court is not to be paid jointly and severally by the principal and the accessory. Each of them shall be subsidiarily liable for the other's share in case of the latter's insolvency. *(*See *People vs. Cortes, 55 Phil. 143; People vs. Bantangan, 54 Phil. 834, 841).*

For example, in *People vs. Deveras* (228 SCRA 482, 488 [1993]), two accused were convicted of the crime of murder as principal and accessory. The civil liability given to the heirs was P50,000.00 which was divided between the accused. P40,000.00 was ordered to be paid by the principal while P10,000.00 was to be paid by the accessory. The Court ruled that each of them shall be liable for the other's share in case of insolvency. In other words, neither the principal nor the accessory can be ordered to pay P50,000.00 unless the other is insolvent.

Among the members of the same class, the liability is solidary. Hence, in *Lumiguis vs. People* (19 SCRA 842, 847 [1967]), the civil liability of P6,000.00 was apportioned among a principal and four (4) accomplices. Of the P6,000.00, the principal was made primarily liable for P3,000.00; the accomplices were made liable to pay P3,000.00 primarily and *in solidum* among themselves.

In *People vs. Ragas* (44 SCRA 152), the Supreme Court ruled that the accused who paid the civil indemnity may later claim from

his partners-in-crime the share that corresponds to each. *(Article 1217, Civil Code).*

3. WHAT IS INCLUDED IN CIVIL LIABILITY

The civil liability mandated in Article 100 of the Revised Penal Code includes restitution, reparation of the damage caused and indemnification for consequential damages. The indemnity provided in criminal law as civil liability is the equivalent of actual and compensatory damages in civil law. *(People vs. Malapo, 294 SCRA 579, 591 [1998]; People vs. Gerentiza, G.R. No. 123151, January 29, 1998; People vs. Victor, G.R. No. 127903, July 9, 1998).*

> Art. 105. *Restitution — How made.* — The restitution of the thing itself must be made whenever possible, with allowance for any deterioration, or diminution of value as determined by the court.
>
> The thing itself shall be restored, even though it be found in the possession of a third person who has acquired it by lawful means, saving to the latter his action against the proper person, who may be liable to him.
>
> This provision is not applicable in cases in which the thing has been acquired by the third person in the manner and under the requirements which, by law, bar an action for its recovery.
>
> Art. 106. *Reparation — How made.* — The court shall determine the amount of damage, taking into consideration the price of the thing, whenever possible, and its special sentimental value to the injured party, and reparation shall be made accordingly.
>
> Art. 107. *Indemnification — What is included.* — Indemnification for consequential damages shall include not only those caused the injured party, but also those suffered by his family or by a third person by reason of the crime.
>
> x x x x x x x x x
>
> Art. 111. *Obligation to make restitution in certain cases.* — Any person who has participated gratuitously in the proceeds of a felony shall be bound to make restitution in an amount equivalent to the extent of such participation.

4. PROXIMATE CAUSE

The rule on proximate cause in quasi-delict cases is applicable to cases involving civil liability arising from delict. Article 2202 provides that in crimes and quasi-delicts, the defendant shall be liable for all damages which are natural and probable consequences of the act or

omission complained of. It is not necessary that such damages have been foreseen or could have reasonably been foreseen by the accused.

5. CIRCUMSTANCES AFFECTING CIVIL LIABILITY

Justifying circumstances are circumstances which make the act of the accused legal. The person is deemed not to have transgressed the law and is free from criminal liability. *(Reyes, Revised Penal Code, Vol. 1, 1998 Ed., p. 139).* Exempting circumstances, on the other hand, merely exempt the person from punishment. Mitigating and aggravating circumstances reduce the criminal liability or compels the court to impose the penalty to the maximum provided by law. The circumstances are stated in Articles 11, 12, 13, 14 and 15 of the Revised Penal Code.

A. JUSTIFYING AND EXEMPTING CIRCUMSTANCES.

Generally, the accused is free from civil liability if justifying circumstances are properly established in a criminal case. The exception is provided for in the second paragraph of Article 101 of the Revised Penal Code which imposes liability on the persons who obtained benefit because he performed an act in a state of necessity. The liability is similar to those imposed under Article 432 of the Civil Code.

On the other hand, exempting circumstances do not erase civil liability. Civil liability is expressly provided for in the first and the third paragraphs of Article 101 of the Revised Penal Code which provides:

> Art. 101. *Rules regarding civil liability in certain cases.* — The exemption from criminal liability established in subdivisions 1, 2, 3, 5 and 6 of article 12 and in subdivision 4 of article 11 of this Code does not include exemption from civil liability, which shall be enforced subject to the following rules:
>
> *First*. In cases of subdivisions 1, 2, and 3 of Article 12, the civil liability for acts committed by an imbecile or insane person, and by a person under nine years of age, or by one over nine but under fifteen years of age, who has acted without discernment, shall devolve upon those having such person under their legal authority or control, unless it appears that there was no fault or negligence on their part.
>
> Should there be no person having such insane, imbecile or minor under his authority, legal guardianship or control, or if such person be insolvent, said insane, imbecile, or minor shall respond with their own property, excepting property exempt from execution, in accordance with the civil law.

> *Second*. In cases falling within subdivision 4 of Article 11, the persons for whose benefit the harm has been prevented shall be civilly liable in proportion to the benefit which they may have received.
>
> The courts shall determine, in sound discretion, the proportionate amount for which each one shall be liable.
>
> When the respective shares cannot be equitably determined, even approximately, or when the liability also attaches to the Government, or to the majority of the inhabitants of the town, and, in all events, whenever the damages have been caused with the consent of the authorities or their agents, indemnification shall be made in the manner prescribed by special laws or regulations.
>
> *Third*. In cases falling within subdivisions 5 and 6 of Article 12, the persons using violence or causing the fears shall be primarily liable and secondarily, or, if there be no such persons, those doing the act shall be liable, saving always to the latter that part of their property exempt from execution.

Thus, civil liability devolves upon those who have custody or authority over the person who caused the damage if the following exempting circumstances are present: a) The crime was created by an imbecile or an insane person unless the latter has acted during a lucid interval *(Art. 12[1], Revised Penal Code);* b) the crime was committed by a person under nine years of age *(Art. 12[2], Revised Penal Code;* and c) the crime was committed by a person over nine years of age and under fifteen, unless he has acted with discernment *(Section 12[3], Revised Penal Code)*. There is secondary liability on the part of the person who caused damage while under the influence of fear or violence in the following instances: a) The crime was committed by any person who acts under the compulsion of an irresistible force *(Section 12[5], Revised Penal Code);* and b) the crime was committed by any person who acts under the impulse of an uncontrollable fear of an equal or greater injury *(Section 12[6], Revised Penal Code)*.

There is no civil liability if the following exempting circumstances are present: a) The crime was committed by any person who, while performing a lawful act with due care, causes and injury by mere accident without fault or intention of causing it *(Section 12[4], Revised Penal Code);* and, b) the crime was committed by any person who fails to perform an act required by law, when presented by some lawful or insuperable cause (Section 12[7], Revised Penal Code).

On the other hand, civil liability when there is justifying circumstances is present only in the situation contemplated under paragraph

4 of Article 11 involving state of necessity.

In *United States vs. Baggay* (20 Phil. 142, 146-147 [1911]), the Supreme Court explained that: "true it is that civil liability accompanies criminal liability, because every person liable criminally for a crime or misdemeanor is also liable for reparation of damage and for indemnification of the harm done, but there may be civil liability because of acts ordinarily punishable, although the law has declared their perpetrators exempt from criminal liability. Such is the case of a lunatic or insane person who, in spite of his irresponsibility on account of the deplorable condition of his deranged mind, is still reasonably and justly liable with his property for the consequences of his acts, even though they be performed unwittingly, for the reason that his fellows ought not to suffer from the disastrous results of his harmful acts more than is necessary, in spite of his unfortunate condition. Law and society are under obligation to protect him during his illness and so when he is declared to be liable with his property for reparation and indemnification, he is still entitled to the benefit of what is necessary for his decent maintenance, but this protection does not exclude liability for damage caused to those who may have the misfortune to suffer the consequences of his acts."

These rules regarding the civil liability (or absence thereof) of persons who may properly invoke exempting or justifying circumstances can be best explained in the light of their philosophical underpinnings. Justice Mariano A. Albert explained the differences between exempting and justifying circumstances, both as to their basis and effects:

> "There can be no criminal liability unless the person committing the crime has the qualities necessary to make it imputable to him.
>
> Etymologically, the verb to *impute* means to charge to one's account. Legally, it means to impose as a charge, and implying that the act spoken of has been freely done and may therefore be put down to the doer as his very own. Imputing an act to the doer implies no judgment of its agreement or disagreement with the law; it means only that the act comes into the field of Ethics as done by a free conscious intelligent agent. Imputability therefore is the quality by which an act may be ascribed to a person as its author or owner.
>
> From the fact that a deed may be imputed to a person arises the idea that the person must take the consequences of such a deed; this moral necessity is known as responsibility. In Criminal Law, therefore, imputability affirms the existence

of a causal relation between the criminal and the crime; while responsibility is the obligation of suffering the consequences of crime. Guilt is an element of responsibility, for a man cannot be made to answer for the consequences of his crime unless he is guilty of it. If, then, responsibility is the obligation of taking the penal and civil consequences of the crime, imputability comes to be the sum of minimum psychical conditions that in view of the causal relation between a deed and the free doer of it necessitate that a crime have a punishable author. Imputability entails responsibility as a consequence.

Our Penal Code does not directly mention the conditions that the active subject of the crime must combine in order to be deemed capable of committing a crime. It merely declares what persons are exempt from criminal liability or incur no penal responsibility or cannot have the penalty imposed upon them. But since the Code has defined crimes as the malicious or negligent acts or omissions that are punishable by law, it is evident that only a man capable of a free and voluntary act or omission, whether malicious or otherwise, can commit an act punishable by law. Unless the active subject of the crime has the conditions that give rise to imputability, he cannot be held criminally accountable.

The causes that exclude imputability and so rule out criminal liability, however harmful the act done may be to another, are improperly termed in our Penal Code justifying or exempting circumstances. A circumstance is some external condition bearing an act, which consequently affects its non-essentials, but cannot touch its substance, whereas the so-called justifying and exempting circumstances so alter the nature of the act as to transform it from a crime into a misfortune. All such defences would more aptly be called *causes that exclude criminal liability* and divide into *justificatory causes or causes of justification* (which comprise the grounds for exemption from liability because of the lawfulness of the act in the circumstances), and *causes of failure of imputability* (comprising the grounds of exemptions from penalty because the defendant lacks the outward freedom to act for himself or the intelligence required to understand the consequences of his acts). Both justification and unimputability prevent the court from imposing a penalty upon the defendant; the first because objectively there is no crime, and the second, because subjectively the person causing the damage is incapable of committing a crime. Scattered throughout our Penal Code are other grounds of exemption from criminal liability for the doing of an act generally punishable by law, some of which are applicable to all crimes and others to certain crimes. Our Code gives them no special name. Silvela calls them *excusas absolutorias* or *grounds of absolution*.

Although at first sight it may seem all one whether a defense be classified as justification or unimputability or absolution, since the practical result is that no penalty can be imposed, in reality the legal consequences in the three cases vary. If the plea is justification, because the act itself is lawful and constitutes no violation of right, then (a) both principal and accomplices or accessories are exempt from criminal liability, and (b) all who took part in the deed are free from civil liability as well.

If the plea is unimputability, because while the act itself is unlawful (a violation of right), the doer lack the intelligence or awareness required to make the act imputable to him, or absolution, because while the crime is complete both objectively and subjectively, it is deemed socially useful not to punish it, then (a) only the particular defendant making good the plea is exempt, but not his fellow principals, accomplices or accessories; while (b) all who took part in the action are civilly liable for any damages arising from the unlawful act." *(Dr. Mariano A. Albert, Justifying and Exempting Circumstances Under Our Penal Code).*

CASE:

ANITA TAN vs. STANDARD VACUUM OIL CO., et al.
91 Phil. 672 [1952]

Anita Tan is the owner of a house of strong materials located in the City of Manila, Philippines. On May 3, 1949, the Standard Vacuum Oil Company ordered the delivery to the Rural Transit Company at its garage at Rizal Avenue Extension, City of Manila, of 1,925 gallons of gasoline using a gasoline tank-truck trailer. The truck was driven by Julito Sto. Domingo, who was helped by Igmidio Rico. While the gasoline was being discharged to the underground tank, it caught fire, whereupon Julito Sto. Domingo drove the truck across the Rizal Avenue Extension and upon reaching the middle of the street he abandoned the truck which continued moving to the opposite side of the street causing the buildings on that side to be burned and destroyed. The house of Anita Tan was among those destroyed and for its repair she spent P12,000.

As an aftermath of the fire, Julito Sto. Domingo and Igmidio Rico were charged with arson through reckless imprudence in the Court of First Instance of Manila where, after trial, both were acquitted, the court holding that their negligence was not proven and the fire was due to an unfortunate accident.

Anita Tan then brought this action against the Standard Vacuum Oil Company and the Rural Transit Company, including the two employees, seeking to recover the damages she has suffered for the destruction of her house.

Defendants filed separate motions to dismiss alleging in substance that (a) plaintiff's action is barred by a prior judgment and (b) plaintiff's complaint states no cause of action; and this motion having been sustained, plaintiff elevated the case to this Court imputing eight errors to the court *a quo*.

The record discloses that the lower court dismissed this case in view of the acquittal of the two employees of defendant Standard Vacuum Oil Company who were charged with arson through reckless imprudence in the Court of First Instance of Manila. In concluding that the accused were not guilty of the acts charged because the fire was accidental, the court made the following findings: "the accused Igmidio Rico cannot in any manner be held responsible for the fire to the three houses and goods therein above mentioned. He was not the cause of it, and he took all the necessary precautions against such contingency as he was confronted with. The evidence throws no light on the cause of the fire. The witnesses for the prosecution and for the defense testified that they did not know what caused the fire. It was an unfortunate accident for which the accused Igmidio Rico cannot be held responsible." And a similar finding was made with respect to the other accused Julito Sto. Domingo. The record also discloses that the information filed against the accused by the Fiscal contains an itemized statement of the damages suffered by the victims, including the one suffered by Anita Tan, thereby indicating the intention of the prosecution to demand indemnity from the accused in the same action, but that notwithstanding this statement with respect to damages, Anita Tan did not make any reservation of her right to file a separate civil action against the accused as required by the Rules of Court Rule 107, section 1-(a). As Anita Tan failed to make reservation, and the accused were acquitted, the lower court ruled that she is now barred from filing this action against the defendants.

This ruling in so far as defendants Julito Sto. Domingo and Igmidio Rico are concerned is correct. The rule is that "extinction of the penal action does not carry with it extinction of the civil, unless the extinction proceeds from a declaration in a final judgment that the fact from which the civil might arise did not exist." *(Rule 107, section 1-d, Rules of Court).* This provision means that the acquittal of the accused from the criminal charge will not necessarily extinguish the civil liability unless the court declares in the judgment that the fact from which the civil liability might arise did not exist. Here it is true that Julito Sto. Domingo and Igmidio Rico were acquitted, the court holding that they were not responsible for the fire that destroyed the house of the plaintiff, — which as a rule will not necessarily extinguish their civil liability, — but the court went further by stating that the evidence throws no light on the cause of fire and that it was an unfortunate accident for which the accused cannot be held responsible. In our opinion, this declaration fits well into the exception of the rule which exempts the two accused from civil liability. When the court acquitted the accused because the fire was due to an unfortunate accident it actually said that the fire was due to a fortuitous event for which the accused are not to blame. It actually exonerated them from civil liability.

But the case takes on a different aspect with respect to the other defendants. For one thing, the principle of *res judicata* cannot apply to them for the simple reason that they were not included as co-accused in the criminal case. Not having been included in the criminal case they cannot enjoy the benefit resulting from the acquittal of the accused. This benefit can only be claimed by the accused if a subsequent action is later taken against them under the Revised Penal Code. And this action can only be maintained if proper reservation is made and there is no express declaration that the basis of the civil action has not existed. It is, therefore, an error for the lower court to dismiss the case against these two defendants more so when their civil liability is predicated on facts other than those attributed to the two employees in the criminal case.

Take, for instance, the case of the Standard Vacuum Oil Company. This company is sued not precisely because of supposed negligent acts of its two employees Julito Sto. Domingo and Igmidio Rico but because of acts of its own which might have contributed to the fire that destroyed the house of the plaintiff. The complaint contains definite allegations of negligent acts properly attributable to the company which if proven and not refuted may serve as basis of its civil liability. Thus, in paragraph 5 of the first cause of action, it is expressly alleged that this company, through its employees, failed to take the necessary precautions or measures to insure safety and avoid harm to person and damage to property as well as to observe that degree of care, precaution and vigilance which the circumstances justly demanded, thereby causing the gasoline they were unloading to catch fire. The precautions or measures which this company has allegedly failed to take to prevent fire are not clearly stated, but they are matters of evidence which need not now be determined. Suffice it to say that such allegation furnishes enough basis for a cause of action against this company. There is no need for the plaintiff to make a reservation of her right to file a separate civil action, for as this court already held in a number of cases, such reservation is not necessary when the civil action contemplated is not derived from the criminal liability but one based on *culpa aquiliana* under the old Civil Code. *(Articles 1902 to 1910).* These two acts are separate and distinct and should not be confused one with the other. Plaintiff can choose either. *(Asuncion Parker vs. Hon. A.J. Panlilio, supra, p. 1).*

The case of the Rural Transit Co. is even more different as it is predicated on a special provision of the Revised Penal Code. Thus, Article 101, Rule 2, of said Code provides:

> "Art. 101. *Rules regarding civil liability in certain cases.* — The exemption from criminal liability established in subdivisions 1, 2, 3, 5 and 6 of Article 12 and in subdivision 4 of article 11 of this Code does not include exemption from civil liability, which shall be enforced subject to the following rules:
>
> x x x x x x x x x
>
> "Second. In cases falling within subdivision 4 of Article 11,

> the persons for whose benefit the harm has been prevented shall be civilly liable in proportion to the benefit which they may have received."
>
> And on this point, the complaint contains the following averments:
>
> "3. That after the corresponding trial the said defendants were acquitted and defendant Julito Sto. Domingo was acquitted, on the ground that he so acted causing damage to another in order to avoid a greater evil or injury, under article 11, paragraph 4 of the Revised Penal Code, as shown by the pertinent portion of the decision of this Honorable Court in said case, dated October 28, 1949, which reads as follows:

'Under the foregoing facts, there can be no doubt that had the accused Julito Sto. Domingo not taken the gasoline tank-truck trailer out in the street, a bigger conflagration would have occurred in Rizal Avenue Extension, and, perhaps, there might have been several deaths and bearing in mind the provisions of Article 11, paragraph 4 of the Revised Penal Code the accused Julito Sto. Domingo incurred no criminal liability.'

"4. That it was consequently the defendant Rural Transit Co., from whose premises the burning gasoline tank-truck trailer was driven out by defendant Julito Sto. Domingo in order to avoid a greater evil or injury, for whose benefit the harm has been prevented under Article 101, second subsection of the Revised Penal Code."

Considering the above quoted law and facts, the cause of action against the Rural Transit Company can hardly be disputed, it appearing that the damage caused to the plaintiff was brought about mainly because of the desire of driver Julito Sto. Domingo to avoid greater evil or harm, which would have been the case had he not brought the tank-truck trailer to the middle of the street, for then the fire would have caused the explosion of the gasoline deposit of the company which would have resulted in a conflagration of much greater proportion and consequences to the houses nearby or surrounding it. It cannot be denied that this company is one of those for whose benefit a greater harm has been prevented, and as such it comes within the purview of said penal provision. The acquittal of the accused cannot, therefore, be deemed a bar to a civil action against this company because its civil liability is completely divorced from the criminal liability of the accused. The rule regarding reservation of the right to file a separate civil action does not apply to it.

B. AGGRAVATING AND MITIGATING CIRCUMSTANCES.

In criminal cases, the damages to be adjudicated may either be increased or reduced depending on the presence of aggravating or

mitigating circumstances. *(Article 2204, Civil Code; Matura vs. Laya, 92 SCRA 268, 280 [1979]).* Thus in *People vs. Ruiz*, the award of moral damages was reduced because there was no aggravating circumstance but there were three mitigating circumstances. In *Matura,* the award of moral damages was reduced because the accused acted under the influence of passion and obfuscation.

Article 2230 of the Civil Code provides that exemplary damages may be awarded in criminal cases when the crime was committed with one or more aggravating circumstances. Hence, no exemplary damages may be awarded if no aggravating circumstance is present. *(People vs. Ruiz, 110 SCRA 155 [1981]; Matura vs. Hon. Alfredo Laya, July 30, 1979).*

6. EXTINCTION AND SURVIVAL OF LIABILITY

The civil liability established under the Revised Penal Code shall be extinguished in the same manner as obligations in accordance with the provisions of Civil Law. *(Art. 112, RPC).* Under the Civil Code, obligations are extinguished by payment, loss of the thing due, condonation or remission of the debt, confusion or merger of the rights of the creditor and debtor, compensation, novation and prescription. *(Art. 1231, New Civil Code).*

The offender shall continue to be obliged to satisfy the civil liability resulting from the crime committed by him, notwithstanding the fact that he has served his sentence consisting of deprivation of liberty or other rights, or has not been required to serve the same by reason of amnesty, pardon, commutation of sentence or any other reason. *(Art. 113, RPC).*

A. EFFECT OF DEATH.

Death of the accused before final judgment, relieves the accused of both criminal and civil liability arising from criminal liability. *(Article 89[1], Revised Penal Code; People vs. Siccuan, 271 SCRA 168, 174 [1997]; People vs. Satorre, 72 SCRA 439; People vs. Alison, 44 SCRA 523).* However, the aggrieved party in a libel or physical injuries case (including homicide or murder) who initially opted to claim damages in the criminal case can file another case to enforce his claim under Article 33 of the New Civil Code. *(People vs. Bayotas, G.R. No. 102007, September 2, 1994; Villegas vs. Court of Appeals, 271 SCRA 148 [1997]).*

Section 4 of Rule 111 of the Rules of Criminal Procedure (effec-

tive December 1, 2000) now provides the rule on the effect of death on the civil liability.

> SEC. 4. *Effect of death on civil actions.* — The death of the accused after arraignment and during the pendency of the criminal action shall extinguish the civil liability arising from the delict. However, the independent civil action instituted under section 3 of this Rule or which thereafter is instituted to enforce liability arising from other sources of obligation may be continued against the estate or legal representative of the accused after proper substitution or against said estate, as the case may be. The heirs of the accused may be substituted for the deceased without requiring the appointment of an executor or administrator and the court may appoint a guardian *ad litem* for the minor heirs.
>
> The court shall forthwith order said legal representative or representatives to appear and be substituted within a period of thirty (30) days from notice.
>
> A final judgment entered in favor of the offended party shall be enforced in the manner especially provided in these rules for prosecuting claims against the estate of the deceased.
>
> If the accused dies before arraignment, the case shall be dismissed without prejudice to any civil action the offended party may file against the estate of the deceased. (n)

B. EFFECT OF PARDON.

Pardon does not erase civil liability. *(Mosanto vs. Factoran, 170 SCRA 190, 201 [1989])*. It is not one of the grounds recognized under the Civil Code that extinguishes civil liability. Civil liability subsists notwithstanding service of sentence or for any reason the sentence is not served by pardon or commutation of sentence.

While pardon has generally been regarded as removing the existence of guilt so that in the eyes of the law, the offender is deemed innocent and treated as though he never committed the offense, it does not operate to remove all the effects of the previous conviction. Pardon looks to the future. It makes no amends of the past. It affords no relief for what has been suffered by the offended party. (*ibid*., p. 198).

CASE:

PEOPLE OF THE PHILIPPINES vs. ROGELIO BAYOTAS
236 SCRA 239 [1994]

In sum, in pursuing recovery of civil liability arising from crime, the

final determination of the criminal liability is a condition precedent to the prosecution of the civil action, such that when the criminal action is extinguished by the demise of accused-appellant pending appeal thereof, said civil action cannot survive. The claim for civil liability springs out of and is dependent upon facts which, if true, would constitute a crime. Such civil liability is an inevitable consequence of the criminal liability and is to be declared and enforced in the criminal proceeding. This is to be distinguished from that which is contemplated under Article 30 of the Civil Code which refers to the institution of a separate civil action that does not draw its life from a criminal proceeding. The Sendaydiego resolution of July 8, 1977, however, failed to take note of this fundamental distinction when it allowed the survival of the civil action for the recovery of civil liability *ex delicto* by treating the same as a separate civil action referred to under Article 30. Surely, it will take more than just a summary judicial pronouncement to authorize the conversion of said civil action to an independent one such as that contemplated under Article 30.

Ironically however, the main decision in Sendaydiego did not apply Article 30, the resolution of July 8, 1977 notwithstanding. Thus, it was held in the main decision:

"Sendaydiego's appeal will be resolved only for the purpose of showing his criminal liability which is the basis of the civil liability for which his estate would be liable."

In other words, the Court, in resolving the issue of his civil liability, concomitantly made a determination on whether Sendaydiego, on the basis of evidenced adduced, was indeed guilty beyond reasonable doubt of committing the offense charged. Thus, it upheld Sendaydiego's conviction and pronounced the same as the source of his civil liability. Consequently, although Article 30 was not applied in the final determination of Sendaydiego's civil liability, there was a reopening of the criminal action already extinguished which served as basis for Sendaydiego's civil liability. We reiterate: Upon death of the accused pending appeal of his conviction, the criminal action is extinguished inasmuch as there is no longer a defendant to stand as the accused; the civil action instituted therein for recovery of civil liability *ex delicto* is *ipso facto* extinguished, grounded as it is on the criminal.

Section 21, Rule 3 of the Rules of Court was also invoked to serve as another basis for the Sendaydiego resolution of July 8, 1977. In citing Sec. 21, Rule 3 of the Rules of Court, the Court made in the inference that civil actions of the type involved in Sendaydiego consist of money claims, the recovery of which may be continued on appeal if defendant dies pending appeal of his conviction by holding his estate liable therefor. Hence, the Court's conclusion:

> "'When the action is for the recovery of money' 'and the defendant dies before final judgment in the court of First Instance, it shall be dismissed to be prosecuted in the manner especially provided' in Rule 87 of the Rules of Court. *(Sec. 21, Rule 3 of the Rules of Court).*
>
> The implication is that, if the defendant dies after a money judg-

ment had been rendered against him by the Court of First Instance, the action survives him. It may be continued on appeal."

Sadly, reliance on this provision of law is misplaced. From the standpoint of procedural law, this course taken in Sendaydiego cannot be sanctioned. As correctly observed by Justice Regalado:

"x x x x x x x x x

I do not, however, agree with the justification advanced in both Torrijos and Sendaydiego which, relying on the provisions of Section 21, Rule 3 of the Rules of Court, drew the strained implication therefrom that where the civil liability instituted together with the criminal liabilities had already passed beyond the judgment of the then Court of First Instance (now the Regional Trial Court), the Court of Appeals can continue to exercise appellate jurisdiction thereover despite the extinguishment of the component criminal liability of the deceased. This pronouncement, which has been followed in the Court's judgments subsequent and consonant to Torrijos and Sendaydiego, should be set aside and abandoned as being clearly erroneous and unjustifiable.

Said Section 21 of Rule 3 is a rule of civil procedure in ordinary civil actions. There is neither authority nor justification for its application in criminal procedure to civil actions. Nor is there any authority in law for the summary conversion from the latter category of an ordinary civil action upon the death of the offender. . . ."

Moreover, the civil action impliedly instituted in a criminal proceeding for recovery of civil liability *ex delicto* can hardly be categorized as an ordinary money claim such as that referred to in Sec. 21, Rule 3 enforceable before the estate of the deceased accused.

Ordinary money claims referred to in Section 21, Rule 3 must be viewed in light of the provisions of Section 5, Rule 86 involving claims against the estate, which in Sendaydiego was held liable for Sendaydiego's civil liability. "What are contemplated in Section 21 of Rule 3, in relation to Section 5 of Rule 86, are contractual money claims while the claims involved in civil liability *ex delicto* may include even the restitution of personal or real property." Section 5, Rule 86 provides an exclusive enumeration of what claims may be filed against the estate. These are: funeral expenses, expenses for the last illness, judgments for money and claim arising from contracts, expressed or implied. It is clear that money claims arising from delict do not form part of this exclusive enumeration. Hence, there could be no legal basis in (1) treating a civil action *ex delicto* as an ordinary contractual money claim referred to in Section 21, Rule 3 of the Rules of Court and (2) allowing it to survive by filing a claim therefor before the estate of the deceased accused. Rather, it should be extinguished upon extinction of the criminal action engendered by the death of the accused pending finality of his conviction.

Accordingly, we rule: if the private offended party, upon extinction of the civil liability *ex delicto* desires to recover damages from the same act or omission complained of, he must subject to Section 1, Rule 111 (1985 Rules

on Criminal Procedure as amended) file a separate civil action, this time predicated not on the felony previously charged but on other sources of obligation. The source of obligation upon which the separate action is premised determines against whom the same shall be enforced.

If the same act or omission complained of also arises from quasi-delict or may, by provision of law, result in an injury to person or property (real or personal), the separate civil action must be filed against the executor or administrator of the estate of the accused pursuant to Sec. 1, Rule 87 of the Rules of Court:

> "SECTION 1. *Actions which may and which may not be brought against executor or administrator.* — No action upon a claim for the recovery of money or debt or interest thereon shall be commenced against the executor or administrator; but actions to recover real or personal property, or an interest therein, from the estate, or to enforce a lien thereon, and actions to recover damages for an injury to person or property, real or personal, may be commenced against him."

This is in consonance with our ruling in *Belamala* where we held that, in recovering damages for injury to persons thru an independent civil action based on Article 33 of the Civil Code, the same must be filed against the executor or administrator of the estate of deceased accused and not against the estate under Sec. 5, Rule 86 because this rule explicitly limits the claim to those for funeral expenses, expenses for the last sickness of the decedent, judgment for money and claims arising from contract, express or implied. Contractual money claims, we stressed, refers only to purely personal obligations other than those which have their source in delict or tort.

Conversely, if the same act or omission complained of also arises from contract, the separate civil action must be filed against the estate of the accused, pursuant to Sec. 5, Rule 86 of the Rules of Court.

From this lengthy disquisition, we summarize our ruling herein:

1. Death of the accused pending appeal of his conviction extinguishes his criminal liability as well as the civil liability based solely thereon. As opined by Justice Regalado, in this regard, "the death of the accused prior to final judgment terminates his criminal liability and only the civil liability directly arising from and based solely on the offense committed, *i.e.*, civil liability *ex delicto* in *senso strictiore*."

2. Corollarily, the claim for civil liability survives notwithstanding the death of accused, if the same may also be predicated on a source of obligation other than delict. Article 1157 of the Civil Code enumerates these other sources of obligation from which the civil liability may arise as a result of the same act or omission:

a) Law

b) Contracts

c) Quasi-contracts

d) x x x

e) Quasi-delicts

3. Where the civil liability survives, as explained in Number 2 above, an action for recovery therefor may be pursued but only by way of filing a separate civil action and subject to Section 1, Rule 111 of the 1985 Rules on Criminal Procedure as amended. This separate civil action may be enforced either against the executor/administrator or the estate of the accused, depending on the source of obligation upon which the same is based as explained above.

4. Finally, the private offended party need not fear a forfeiture of his right to file this separate civil action by prescription, in cases where during the prosecution of the criminal action and prior to its extinction, the private-offended party instituted together therewith the civil action. In such case, the statute of limitations on the civil liability is deemed interrupted during the pendency of the criminal case, conformably with provisions of Article 1155 of the Civil Code, that should thereby avoid any apprehension on a possible privation of right by prescription.

Applying this set of rules to the case at bench, we hold that the death of appellant Bayotas extinguished his criminal liability and the civil liability based solely on the act complained of, *i.e.,* rape. Consequently, the appeal is hereby dismissed without qualification."

7. CONCURRENCE OF CAUSES OF ACTION AND REMEDIES

A. CONCURRENCE OF CAUSES OF ACTION.

In explaining Articles 32, 33, and 34 of the Civil Code, the Code Commission noted that under the Old Civil Code, "a citizen who suffers damage or injury through the wrongful act of another must rely upon the action of the prosecuting attorney if the offense is criminal." *(Report of the Code Commission).* The Commission articulated the old rule that if the act or omission complained of is criminal, the offended party can only rely on the civil liability arising from delict and can pursue his claim only in the criminal case.

Under the New Civil Code, a single act or omission may give rise to two separate causes of action. The separate causes of action may be based on quasi-delict under Article 2176 or on any of Articles 32, 33 or 34 of the New Civil Code. In fact, as pointed out in an earlier chapter, the separate basis of liability may even be contract. The rule is expressly recognized under Article 2177 and Articles 32, 33, and 34 subject only to the proscription against double recovery. Article 2177 states:

"Art. 2177. Responsibility for fault or negligence under the

> preceding article is entirely separate and distinct from the civil liability arising from negligence under the Penal Code. But the plaintiff cannot recover damages twice for the same act or omission of the defendant." (n)

With respect to the independent civil actions, the Code Commission explained that the "underlying purpose of the principle under consideration is to allow the citizen to enforce his rights in a private action brought by him." *(Report)*.

It is not correct to say, however, that the operation of the abovementioned rule started only when the New Civil Code took effect. The Supreme Court had already adopted the rule even while the Old Civil Code was still in force in *Fausta Barredo vs. Severina Garcia and Timotea Almario* (G.R. No. 48006, July 8, 1942). In the said case, Justice Bocobo, after painstakingly examining decisions of various courts and opinions of jurists, explained:

> "The foregoing authorities clearly demonstrate the separate individuality of *cuasi-delitos* or *culpa aquiliana* under the Civil Code. Specifically they show that there is a distinction between civil liability arising from criminal negligence (governed by the Penal Code) and responsibility for fault or negligence under Articles 1902 to 1910 of the Civil Code, and that the same negligent act may produce either a civil liability arising from a crime under the Penal Code, or a separate responsibility for fault or negligence under Articles 1902 to 1910 of the Civil Code. Still more concretely, the authorities above cited render it inescapable to conclude that the employer — in this case the defendant-petitioner — is primarily and directly liable under article 1903 of the Civil Code.
>
> The legal provisions, authors, and cases already invoked should ordinarily be sufficient to dispose of this case. But inasmuch as we are announcing doctrines that have been little understood in the past, it might not be inappropriate to indicate their foundations.
>
> Firstly, the Revised Penal Code in Article 365 punishes not only reckless but also simple negligence. If we were to hold that Articles 1902 to 1910 of the Civil Code refer only to fault or negligence not punished by law, according to the literal import of Article 1093 of the Civil Code, the legal institution of *culpa aquiliana* would have very little scope and application in actual life. Death or injury to persons and damage to property through any degree of negligence — even the slightest — would have to be indemnified only through the principle of civil liability arising from a crime. In such a state of affairs, what sphere would remain for *cuasi-delito* or *culpa aquiliana*? We are loath to impute to the

lawmaker any intention to bring about a situation so absurd and anomalous. Nor are we, in the interpretation of the laws, disposed to uphold the letter that killeth rather than the spirit that giveth life. We will not use the literal meaning of the law to smother and render almost lifeless a principle of such ancient origin and such full-grown development as *culpa aquiliana* or *cuasi-delito*, which is conserved and made enduring in Articles 1902 to 1910 of the Spanish Civil Code.

Secondly, to find the accused guilty in a criminal case, proof of guilt beyond reasonable doubt is required, while in a civil case, preponderance of evidence is sufficient to make the defendant pay in damages. There are numerous cases of criminal negligence which can not be shown beyond reasonable doubt, but can be proved by a preponderance of evidence. In such cases, the defendant can and should be made responsible in a civil action under Articles 1902 to 1910 of the Civil Code. Otherwise, there would be many instances of unvindicated civil wrongs. *Ubi jus ibi remedium*.

Thirdly, to hold that there is only one way to make defendant's liability effective, and that is, to sue the driver and exhaust his (the latter's) property first, would be tantamount to compelling the plaintiff to follow a devious and cumbersome method of obtaining relief. True, there is such a remedy under our laws, but there is also a more expeditious way, which is based on the primary and direct responsibility of the defendant under Article 1903 of the Civil Code. Our view of the law is more likely to facilitate remedy for civil wrongs, because the procedure indicated by the defendant is wasteful and productive of delay, it being a matter of common knowledge that professional drivers of taxis and similar public conveyances usually do not have sufficient means with which to pay damages. Why then, should the plaintiff be required in all cases to go through this roundabout, unnecessary, and probably useless procedure? In construing the laws, courts have endeavored to shorten and facilitate the pathways of right and justice.

At this juncture, it should be said that the primary and direct responsibility of employers and their presumed negligence are principles calculated to protect society. Workmen and employees should be carefully chosen and supervised in order to avoid injury to the public. It is the masters or employers who principally reap the profits resulting from the services of these servants and employees. It is but right that they should guarantee the latter's careful conduct for the personnel and patrimonial safety of others. As Theilhard has said, "they should reproach themselves, at least, some for their weakness, others for their poor selection and all for their negligence." And according to Manresa, "It is

much more equitable and just that such responsibility should fall upon the principal or director who could have chosen a careful and prudent employee, and not upon the injured person who could not exercise such selection and who used such employee because of his confidence in the principal or director." *(Vol. 12, p. 622, 2nd Ed.)*. Many jurists also base this primary responsibility of the employer on the principle of representation of the principal by the agent. Thus, Oyuelos says in the work already cited (Vol. 7, p. 747) that before third persons the employer and employee *"vienen a ser como una sola personalidad, por refundicion de la del dependiente en la de quien le emplea y utiliza."* ("become as one personality by the merging of the person of the employee in that of him who employs and utilizes him.") All these observations acquire a peculiar force and significance when it comes to motor accidents, and there is need of stressing and accentuating the responsibility of owners of motor vehicles.

Fourthly, because of the broad sweep of the provisions of both the Penal Code and the Civil Code on this subject, which has given rise to the overlapping or concurrence of spheres already discussed, and for lack of understanding of the character and efficacy of the action for *culpa aquiliana*, there has grown up a common practice to seek damages only by virtue of the civil responsibility arising from a crime, forgetting that there is another remedy, which is by invoking Articles 1902-1910 of the Civil Code. Although this habitual method is allowed by our laws, it has nevertheless rendered practically useless and nugatory the more expeditious and effective remedy based on *culpa aquiliana* or *culpa extra-contractual*. In the present case, we are asked to help perpetuate this usual course. But we believe it is high time we pointed out to the harm done by such practice and to restore the principle of responsibility for fault or negligence under articles 1902 *et seq*. of the Civil Code to its full rigor. It is high time we caused the stream of *quasi-delict* or *culpa aquiliana* to flow on its own natural channel, so that its waters may no longer be diverted into that of a crime under the Penal Code. This will, it is believed, make for the better safeguarding of private rights because it re-establishes an ancient and additional remedy, and for the further reason that an independent civil action, not depending on the issues, limitations and results of a criminal prosecution, and entirely directed by the party wronged or his counsel, is more likely to secure adequate and efficacious redress. (Spanish Text Omitted)

B. REMEDIES.

a. The Rules.

Enforcement of the civil liability arising from crime is governed by Rule 111 of the Rules of Criminal Procedure effective December 1, 2000. Sections 1, 2, 3 and 5 provide:

> *Sec. 1. Institution of criminal and civil action.* — (a) When a criminal action is instituted, the civil action for the recovery of civil liability arising from the offense charged shall be deemed instituted with the criminal action unless the offended party waives the civil action, reserves the right to institute it separately or institutes the civil action prior to the criminal action.
>
> The reservation of the right to institute separately the civil action shall be made before the prosecution starts presenting its evidence and under circumstances affording the offended party a reasonable opportunity to make such reservation.
>
> When the offended party seeks to enforce civil liability against the accused by way of moral, nominal, temperate, or exemplary damages without specifying the amount thereof in the complaint or information, the filing fees thereof shall constitute a first lien on the judgment awarding such damages.
>
> Where the amount of damages, other than actual, is specified in the complaint or information, the corresponding filing fees shall be paid by the offended party upon the filing thereof in court.
>
> Except as otherwise provided in these Rules, no filing fees shall be required for actual damages.
>
> No counterclaim cross-claim or third-party complaint may be filed by the accused in the criminal case, but any cause of action which could have been the subject thereof may be litigated in a separate civil action. (1a)
>
> (b) The criminal action for violation of Batas Pambansa Blg. 22 shall be deemed to include the corresponding civil action. No reservation to file such civil action separately shall be allowed.
>
> Upon filing of the aforesaid joint criminal and civil action, the offended party shall pay in full the filing fees based on the amount of the check involved, which shall be considered as the actual damages claimed. Where the complaint or information also seeks to recover liquidated, moral, nominal, temperate or exemplary damages, the offended party shall pay additional filing fees based on the amounts alleged therein. If the amount are not so alleged but any of these damages are subsequently awarded by the court, the filing fees based on the amount awarded shall constitute a first lien on the judgment.
>
> Where the civil action has been filed separately and trial thereof has not yet commenced, it may be consolidated with the

criminal action upon application with the court trying the latter case. If the application is granted, the trial of both actions shall proceed in accordance with section 2 of this Rule governing consolidation of the civil and criminal actions. *(cir. 57-97).*

Sec. 2. When separate civil action is suspended. — After the criminal action has been commenced, the separate civil action arising therefrom cannot be instituted until final judgment has been entered in the criminal action.

If the criminal action is filed after the said civil action has already been instituted, the latter shall be suspended in whatever stage it may be found before judgment on the merits. The suspension shall last until final judgment is rendered in the criminal action. Nevertheless, before judgment on the merits is rendered in the civil action, the same may, upon motion of the offended party, be consolidated with the criminal action in the court trying the criminal action. In case of consolidation, the evidence already adduced in the civil action shall be deemed automatically reproduced in the criminal action without prejudice to the right of the prosecution to cross-examine the witnesses presented by the offended party in the criminal case and of the parties to present additional evidence. The consolidated criminal and civil actions shall be tried and decided jointly.

During the pendency of the criminal action, the running of the period of prescription of the civil action which cannot be instituted separately or whose proceeding has been suspended shall be tolled. (n)

The extinction of the penal action does not carry with it extinction of the civil action. However, the civil action based on delict shall be deemed extinguished if there is a finding in a final judgment in the criminal action that the act or omission from which the civil liability may arise did not exist. (2a)

Sec. 3. When civil action may proceed independently. — In the cases provided in Articles 32, 33, 34 and 2176 of the Civil Code of the Philippines, the independent civil action may be brought by the offended party. It shall proceed independently of the criminal action and shall require only a preponderance of evidence. In no case, however, may the offended party recover damages twice for the same act or omission charged in the criminal action. (3a)

Sec. 5. Judgment in civil action not a bar. — A final judgment rendered in a civil action absolving the defendant from civil liability is not a bar to a criminal action against the defendant for the same act or omission subject of the civil action.

The preceding rules are likewise consistent with Articles 29, 30, and 31 of the Civil Code which provide:

> Art. 29. When the accused in a criminal prosecution is acquitted on the ground that his guilt has not been proved beyond reasonable doubt, a civil action for damages for the same act or omission may be instituted. Such action requires only a preponderance of evidence. Upon motion of the defendant, the court may require the plaintiff to file a bond to answer for damages in case the complaint should be found to be malicious.
>
> If in a criminal case the judgment of acquittal is based upon reasonable doubt, the court shall so declare. In the absence of any declaration to that effect, it may be inferred from the text of the decision whether or not the acquittal is due to that ground.
>
> Art. 30. When a separate civil action is brought to demand civil liability arising from a criminal offense, and no criminal proceedings are instituted during the pendency of the civil case, a preponderance of evidence shall likewise be sufficient to prove the act complained of.
>
> Art. 31. When the civil action is based on an obligation not arising from the act or omission complained of as a felony, such civil action may proceed independently of the criminal proceedings and regardless of the result of the latter.

Based on the foregoing, it is clear that civil liability arising from crime is impliedly instituted with the criminal action but a separate case may be filed to enforce the same. Such case may be filed ahead of the criminal action or after reservation, upon rendition of final judgment in the case. However, in both cases, the civil action is dependent on the criminal action. This is manifested by the following rules: a. If a case was filed ahead of the criminal case, the separate action shall be suspended until a final judgment is rendered in the criminal case; b. If no case is filed, a separate case cannot be filed until rendition of final judgment; c. Civil liability is extinguished if the criminal case resulted in an acquittal with a finding that the act complained of was not actually committed by the accused.

The Code Commission explained the rule on acquittal provided for under Article 29 of the Civil Code in this wise:

> "The present rule that the acquittal of the accused in a criminal case also releases him from civil liability is one of the most serious flaws in the Philippine legal system. It has given rise to numberless instances of miscarriage of justice, where the acquittal was due to a reasonable doubt in the mind of the court as to the guilt of the accused. The reasoning followed is that inasmuch as the civil liability is derived from the criminal offense, when the latter is not proved, civil liability cannot be demanded.
>
> This is one of those cases where confused thinking leads to

unfortunate and deplorable consequences. Such reasoning fails to draw a clear line of demarcation between criminal liability and civil responsibility, and to determine the logical result of the distinction. The two liabilities are separate and distinct from each other. One affects the social order and the other, private rights. One is for the punishment or correction of the offender while the other is reparation of damages suffered by the aggrieved party. The two responsibilities are so different from each other that Article 1813 of the present Civil Code reads thus: 'There may be a compromise upon the civil action arising from a crime; but the public action for the imposition of the legal penalty shall not thereby be extinguished. It is just and proper that, for the purposes of the imprisonment of or fine upon the accused, the offense should be proved beyond reasonable doubt. But for the purpose of indemnifying the complaining party, why should the offense be also proved beyond reasonable doubt? Is not the invasion or violation of every private right to be proved only by a preponderance of evidence? Is the right of the aggrieved person any less private because the wrongful act is also punishable by the criminal law?

For these reasons, the Commission recommends the adoption of the reform under discussion. It will correct a serious defect in our laws. It will close up an inexhaustible source of injustice — a cause for disillusionment on the part of innumerable persons injured or wronged." (Report, pp. 45-46).

No Reservation Requirement

Before the recent amendatory provisions of the 2000 Revised Rules of Criminal Procedure were adopted, the action to enforce civil liability based on Articles 2176, 32, 33, and 34 of the Civil Code is likewise deemed instituted together with the criminal case unless reserved. Reference in the said statutory provisions of the reservation requirement and Articles 2176, 32, 33, and 34 is now absent in Section 1, Rule 111 of the 2000 Revised Rules of Criminal Procedure indicating that the action to enforce civil liability based thereon are not deemed instituted and what is deemed instituted only is the action to enforce civil liability arising from criminal liability.

The Supreme Court explained the present rules in *Avelino Casupanan et al. v. Mario Llavore Laroya (G.R. No. 145391, August 26, 2002. See also: Philippine Rabbit Bus Lines Inc. v. People, No. 147703, April 14, 2004.)*:

Under Section 1 of the present Rule 111, what is "deemed instituted" with the criminal action is only the action to recover

civil liability arising from the crime or ex-delicto. All the other civil actions under Articles 32, 33, 34 and 2176 of the Civil Code are no longer "deemed instituted," and may be filed separately and prosecuted independently even without any reservation in the criminal action. The failure to make a reservation in the criminal action is not a waiver of the right to file a separate and independent civil action based on these articles of the Civil Code. The prescriptive period on the civil actions based on these articles of the Civil Code continues to run even with the filing of the criminal action. Verily, the civil actions based on these articles of the Civil Code are separate, distinct and independent of the civil action "deemed instituted" in the criminal action.

x x x

Under Section 1 of the present Rule 111, the independent civil action in Articles 32, 33, 34 and 2176 of the Civil Code is not deemed instituted with the criminal action but may be filed separately by the offended party even without reservation. The commencement of the criminal action does not suspend the prosecution of the independent civil action under these articles of the Civil Code. The suspension in Section 2 of the present Rule 111 refers only to the civil action arising from the crime, if such civil action is reserved or filed before the commencement of the criminal action.

Thus, the offended party can file two separate suits for the same act or omission. The first a criminal case where the civil action to recover civil liability ex-delicto is deemed instituted, and the other a civil case for quasi-delict — without violating the rule on non-forum shopping. The two cases can proceed simultaneously and independently of each other. The commencement or prosecution of the criminal action will not suspend the civil action for quasi-delict. The only limitation is that the offended party cannot recover damages twice for the same act or omission of the defendant. In most cases, the offended party will have no reason to file a second civil action since he cannot recover damages twice for the same act or omission of the accused. In some instances, the accused may be insolvent, necessitating the filing of another case against his employer or guardians.

Accused's Right to File

The right to file an independent action is even available to the accused in the criminal case. The right to file a separate civil action while the criminal case is pending pertains not only to the offended party but also to the accused as well. The Supreme Court explained in the *Avelino Casupanan* case *(ibid.):*

Similarly, the accused can file a civil action for quasi-delict for the same act or omission he is accused of in the criminal case. This is expressly allowed in paragraph 6, Section 1 of the present Rule 111 which states that the counterclaim of the accused "may be litigated in a separate civil action." This is only fair for two reasons. First, the accused is prohibited from setting up any counterclaim in the civil aspect that is deemed instituted in the criminal case. The accused is therefore forced to litigate separately his counterclaim against the offended party. If the accused does not file a separate civil action for quasi-delict, the prescriptive period may set in since the period continues to run until the civil action for quasi-delict is filed.

Second, the accused, who is presumed innocent, has a right to invoke Article 2177 of the Civil Code, in the same way that the offended party can avail of this remedy which is independent of the criminal action. To disallow the accused from filing a separate civil action for quasi-delict, while refusing to recognize his counterclaim in the criminal case, is to deny him due process of law, access to the courts, and equal protection of the law.

x x x

We make this ruling aware of the possibility that the decision of the trial court in the criminal case may vary with the decision of the trial court in the independent civil action. This possibility has always been recognized ever since the Civil Code introduced in 1950 the concept of an independent civil action under Articles 32, 33, 34 and 2176 of the Code. But the law itself, in Article 31 of the Code, expressly provides that the independent civil action "may proceed independently of the criminal proceedings and regardless of the result of the latter." In Azucena vs. Potenciano, the Court declared:

> ". . . There can indeed be no other logical conclusion than this, for to subordinate the civil action contemplated in the said articles to the result of the criminal prosecution — whether it be conviction or acquittal — would render meaningless the independent character of the civil action and the clear injunction in Article 31 that this action 'may proceed independently of the criminal proceedings and regardless of the result of the latter.'"

More than half a century has passed since the Civil Code introduced the concept of a civil action separate and independent from the criminal action although arising from the same act or omission. The Court, however, has yet to encounter a case of conflicting and irreconcilable decisions of trial courts, one hearing the criminal case and the other the civil action for quasi-delict. The fear of conflicting and irreconcilable decisions may be more apparent than real. In any event, there are sufficient remedies

under the Rules of Court to deal with such remote possibilities.

b. History and Justification of Reservation Requirement.

It would seem that the present rule hews to the view of some authorities that the reservation requirement, for actions based on Articles 2176, 32, 33, and 34, is contrary to the express provisions of the same law which state that the action based thereon shall proceed independently of the criminal action. The present rule is likewise consistent with the observation of the Supreme Court in a number of cases to the effect that the requirement to reserve the civil action is substantive in character and, therefore, is beyond the rulemaking power of the Supreme Court. *(Garcia vs. Florido, 52 SCRA 420 [1973]; Abellana vs. Marave, 57 SCRA 106 [1974]; Tayag vs. Alcantara, 98 SCRA 723 [1980]; Madeja vs. Caro, 126 SCRA 293 [1983]; Jarantilla vs. Court of Appeals, 171 SCRA 429 [1989]; Bonite vs. Zosa, 162 SCRA 173 [1988]; Diong Bi Chu vs. Court of Appeals, 192 SCRA 554 [1990]).*

It should be noted however that there are those who subscribe to the view that the reservation requirement under the previous rules is justified under existing substantive laws. Thus, Justice Vitug expressed the view in *Rafael Reyes Trucking Corporation vs. People* (G.R. No. 129029, April 3, 2000) that "there is no incongruence between allowing the trial of civil actions to proceed independently of the criminal prosecution and mandating that, before so proceeding, a reservation to do so should first be made." He summarized therein the rules before the amendment of the rules in the year 2000:

> "In fine —
>
> First — The civil action is deemed instituted together with the criminal case except when the civil action is reserved. The reservation should be made at the institution of the criminal case. In independent civil actions, not being dependent on the criminal case, such reservation would be required not for preserving the cause of action but in order to allow the civil action to proceed separately from the criminal case in interest of good order and procedure. Indeed, independent civil actions already filed and pending may still be sought to be consolidated in the criminal case before final judgment is rendered in the latter case. When no criminal proceedings are instituted, a separate civil action may be brought to demand the civil liability, and a preponderance of evidence is sufficient to warrant a favorable judgment therefor. The same rule applies if the information were to be dismissed upon motion of the fiscal.
>
> Second — The pendency of the criminal case suspends the

civil action except —

(1) When properly reserved, in independent civil actions, such as those cases (a) not arising from the act or omission complained of as a felony (*e.g., culpa contractual* under Art. 31, intentional torts under Arts. 32 and 34, and *culpa aquiliana* under Art. 2176 of the Civil Code); or (b) where the injured party is granted a right to file an action independent and separate from the criminal action (*e.g.,* Art. 33, Civil Code); and

(2) In the case of pre-judicial questions which must be decided before any criminal prosecution may be instituted or may proceed. (Art. 36, Civil Code).

In the above instances, the civil case may proceed independently and regardless of the outcome of the criminal case.

Third — An acquittal in the criminal may bar any further separate civil action, except —

(1) In independent civil actions, unless the complainant, not having reserved a separate action, has actively participated and intervened in the criminal case. In such active participation and intervention can only be deemed to be an unequivocal election by the complainant to sue under *ex-delicto* rather than on another cause of action (arising from the same act or omission complained of as being *ex-delicto*). If, however, the acquittal is predicated on the ground that guilt has not been proven beyond reasonable doubt, and not upon a finding that the "fact from which the civil (action) might arise did not exist," an action for damages can still be instituted.

(2) In independent civil actions where the acquittal is premised on a failure of proof beyond reasonable doubt, which the court shall so declare as its basis, a civil action for damages for the same act or omission may be instituted. Such action requires only a preponderance of evidence. Where acquittal is thus based on the fact that the crime did not exist or that the offender did not commit the crime, and not on mere quantum of proof, a civil action based on such *ex delicto* of which the accused is already acquitted would be improper."

Justice Vitug cited *Ruben Maniago vs. Court of Appeals* (G.R. No. 104392, February 20, 1996) in his exposition. The historical development of the rule regarding reservation and the reason why it was viewed to be consistent with substantive laws were explained in *Maniago, viz.*:

"After considering the arguments of the parties, we have reached the conclusion that the right to bring an action for damages under the Civil Code must be reserved as required by Rule

111, otherwise it should be dismissed.

To begin with, (Sec. 1) quite clearly requires that a reservation must be made to institute separately all civil actions for the recovery of civil liability, otherwise they will be deemed to have been instituted with the criminal case. Such civil actions are not limited to those which arise "from the offense charged," as originally provided in Rule 111 before the amendment of the Rules of Court in 1988. In other words the right of the injured party to sue separately for the recovery of the civil liability whether arising from crimes *(ex delicto)* or from *quasi delict* under Art. 2176 of the Civil Code must be reserved otherwise they will be deemed instituted with the criminal action.

x x x

B. There are statements in some cases implying that Rule 111, 1 and 3 are beyond the rulemaking power of the Supreme Court under the Constitution. A careful examination of the cases, however, will show that approval of the filing of separate civil action for damages even though no reservation of the right to institute such civil action had been reserved rests on considerations other than that no reservation is needed.

In *Garcia v. Florido,* the right of an injured person to bring an action for damages even if he did not make a reservation of his action in the criminal prosecution for physical injuries through reckless imprudence was upheld on the ground that by bringing the civil action the injured parties had "in effect abandoned their right to press for recovery of damages in the criminal case. . . . Undoubtedly an offended party loses his right to intervene in the prosecution of a criminal case, not only when he has waived the civil action or expressly reserved his right to institute, but also when he has actually instituted the civil action. For by either of such actions his interest in the criminal case has disappeared." The statement that Rule 111, of the 1964 Rules is "an unauthorized amendment of substantive law, Articles 32, 33, and 34 of the Civil Code, which do not provide for the reservation" is not the ruling of the Court but only an aside, quoted from an observation made in the footnote of a decision in another case.

Another case cited by private respondent in support of his contention that the civil case need not be reserved in the criminal case is *Abellana vs. Marave* in which the right of persons injured in a vehicular accident to bring a separate action for damages was sustained despite the fact that the right to bring it separately was not reserved. But the basis of the decision in that case was the fact that the filing of the civil case was equivalent to a reservation because it was made after the decision of the City Court convicting the accused had been appealed. Pursuant to Rule 123, of the 1964 Rules, this had the effect of vacating the decision in

the criminal case so that technically, the injured parties could still reserve their right to institute a civil action while the criminal case was pending in the Court of First Instance. The statement "the right of a party to sue for damages independently of the criminal action is a substantive right which cannot be frittered away by a construction that could render it nugatory" without raising a "serious constitutional question" was thrown in only as additional support for the ruling of the Court.

On the other hand, in *Madeja vs. Caro,* the Court held that a civil action for damages could proceed even while the criminal case for homicide through reckless imprudence was pending and did not have to await the termination of the criminal case precisely because the widow of the deceased had reserved her right to file a separate civil action for damages. We do not see how this case can lend support to the view of private respondent.

In *Jarantilla vs. Court of Appeals,* the ruling is that the acquittal of the accused in the criminal case for physical injuries through reckless imprudence on the ground of reasonable doubt is not a bar to the filing of an action for damages even though the filing of the latter action was not reserved. This is because of Art. 29 of the Civil Code which provides that "when an accused is acquitted on the ground that his guilt has not been proved beyond reasonable doubt, a civil action for damages for the same act or cannot apply to this case because the basis of the dismissal of the criminal case against the driver is the fact that the prosecution failed to prove its case as a result of its failure to make a formal offer of its evidence. Rule 132, of the Revised Rules on Evidence provides that "The court shall consider no evidence which has not been formally offered. The purpose for which the evidence is offered must be specified."

To the same effect are the holdings in *Tayag, Sr. vs. Alcantara, Bonite vs. Zosa* and *Diong Bi Chu vs. Court of Appeal*s. Since Art. 29 of the Civil Code authorizes the bringing of a separate civil action in case of acquittal on reasonable doubt and under the Revised Rules of Criminal Procedure such action is not required to be reserved, it is plain that the statement in these cases that to require a reservation to be made would be to sanction an unauthorized amendment of the Civil Code provisions is a mere dictum. As already noted in connection with the case of *Garcia vs. Florido*, that statement was not the ruling of the Court but only an observation borrowed from another case.

The short of it is that the rulings in these cases are consistent with the proposition herein made that, on the basis of Rule 111, 1-3, a civil action for the recovery of civil liability is, as a general rule, impliedly instituted with the criminal action, except

only (1) when such action arising from the same act or omission, which is the subject of the criminal action, is waived; (2) the right to bring it separately is reserved or (3) such action has been instituted prior to the criminal action. Even if an action has not been reserved or it was brought before the institution of the criminal case, the acquittal of the accused will not bar recovery of Civil liability unless the acquittal is based on a finding that the act from which the civil liability might arise did not exist because of Art. 29 of the Civil Code.

Indeed the question on whether the criminal action and the action for recovery of the civil liability must be tried in a single proceeding has always been regarded a matter of procedure and, since the rulemaking power has been conferred by the Constitution on this Court, it is in the keeping of this Court. Thus the subject was provided for by G.O. No. 58, the first Rules of Criminal Procedure under the American rule. Sec. 107 of these Orders provided:

"The privileges now secured by law to the person claiming to be injured by the commission of an offense to take part in the prosecution of the offense and to recover damages for the injury sustained by reason of the same shall not be held to be abridged by the provisions of this order; but such person may appear and shall be heard either individually or by attorney at all stages of the case, and the court upon conviction of the accused may enter judgment against him for the damages occasioned by his wrongful act. It shall, however, be the duty of the promotor fiscal to direct the prosecution, subject to the right of the person injured to appeal from any decision of the court denying him a legal right.

This was superseded by the 1940 Rules of Court, Rule 106 of which provided:

> "SEC. 15. *Intervention of the offended party in criminal action.* — Unless the offended party has waived the civil action or expressly reserved the right to institute it after the termination of the criminal case, and subject to the provisions of section 4 hereof, he may intervene, personally or by attorney, in the prosecution of the offense."

This Rule was amended thrice, in 1964, in 1985 and lastly in 1988. Through all the shifts or changes in policy as to the civil action arising from the same act or omission for which a criminal action is brought, one thing is clear: The change has been effected by this Court. Whatever contrary impression may have been created by *Garcia vs. Florido* and its progeny must therefore be deemed to have been clarified and settled by the new rules which require reservation of the right to recover the

civil liability, otherwise the action will be deemed to have been instituted with the criminal action.

Contrary to private respondent's contention, the requirement that before a separate civil action may be brought it must be reserved does not impair, diminish or defeat substantive rights, but only regulates their exercise in the general interest of orderly procedure. The requirement is merely procedural in nature. For that matter Revised Penal Code, by providing in Art. 100 that any person criminally liable is also civilly liable, gives the offended party the right to bring a separate civil action, yet no one has ever questioned that rule that such action must be reserved before it may be brought separately.

Indeed, the requirement that the right to institute actions under the Civil Code separately must be reserved is not incompatible with the independent character of such actions. There is a difference between allowing the trial of civil actions to proceed independently of the criminal prosecution and requiring that, before they may be instituted at all, a reservation to bring them separately must be made. Put in another way, it is the conduct of the trial of the civil action — not its institution through the filing of a complaint — which is allowed to proceed independently of the outcome of the criminal case.

C. There is a practical reason for requiring that the right to bring an independent civil action under the Civil Code separately must be reserved. It is to avoid the filing of more than one action for the same act or omission against the same party. Any award made against the employer, whether based on his subsidiary civil liability under Art. 103 of the Revised Penal Code or his primary liability under Art. 2180 of the Civil Code, is ultimately recoverable from the accused.

In the present case, the criminal action was filed against the employee, a bus driver. Had the driver been convicted and found insolvent, his employer would have been held subsidiarily liable for damages. But if the right to bring a separate civil action (whether arising from the crime or from quasi delict) is reserved, there would be no possibility that the employer would be held liable because in such a case there would be no pronouncement as to the civil liability of the accused. In such a case, the institution of a separate and independent civil action under the Civil Code would not result in the employee being held for the same act or omission. The rule requiring reservation in the end serves to implement the prohibition against double for the same act or omission. As held in *Barredo vs. Garcia*, the injured party must choose which of the available causes of action for damages he will bring. If he fails to reserve the filing of a separate civil action he will be deemed to have elected to recover damages from the bus

> driver on the basis of the crime. In such a case his cause of action against the employer will be limited to the recovery of the latter's subsidiary liability under Art. 103 of the Revised Penal Code.

It is best to bear in mind the history of the rule because the present rules (2000 Rules of Criminal Procedure) may not be the end of the saga of the reservation requirement. It remains to be seen if the Supreme Court will finally stick to the present policy it is now implementing under the present rules.

8. PREJUDICIAL QUESTION

A matter that may suspend the civil action that is deemed instituted with the criminal case is the presence of prejudicial question. Section 6 of Rule 111 of the Revised Rules of Criminal Procedure provides for the following elements of prejudicial question:

> "Sec. 6. *Elements of prejudicial question.* — The two (2) essential elements of a prejudicial question are: (a) the previously instituted civil action involves an issue similar or intimately related to the issue raised in the criminal action; and (b) the resolution of such issue determines whether or not the criminal action may proceed." (n)

> Section 7 of the same rule provides that "a petition for suspension of the criminal action based upon the pendency of a prejudicial question in a civil action may be filed in the office of the fiscal or the court conducting the preliminary investigation. When the criminal action has been filed in court for trial, the petition to suspend shall be filed in the same criminal action at any time before the prosecution rests."

CIVIL LIABILITY ARISING FROM DELICT

CHAPTER 10

THE DEFENDANTS

This chapter deals with persons who may be sued for tort, particularly those who may be held liable for quasi-delict under Article 2176 of the Civil Code.

Preliminarily, it is well to reiterate that both natural and juridical persons may be held liable for quasi-delict. With respect to juridical persons, the liability is always vicarious or imputed; as artificial beings, they act only through their officers and employees. Even the State and its political subdivisions may, in proper cases, be subject to civil liability.

1. CONCURRENT NEGLIGENCE OR ACTS

A. JOINT TORT-FEASORS.

Article 2194 provides for the rule when two or more acts or omission of different persons are the proximate causes of an injury. Article 2194 states:

> Art. 2194. The responsibility of two or more persons who are liable for quasi-delict is solidary. (n)

The rule was explained in *Worcester vs. Ocampo* (22 Phil. 42 [1912]):

> "x x x The difficulty in the contention of the appellants is that they fail to recognize that the basis of the present action is a tort. They fail to recognize the universal doctrine that each joint tort feasor is not only individually liable for the tort in which he participates, but is also jointly liable with his tort feasors. The defendants might have been sued separately for the commission of the tort. They might have been sued jointly and severally, as they were. *(Nicoll vs. Glennie, 1 M. & S. [English Common Law Reports], 588).* If several persons jointly commit a tort, the plaintiff or person injured, has his election to sue all or some of the parties jointly, or one of them separately, because the tort is

in its nature a separate act of each individual. *(1 Chiddey, Common Law Pleadings, 86).* It is not necessary that the cooperation should be a direct, corporeal act, for, to give an example, in a case of assault and battery committed by various persons, under the common law all are principals. So, also is the person who counsels, aids or assists in any way the commission of a wrong. Under the common law, he who aided or assisted or counseled, in any way, the commission of a crime, was as much a principal as he who inflicted or committed the actual tort. *(Page vs. Freeman, 19 Mo., 421).*

It may be stated as a general rule, that joint tort feasors are all the persons who command, instigate, promote, encourage, advise, countenance, cooperate in, aid or abet the commission of a tort, or who approve of it after it is done, if done for their benefit. They are each liable as principals, to the same extent and in the same manner as if they had performed the wrongful act themselves. *(Cooley on Torts, 133; Moir vs. Hopkins, 16 Ill., 313 [63 Am. Dec., 312 and note]; Berry vs. Fletch, 1st Dill., 67; Smithwick vs. Ward, 7 Jones L. 64; Smith vs. Felt, 50 Barb. [N. Y.], 612; Shepard vs. McQuilkin, 2 W. Va., 90; Lewis vs. Johns, 34 Cal., 269).*

Joint tort feasors are jointly and severally liable for the tort which they commit. The person injured may sue all of them, or any number less than all. Each is liable for the whole damage caused by all, and all together are jointly liable for the whole damage. It is no defense for one sued alone, that the others who participated in the wrongful act are not joined with him as defendants; nor is it any excuse for him that his participation in the tort was insignificant as compared with that of the others. *(Forebrother vs. Ansley, 1 Campbell [English Reports], 343; Pitcher vs. Bailey, 8 East, 171; Booth vs. Hodgson, 6 Term Reports, 405; Vose vs. Grant, 15 Mass., 505; Acheson vs. Miller, 18 Ohio, 1; Wallace vs. Miller, 15 La. Ann., 449; Murphy vs. Wilson, 44 Mo., 313; Bishop vs. Ealey, 9 Johnson [N. Y.], 294).*

Joint tort feasors are not liable *pro rata*. The damages can not be apportioned among them, except among themselves. They can not insist upon an apportionment, for the purpose of each paying an aliquot part. They are jointly and severally liable for the full amount. *(Pardrige vs. Brady, 7 Ill. App., 639; Carney vs. Read, 11 Ind., 417; Lee vs. Black, 27 Ark., 337; Bevins vs. McElroy, 52 Am. Dec., 258).*

A payment in full of the damage done, by one of the joint tort feasors, of course satisfies any claim which might exist against the others. There can be but one satisfaction. The release of one of the joint tort feasors by agreement, generally operates to discharge all. *(Wright vs. Lathrop, 2 Ohio, 33; Livingston vs. Bishop,*

1 Johnson [N. Y.], 290; Brown vs. Marsh, 7 Vt., 327; Ayer vs. Ashmead, 31 Conn., 447; Eastman vs. Grant, 34 Vt., 387; Turner vs. Hitchcock, 20 Iowa, 310; Ellis vs. Esson, 50 Wis., 149).

> Of course the courts during the trial may find that some of the alleged joint tort feasors are liable and that others are not liable. The courts may release some for lack of evidence while condemning others of the alleged tort feasors. And this is true even though they are charged jointly and severally. *(Lansing vs. Montgomery, 2 Johnson [N. Y.], 382; Drake vs. Barrymore, 14 Johnson, 166; Owens vs. Derby, 3 Ill., 126).*

Thus, if the proximate causes of the injury are two (2) causal sets, both persons who are responsible for the two separate causes are liable jointly and severally. Solidary liability exists not only if the defendants conspired to bring about the result but also in cases where causes are independent of each other. Thus, if a passenger was injured in a vehicular accident involving the public utility vehicle where he was riding and another vehicle, the drivers of both vehicles are solidarily liable if it can be established that their respective negligence are the proximate causes of the injury.

B. MOTOR VEHICLE MISHAPS.

Solidary liability likewise exists in the cases covered by Article 2184 of the Civil Code which provides that:

> "Art. 2184. In motor vehicle mishaps, the owner is solidarily liable with his driver, if the former, who was in the vehicle, could have, by the use of the due diligence, prevented the misfortune. x x x"

Solidary liability is imposed on the owner of the vehicle not because of his imputed liability but because his own omission is a concurring proximate cause of the injury. This rule was first laid down in *Chapman vs. Underwood* (27 Phil. 374, 376-377 [1914]), where the Supreme Court explained that the owner who was present is liable if the negligent acts of the driver are continued for such a length of time so as to give the owner a reasonable opportunity to observe them and to direct his driver to desist therefrom. An owner who sits in his automobile and permits his driver to continue in violation of the law by the performance of negligent acts, after he has had a reasonable opportunity to observe them and to direct the driver to desist therefrom, becomes himself responsible for such acts. *(see: Caedo v. Yu Khe Thai, No. L-20392, Dec. 18, 1968; Malayan Insurance v. CA, No. L-36413, Sept. 26, 1988).*

In *Marcial T. Caedo et al. v. Yu Khe Thai et al (G.R. No. L-20392, December 18, 1968)* the Supreme Court explained that the basis of the master's liability in civil law is not respondent superior but rather the relationship of pater familias. The theory is that ultimately the negligence of the servant, if known to the master and susceptible of timely correction by him, reflects his own negligence if he fails to correct it in order to prevent injury or damage. Nevertheless, the test of imputed negligence under Article 2184 of the Civil Code is, to a great degree, necessarily subjective. Car owners are not held to a uniform and inflexible standard of diligence as are professional drivers. In many cases they refrain from driving their own cars and instead hire other persons to drive for them precisely because they are not trained or endowed with sufficient discernment to know the rules of traffic or to appreciate the relative dangers posed by the different situations that are continually encountered on the road. What would be a negligent omission under aforesaid Article on the part of a car owner who is in the prime of age and knows how to handle a motor vehicle is not necessarily so on the part, say, of an old and infirm person who is not similarly equipped. The law does not require that a person must possess a certain measure of skill or proficiency either in the mechanics of driving or in the observance of traffic rules before he may own a motor vehicle. The test of his negligence, within the meaning of Article 2184, is his omission to do that which the evidence of his own senses tells him he should do in order to avoid the accident. And as far as perception is concerned, absent a minimum level imposed by law, a maneuver that appears to be fraught with danger to one passenger may appear to be entirely safe and commonplace to another. Were the law to require a uniform standard of perceptiveness, employment of professional drivers by car owners who, by their very inadequacies, have real need of drivers' services, would be effectively prescribed.

2. VICARIOUS LIABILITY

A. GENERAL CONCEPTS.

There is vicarious liability where a person is not only liable for torts committed by himself, but also for torts committed by others with whom he has a certain relationship and for whom he is responsible. *(Tamargo vs. Court of Appeals, 209 SCRA 518, 523 [1992])*. The doctrine is also called the doctrine of "imputed negligence" in Anglo-American tort law. The basis of the vicarious liability was explained by the Court in *Cangco vs. Manila Railroad Co.* (38 Phil. 768 [1918]) in the following terms:

> "With respect to extra-contractual obligation arising from negligence, whether of act or omission, it is competent for the legislature to elect — and our Legislature has so elected — to limit such liability to cases in which the person upon whom such an obligation is imposed is morally culpable or, on the contrary, for reasons of public policy, to extend that liability, without regard to the lack of moral culpability, so as to include responsibility for the negligence of those persons whose acts or omissions are imputable, by a legal fiction, to others who are in a position to exercise an absolute or limited control over them. The legislature which adopted our Civil Code has elected to limit extra-contractual liability — with certain well-defined exceptions — to cases in which moral culpability can be directly imputed to the persons to be charged. This moral responsibility may consist in having failed to exercise due care in one's own acts, or in having failed to exercise due care in the selection and control of one's agents or servants, or in the control of persons who, by reasons of their status, occupy a position of dependency with respect to the person made liable for their conduct."

In Anglo-American law, vicarious liability consists mainly of the liability of the employer for the tort conduct of the employee committed in the performance of the latter's assigned task. The applicable doctrine is *respondeat superior*. Under the said doctrine, the liability is strictly imputed, that is, the employer is liable not because of his act or omission but because of the act or omission of the employee. What is material is not whether the employer exercised due care but the conduct of the employee. Consequently, the employer cannot escape liability by claiming that he exercised due diligence in the selection or supervision of the employee.

In the Philippines, vicarious liability is generally not governed by the doctrine of *respondeat superior*. The employers or the parents are being made liable not only because of the negligent or wrongful act of the person for whom they are responsible but also because of their own negligence. Liability is imposed on the employer because he failed to exercise due diligence in the selection and supervision of his employee while parents are made liable because they failed to exercise diligence in the supervision of their child who lives in their company. Nevertheless, the liability is still vicarious or imputed because there is no direct link between their act or omission and the injury. The employers or the parents, no matter how negligent in supervising their employee or child, would not be liable were it not for the act or omission of the said employee or child. The operative act or omission is still the act or omission of the employee or child and the negligence or wrongful conduct is imputed to the person responsible for them.

The exceptional cases when the doctrine of *Respondeat Superior* is applicable include the liability of employers under Article 103 of the Revised Penal Code. The liability of the employer under the said statute is not determined by the exercise of diligence in the selection and supervision of the employee. In other words, he is being held liable for the negligence of another irrespective of his exercise of due care.

There is also an opinion to the effect that *respondeat superior* is present with respect to the liability of the partnership for the tort committed by the partner. *(Arts. 1182 and 1183, Civil Code; De Leon, Partnership, Agency and Trusts, 1997 Ed., p. 179).*

B. STATUTORY PROVISIONS.

a. Civil Code and Family Code.

Central to the determination of vicarious liability is Article 2180 of the Civil Code. Articles 2180 to 2182 of the Civil Code provide:

> Art. 2180. The obligation imposed by article 2176 is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible.
>
> The father and, in case of his death or incapacity, the mother, are responsible for the damages caused by the minor children who live in their company.
>
> Guardians are liable for damages caused by the minors or incapacitated persons who are under their authority and live in their company.
>
> The owners and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions.
>
> Employers shall be liable for the damages caused by their employees and household helpers acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry.
>
> The State is responsible in like manner when it acts through a special agent; but not when the damage has been caused by the official to whom the task done properly pertains, in which case what is provided in Article 2176 shall be applicable.
>
> Lastly, teachers or heads of establishments of arts and trades shall be liable for damages caused by their pupils and

students or apprentices, so long as they remain in their custody.

The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage. (1903a)

Art. 2181. Whoever pays for the damage caused by his dependents or employees may recover from the latter what he has paid or delivered in satisfaction of the claim. (1904)

Art. 2182. If the minor or insane person causing damage has no parents or guardian, the minor or insane person shall be answerable with his own property in an action against him where a guardian *ad litem* shall be appointed. (n)

Article 58 of the Child and Youth Welfare Code (Presidential Decree No. 603) complement the above-quoted provisions:

"Article 58. *Torts*. — Parents and guardians are responsible for the damage caused by the child under their parental authority in accordance with the Civil Code."

The above-quoted provisions of the Civil Code were later modified by some of the provisions of the Family Code. *(Executive Order No. 209)*. Articles 219, 221 and 236 of the Family Code provide:

Art. 219. Those given the authority and responsibility under the preceding Article shall be principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor. The parents, judicial guardians or the persons exercising substitute parental authority over said minor shall be subsidiarily liable.

The respective liabilities of those referred to in the preceding paragraph shall not apply if it is proved that they exercised the proper diligence required under the particular circumstances.

All other cases not covered by this and the preceding articles shall be governed by the provisions of the Civil Code on quasi-delicts. (n)

Art. 221. Parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority subject to the appropriate defenses provided by law.

Art. 236. Emancipation shall terminate parental authority over the person and property of the child who shall then be qualified and responsible for all acts of civil life, save the exceptions established by existing laws in special cases.

> Contracting marriage shall require parental consent until the age of twenty-one.
>
> Nothing in this Code shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code.

It should be emphasized that paragraphs 2 and 3 of Article 2180 of the Civil Code were not rendered ineffective by the Family Code. The provisions remain effective subject to the modifications resulting from the operation of the provisions of the Family Code. Thus, the provisions with respect to parents in the second paragraph of Article 2180 is modified by Article 221 of the Family Code by removing the alternative qualification of the liability of the father and the mother. *(Libi vs. Intermediate Appellate Court, 214 SCRA 16 [1992]).* The liability of teachers and heads of institutions under Article 2180 are likewise modified by making the school itself liable. The liability extends to acts committed even outside the school so long as it is an official activity of the school. *(Valenzuela vs. Court of Appeals, 253 SCRA 303 [1996]).*

b. Revised Penal Code.

The Revised Penal Code likewise contains provisions providing for vicarious civil liability arising from delict. Articles 101, 102 and 103 thereof provides:

> Art. 101. *Rules regarding civil liability in certain cases.* — The exemption from criminal liability established in subdivisions 1, 2, 3, 5 and 6 of Article 12 and in subdivision 4 of Article 11 of this Code does not include exemption from civil liability, which shall be enforced subject to the following rules:
>
> *First*. In cases of subdivisions 1, 2, and 3 of Article 12, the civil liability for acts committed by an imbecile or insane person, and by a person under nine years of age, or by one over nine but under fifteen years of age, who has acted without discernment, shall devolve upon those having such person under their legal authority or control, unless it appears that there was no fault or negligence on their part.
>
> Should there be no person having such insane, imbecile or minor under his authority, legal guardianship or control, or if such person be insolvent, said insane, imbecile, or minor shall respond with their own property, excepting property exempt from execution, in accordance with the civil law.
>
> *Second*. In cases falling within subdivision 4 of Article 11,

the persons for whose benefit the harm has been prevented shall be civilly liable in proportion to the benefit which they may have received.

The courts shall determine, in sound discretion, the proportionate amount for which each one shall be liable.

When the respective shares cannot be equitably determined, even approximately, or when the liability also attaches to the Government, or to the majority of the inhabitants of the town, and, in all events, whenever the damages have been caused with the consent of the authorities or their agents, indemnification shall be made in the manner prescribed by special laws or regulations.

Third. In cases falling within subdivisions 5 and 6 of Article 12, the persons using violence or causing the fears shall be primarily liable and secondarily, or, if there be no such persons, those doing the act shall be liable, saving always to the latter that part of their property exempt from execution.

Art. 102. *Subsidiary civil liability of innkeepers, tavernkeepers and proprietors of establishments*. — In default of the persons criminally liable, innkeepers, tavernkeepers, and any other persons or corporations shall be civilly liable for crimes committed in their establishments, in all cases where a violation of municipal ordinances or some general or special police regulation shall have been committed by them or their employees.

Innkeepers are also subsidiarily liable for the restitution of goods taken by robbery or theft within their houses from guests lodging therein, or for the payment of the value thereof, provided that such guests shall have notified in advance the innkeeper himself, or the person representing him, of the deposit of such goods within the inn; and shall furthermore have followed the directions which such innkeeper or his representative may have given them with respect to the care and vigilance over such goods. No liability shall attach in case of robbery with violence against or intimidation of persons unless committed by the innkeeper's employees.

Art. 103. *Subsidiary civil liability of other persons*. — The subsidiary liability established in the next preceding article shall also apply to employers, teachers, persons, and corporations engaged in any kind of industry for felonies committed by their servants, pupils, workmen, apprentices, or employees in the discharge of their duties.

C. PARENTS AND OTHER PERSONS EXERCISING PARENTAL AUTHORITY.

a. NEW CIVIL CODE AND FAMILY CODE.

(1) Liability for Acts of Minors.

(1.1) Basis of Liability.

The basis of liability of parents for the acts or omissions of their minor children is the parental authority that they exercise over them. Their liability is a necessary consequence of the parental authority which imposes upon them the duty of supporting their children, keeping them in their company and educating them in proportion to their means. At the same time, parental authority gives them the right to correct and punish their children in moderation. *(Fuellas vs. Cadano, citing Exconde vs. Capuno, et al., G.R. No. L-10132, June 29, 1957).* Manresa said that:

> "Since children and wards do not yet have the capacity to govern themselves, the law imposes upon the parents and guardians the duty of exercising special vigilance over the acts of their children and wards in order that damages to third persons due to the ignorance, lack of foresight or discernment of such children and wards may be avoided. If the parents and guardians fail to comply with this duty, they should suffer the consequences of their abandonment or negligence by repairing the damage caused." *(12 Manresa, 649-650, cited in Fuellas vs. Cadano).*

(1.2) Persons Liable.

Liability based on parental authority is not limited to parents; the same is also imposed on those exercising substitute parental authority and special parental authority. In other words, parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority. *(Article 221, Family Code).* Other persons exercising parental authority include the adopter and a court-appointed guardian.

It should be noted that parents have the natural right and duty over the person and property of their unemancipated children. *(Article 209, Family Code).* The parents exercise their authority jointly and in the absence or death of either parent, the parent present shall continue exercising parental authority. *(Articles 211 and 212, Family Code).* The same parental authority is terminated upon adoption of the child and shall be vested in the adopters. *(Articles 229, Family Code and 189, Civil Code).*

In the absence of both parents (or the adopter in proper cases), a guardian may be appointed by the court to exercise parental authority over the child. In default of the parents or a judicially appointed guardian, parental authority shall be exercised by the following persons in the order indicated *(Articles 214 and 216, Family Code):*

a) The surviving grandparents;

b) The oldest brother or sister, over twenty-one years of age, unless unfit or disqualified; and

c) The child's actual custodian, over twenty-one years of age, unless unfit or disqualified.

The surviving grandparents and other persons named above, exercise parental authority only in case of parents' death, absence or unsuitability. *(Santos vs. Court of Appeals, March 16, 1995).* Hence, they are civilly liable only in such cases where both parents are dead, absent or otherwise incapacitated to perform their duty.

(1.3) Nature of Liability.

Under Article 2180 of the Civil Code, the obligation of the parents are alternative — the father shall be primarily liable and the mother shall be liable in his absence. However, under the Family Code, this civil liability is now, without such alternative qualification. *(Libi vs. Intermediate Appellate Court, 214 SCRA 16, 33 [1992]).* In other words, both parents are primarily liable for the damages caused by their child. It should be emphasized that the liability is primary and not subsidiary. The Supreme Court explained in *Libi vs. Intermediate Appellate Court* (*ibid.* at p. 630):

> "We believe that the civil liability of parents for quasi-delicts of their minor children, as contemplated in Article 2180 of the Civil Code, is primary and not subsidiary. In fact, if we apply Article 2194 of said code which provides for solidary liability of joint tortfeasors, the persons responsible for the act or omission, in this case the minor and the father and, in case of his death or incapacity, the mother, are solidarily liable. Accordingly, such parental liability is primary and not subsidiary, hence the last paragraph of Article 2180 provides that '(t)he responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damages.'"

(1.4) Other Requirements.

The law refers to liability of parents for acts or omissions of unemancipated children. It should be noted, however, that under existing laws, there is no longer any instance when a minor may be emancipated before he reaches the age of majority. Under the original provisions of the Family Code, twenty one (21) is the age of majority. It further provides that emancipation before the minor reaches the age majority will result by reason of marriage. Marriage of a minor was possible then if the minor was at least eighteen (18) years of age. Republic Act No. 6809 amended Article 234 of the Family Code by making eighteen (18) years as the uniform majority age for men and women. Since the same age (18) is required for a valid marriage, there is no more room for emancipation by reason of marriage.

Consistent with the basis of liability of parents and other persons exercising parental authority, the liability is present only, both under Article 2180 of the Civil Code and Article 221 of the Family Code, if the child is living in their company. Thus, the parents are not liable if their child is presently living with a relative under an informal adoption arrangement.

(2) Liability for Acts of Children of Majority Age.

Emancipation takes place by the attainment of the age of majority. *(Article 234, Civil Code).* Emancipation shall terminate parental authority over the person and property of the child who shall then be qualified and responsible for all acts of civil life. *(Article 236, Family Code).* Similarly, the power of guardians over minors shall likewise cease when the said minors reach the age of majority.

Logically, therefore, the liability of the parents should cease upon emancipation. This is not the case, however, because the last paragraph of Article 236 of the Family Code as amended by Republic Act No. 6809 provides that nothing in said Code "shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code." Thus, the parents or guardians can be still be held liable even if the minor is already emancipated provided that he is below twenty-one years of age.

The amendment had been criticized for imposing liability without filial nor juridical justification. *(1 Tolentino 643).* Senator Tolentino believes that it is a case of responsibility without authority. *(ibid.).*

Indeed, parental authority is not the basis of responsibility

because there is no such authority after emancipation. Apparently, proponents of the amendment in Congress did not intend to make parental authority as the basis of responsibility. Thus, the records of the Senate reflect the following:

> *"Senator Saguisag*. Mr. President, the second and third paragraphs of Article 2180 of the Civil Code, if I am the victim of a tort committed by a 19- or 20-year old, I can go after the parents or guardians, as the case may be. And it seems to me that is something which we would retain. As I said, If I got run over by a 19-year old, my chances of recovering against someone who may still be in school and would be a long way from getting employed would be a little problematic. So, I was hoping also to save that as an exception. In other words, I have no objection to the general formulation of Senator Guingona, but I would hope that he would be open to accommodating that special concern. The language I have in mind is something like as follows: "NOTHING IN THIS ACT SHALL BE CONSTRUED TO DEROGATE FROM THE DUTY OR RESPONSIBILITY OF PARENTS AND GUARDIANS MENTIONED IN THE SECOND AND THIRD PARAGRAPHS OF ARTICLE 2180 OF THE CIVIL CODE." *(Senate Records, June 6, 1988, pp. 80-81).*

The Congress seems to have used the "deep pocket" policy of imposing vicarious liability on parents of persons who are above eighteen (18) and below twenty-one (21). The parents are still being made liable because they are the persons who are financially capable of satisfying any judgment obligation. It should be noted that such policy is not novel and is considered by some as the basis of responsibility of employer in American Law.

It should likewise be noted that even under the New Civil Code, parental authority is not the sole basis of liability. For example, teachers-in-charge are still liable for the acts of their students who are no longer minors. In other words, the liability of teachers-in-charge do not cease even if the minor student reaches the age of majority. Similarly, the imposition of liability on parents may be justified because of the moral responsibility imposed on them and the power that they exercise over their children who live in their company. It is believed that moral responsibility need not be based on parental authority. Nevertheless, the fact that they no longer exercise parental authority, the age of the actor and his level of maturity are circumstances that should be considered in determining the degree of diligence required of the parents. Definitely, the degree of diligence required of them is lower compared to cases when they exercise parental authority over the actor.

b. CIVIL LIABILITY *EX DELICTO*.

The first paragraph of Article 101 of the Revised Penal Code imposes liability on parents and other persons exercising legal authority over minors. Under the said provision, parents are primarily liable for the civil liability arising from criminal offense committed by their minor children under their legal authority or control or who live in their company. As stated in Article 101, the liability arises with respect to damages *ex delicto* caused by their children nine (9) years of age or under, or over nine (9) but under fifteen (15) years of age who acted without discernment. *(Libi vs. Intermediate Appellate Court, supra, p. 33).*

Article 101 does not cover cases involving minors over nine who acted with discernment. However, prevailing jurisprudence is to the effect that parents and other persons exercising parental authority are also liable for the acts of their children over nine (9) but under fifteen (15) years of age who acted with discernment pursuant to Article 2180. *(Araneta vs. Areglado, 104 Phil. 524; Salen, et al. vs. Balce, 107 Phil. 748 [1960]; Paleyan, etc., et al. vs. Bangkili, et al., 40 SCRA 132 [1971]; Elcano, et al. vs. Hill, 77 SCRA 98 [1977]; Libi vs. Intermediate Appellate Court, ibid.).*

The same persons who are exercising legal authority are likewise primarily liable for acts of their children who are fifteen (15) years or over but under twenty-one (21) years of age. Such liability shall be imposed pursuant to Article 2180. The Supreme Court explained in one of its notes in *Libi vs. Intermediate Appellate Court* that "while R.A. No. 6809 amended Art. 234 of the Family Code to provide that majority commences at the age of 18 years, Art. 236 thereof, as likewise amended, states that '(n)othing in this Code shall be construed to derogate from the duty or responsibility of parents and guardians for children and wards below twenty-one years of age mentioned in the second and third paragraphs of Article 2180 of the Civil Code.'"

The Supreme Court explained the doctrine on the applicability of Article 2180 on acts of minors over nine (9) who acted with discernment in *Salen, et al. vs. Balce, et al.*:

> "It is true that under Article 101 of the Revised Penal Code, a father is made civilly liable for the acts committed by his son o*nly* if the latter is an imbecile, an insane, under 9 years of age, or over 9 but under 15 years, who acts without discernment, unless it appears that there is no fault or negligence on his part. This is because a son who commits the act under any of those conditions is by law exempt from criminal liability. *(Article 12, subdivisions 1, 2 and 3, Revised Penal Code).* The idea is not to leave the act entirely unpunished but to attach certain liability to the person

> who has the delinquent minor under his authority or control. But a minor over 15 who acts with discernment is not exempt from criminal liability, for which reason the Code is silent as to the subsidiary liability of his parents should he stand convicted. In that case, resort should be had to the general law which is our Civil Code.
>
> The particular law that governs this case is Article 2180, the pertinent portion of which provides: 'The father and, in case of his death or incapacity, the mother, are responsible for damages caused by the minor children who lived in their company.' To hold that this provision does not apply to the instant case because it only covers obligations which arise from *quasi-delicts* and not obligations which arise from criminal offenses, would result in the absurdity that while for an act where mere negligence intervenes the father or mother may stand subsidiarily liable for the damage caused by his or her son, no liability would attach if the damage is caused with criminal intent. Verily, the void that apparently exists in the Revised Penal Code is subserved by this particular provision of our Civil Code, as may be gleaned from some recent decisions of this Court which cover equal or identical cases."

c. Defense of Exercise of Due Diligence.

Parents and other persons exercising parental authority can escape liability by proving that they observed all the diligence of a good father of a family to prevent damage. *(Article 2180, Civil Code).* The defense is retained under Article 221 of the Family Code because it provides that the liability is "subject to the appropriate defenses provided by law." The rule is likewise applicable to the liability of the parents for damages *ex delicto* caused by their children because Article 101 of the Revised Penal Code expressly provides that parents are liable "unless it appears that there was no fault or negligence on their part."

The burden of proof rests on parents and persons exercising parental authority. Their fault or negligence is presumed from that which accompanied the causative act or omission although the presumption is merely *prima facie*; this is the clear and logical inference that may be drawn from the last paragraph of Article 2180. *(Cuadra vs. Monfort, 25 SCRA 160 [1970]).*

Justice Regalado explained in *Libi vs. Intermediate Appellate Court* that diligence of a good father of a family required by law in a parent and child relationship consists, to a large extent, of instruction and supervision of the child. This includes the duty and responsibility in monitoring and knowing the activities of their children. This is especially true if their children are engaged in dangerous work.

Obviously, there can be no meticulously calibrated measure applicable; and when the law simply refers to all the diligence of a good father of a family to prevent damage, it implies a consideration of the attendant circumstances in every individual case, to determine whether or not by the exercise of such diligence the damage could have been prevented. *(Cuadra vs. Monfort, 35 SCRA 160, 163 [1970]).*

As we are concerned with the negligence of parents, due care that they are supposed to exercise is a question of foreseeability. In other words, the same general test of negligence should apply to parents when they are sought to be held liable under Article 2180. As explained in *Cuadra vs. Monfort*, there is no liability if the parents are not remiss in failing to foresee the damage or the act which caused it. Thus, the parents would not be liable if the act that caused the injury was an innocent prank not unusual among children at play which no parent, however, careful would have any special reason to anticipate much less to guard against. Nor will an innocent prank reveal any mischievous propensity or any trait in the child's character which would reflect unfavorably on her upbringing and for which the blame could be attributed to her parents.

Using the test of foreseeability, the parents can be said to have failed to exercise due diligence in supervising their child if they allowed the latter to have access to the pistol used to injure another. *(Araneta vs. Arreglado, 104 Phil. 529 [1958]).* A good father of a family would have foreseen that a gun in the hands of an immature child may cause injury either to the child or to third persons.

CASES:

CUADRA, et al. vs. ALFONSO MONFORT
35 Phil. 160 [1970]

This is an action for damages based on *quasi-delict*, decided by the Court of First Instance of Negros Occidental favorably to the plaintiffs and appealed by the defendant to the Court of Appeals, which certified the same to us since the facts are not in issue.

Maria Teresa Cuadra, 12, and Maria Teresa Monfort, 13, were classmates in Grade Six at the Mabini Elementary School in Bacolod City. On July 9, 1962 their teacher assigned them, together with three other classmates, to weed the grass in the school premises. While thus engaged Maria Teresa Monfort found a plastic headband, an ornamental object commonly worn by young girls over their hair. Jokingly she said aloud that she had found an earthworm and, evidently to frighten the Cuadra girl, tossed the object at her. At that precise moment the latter turned around to face her friend, and

the object hit her right eye. Smarting from the pain, she rubbed the injured part and treated it with some powder. The next day, July 10, the eye became swollen and it was then that the girl related the incident to her parents, who thereupon took her to a doctor for treatment. She underwent surgical operation twice, first on July 20 and again on August 4, 1962, and stayed in the hospital for a total of twenty-three days, for all of which the parents spent the sum of P1,703.75. Despite the medical efforts, however, Maria Teresa Cuadra completely lost the sight of her right eye.

In the civil suit subsequently instituted by the parents in behalf of their minor daughter against Alfonso Monfort, Maria Teresa Monfort's father, the defendant was ordered to pay P1,703.00 as actual damages; P20,000.00 as moral damages; and P2,000.00 as attorney's fees, plus the costs of the suit.

The legal issue posed in this appeal is the liability of a parent for an act of his minor child which causes damage to another under the specific facts related above and the applicable provisions of the Civil Code, particularly Articles 2176 and 2180 thereof, which read:

x x x

The underlying basis of the liability imposed by Article 2176 is the fault or negligence accompanying the act or the omission, there being no willfulness or intent to cause damage thereby. When the act or omission is that of one person for whom another is responsible, the latter then becomes himself liable under Article 2180, in the different cases enumerated therein, such as that of the father or the mother under the circumstances above quoted. The basis of this vicarious, although primary, liability is, as in Article 2176, fault or negligence, which is presumed from that which accompanied the causative act or omission. The presumption is merely *prima facie* and may therefore be rebutted. This is the clear and logical inference that may be drawn from the last paragraph of Article 2180, which states "that the responsibility treated of in this Article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damage."

Since the fact thus required to be proven is a matter of defense, the burden of proof necessarily rests on the defendant. But what is the exact degree of diligence contemplated, and how does a parent prove it in connection with a particular act or omission of a minor child, especially when it takes place in his absence or outside his immediate company? Obviously there can be no meticulously calibrated measure applicable; and when the law simply refers to "all the diligence of a good father of the family to prevent damage," it implies a consideration of the attendant circumstances in every individual case, to determine whether or not by the exercise of such diligence the damage could have been prevented.

In the present case there is nothing from which it may be inferred that the defendant could have prevented the damage by the observance of due care, or that he was in any way remiss in the exercise of his parental authority in failing to foresee such damage, or the act which caused it. On the contrary,

his child was at school, where it was his duty to send her and where she was, as he had the right to expect her to be, under the care and supervision of the teacher. And as far as the act which caused the injury was concerned, it was an innocent prank not unusual among children at play and which no parent, however careful, would have any special reason to anticipate much less guard against. Nor did it reveal any mischievous propensity, or indeed any trait in the child's character which would reflect unfavorably on her upbringing and for which the blame could be attributed to her parents.

The victim, no doubt, deserves no little commiseration and sympathy for the tragedy that befell her. But if the defendant is at all obligated to compensate her suffering, the obligation has no legal sanction enforceable in court, but only the moral compulsion of good conscience.

The decision appealed from is reversed, and the complaint is dismissed, without pronouncement as to costs.

MACARIO TAMARGO, et al. vs. THE HON. COURT OF APPEALS, et al.
209 SCRA 518 [1992]

On 20 October 1982, Adelberto Bundoc, then a minor of 10 years of age, shot Jennifer Tamargo with an air rifle causing injuries which resulted in her death. Accordingly, a civil complaint for damages was filed with the Regional Trial Court, Branch 20, Vigan, Ilocos Sur, docketed as Civil Case No. 3457-V, by Petitioner Macario Tamargo, Jennifer's adopting parent, and petitioner spouses Celso and Aurelia Tamargo, Jennifer's natural parents, against respondent spouses Victor and Clara Bundoc, Adelberto's natural parents with whom he was living at the time of the tragic incident. In addition to this case for damages, a criminal information for Homicide through Reckless Imprudence was filed [Criminal Case No. 1722-V] against Adelberto Bundoc. Adelberto, however, was acquitted and exempted from criminal liability on the ground that he had acted without discernment.

Prior to the incident, or on 10 December 1981, the spouses Sabas and Felisa Rapisura had filed a petition to adopt the minor Adelberto Bundoc in Special Proceedings No. 0373-T before the then Court of First Instance of Ilocos Sur. This petition for adoption was granted on 18 November 1982, that is, after Adelberto had shot and killed Jennifer.

In their Answer, respondent spouses Bundoc, Adelberto's natural parents, reciting the result of the foregoing petition for adoption, claimed that not they, but rather the adopting parents, namely the spouses Sabas and Felisa Rapisura, were indispensable parties to the action since parental authority had shifted to the adopting parents from the moment the successful petition for adoption was filed.

Petitioners in their Reply contended that since Adelberto Bundoc was then actually living with his natural parents, parental authority had not ceased nor been relinquished by the mere filing and granting of a petition

for adoption.

[The trial court on 3 December 1987 dismissed petitioners' complaint, ruling that respondent natural parents of Adelberto indeed were not indispensable parties to the action. Later, a notice of appeal was filed by the petitioners but the same was dismissed for having been filed beyond the reglementary period. The dismissal of the appeals was sustained by the Court of Appeals. However, when the case was elevated to the Supreme Court, the latter gave due course to the petition in view of the nature of the issue raised in the instant Petition, and in order that substantial justice may be served.]

x x x

2. It is not disputed that Adelberto Bundoc's voluntary act of shooting Jennifer Tamargo with an air rifle gave rise to a cause of action on quasi-delict against him.

x x x

The civil liability imposed upon parents for the torts of their minor children living with them, may be seen to be based upon the parental authority vested by the Civil Code upon such parents. The civil law assumes that when an unemancipated child living with its parents commits a tortious act, the parents were negligent in the performance of their legal and natural duty closely to supervise the child who is in their custody and control. Parental liability is, in other words, anchored upon parental authority coupled with presumed parental dereliction in the discharge of the duties accompanying such authority. The parental dereliction is, of course, only presumed and the presumption can be overturned under Article 2180 of the Civil Code by proof that the parents had exercised all the diligence of a good father of a family to prevent the damage.

In the instant case, the shooting of Jennifer by Adelberto with an air rifle occurred when parental authority was still lodged in respondent Bundoc spouses, the natural parents of the minor Adelberto. It would thus follow that the natural parents who had then actual custody of the minor Adelberto, are the indispensable parties to the suit for damages.

The natural parents of Adelberto, however, stoutly maintain that because a decree of adoption was issued by the adoption court in favor of the Rapisura spouses, parental authority was vested in the latter as adopting parents as of the time of the filing the petition for adoption that is, before Adelberto had shot Jennifer with an air rifle. The Bundoc spouses contend that they were therefore free of any parental responsibility for Adelberto's allegedly tortious conduct.

Respondent Bundoc spouses rely on Article 36 of the Child and Youth Welfare Code which reads as follows:

> "Article 36. *Decree of Adoption.* — If, after considering the report of the Department of Social Welfare or duly licensed child placement

agency and the evidence submitted before it, the court is satisfied that the petitioner is qualified to maintain, care for, and educate the child, that the trial custody period has been completed, and that the best interests of the child will be promoted by the adoption, a decree of adoption shall be entered, which shall be effective as of the date the original petition was filed. The decree shall state the name by which the child is thenceforth to be known." (Emphasis supplied).

The Bundoc spouses further argue that the above Article 36 should be read in relation to Article 39 of the same Code:

"Art. 39. *Effect of Adoption.* — The adoption shall:

x x x x x x x x x

(2) Dissolve the authority vested in the natural parents, except where the adopter is the spouse of the surviving natural parent;"

xx x x x x x x x x x x

(Emphasis supplied)

and urge that their parental authority must be deemed to have been dissolved as of the time the petition for adoption was filed.

The Court is not persuaded. As earlier noted, under the Civil Code, the basis of parental liability for the torts of a minor child is the relationship existing between the parents and the minor child living with them and over whom, the law presumes, the parents exercise supervision and control. Article 58 of the Child and Youth Welfare Code, re-enacted this rule:

"Article 58. *Torts.* — Parents and guardians are responsible for the damage caused by the child under their parental authority in accordance with the Civil Code." (Emphasis supplied).

Article 221 of the Family Code of the Philippines has similarly insisted upon the requisite that the child, doer of the tortious act, shall have been in the actual custody of the parents sought to be held liable for the ensuing damage:

"Art. 221. Parents and other persons exercising parental authority shall be civilly liable for the injuries and damages caused by the acts or omissions of their unemancipated children living in their company and under their parental authority subject to the appropriate defenses provided by law." (Emphasis supplied)

We do not believe that parental authority is properly regarded as having been retroactively transferred to and vested in the adopting parents, the Rapisura spouses, at the time the air rifle shooting happened. We do not consider that retroactive effect may be given to the decree of adoption so as to impose a liability upon the adopting parents accruing at a time when the adopting parents had no actual or physical custody over the adopted child.

Retroactive effect may perhaps be given to the granting of the petition for adoption where such is essential to permit the accrual of some benefit or advantage in favor of the adopted child. In the instant case, however, to hold that parental authority had been retroactively lodged in the Rapisura spouses so as to burden them with liability for a tortious act that they could not have foreseen and which they could not have prevented (since they were at the time in the United States and had no physical custody over the child Adelberto) would be unfair and unconscionable. Such a result, moreover, would be inconsistent with the philosophical and policy basis underlying the doctrine of vicarious liability. Put a little differently, no presumption of parental dereliction on the part of the adopting parents, the Rapisura spouses, could have arisen since Adelberto was not in fact subject to their control at the time the tort was committed.

Article 35 of the Child and Youth Welfare Code fortifies the conclusion reached above. Article 35 provides as follows:

> "Art. 35. *Trial Custody*. — No Petition for adoption shall be finally granted unless and until the adopting parents are given by the courts a supervised trial custody period of at least six months to assess their adjustment and emotional readiness for the legal union. During the period of trial custody, parental authority shall be vested in the adopting parents." (Emphasis supplied)

Under the above Article 35, parental authority is provisionally vested in the adopting parents during the period of trial custody, *i.e.,* before the issuance of a decree of adoption, precisely because the adopting parents are given actual custody of the child during such trial period. In the instant case, the trial custody period either had not yet begun or had already been completed at the time of the air rifle shooting; in any case, actual custody of Adelberto was then with his natural parents, not the adopting parents.

Accordingly, we conclude that respondent Bundoc spouses, Adelberto's natural parents, were indispensable parties to the suit for damages brought by petitioners, and that the dismissal by the trial court of petitioners' complaint, the indispensable parties being already before the court, constituted grave abuse of discretion amounting to lack or excess of jurisdiction.

[Note: In 1997, Congress passed Republic Act No. 8552, othewise known as the Domestic Adoption Act. The provisions of the said law do not affect the force of the ruling in Tamargo because the rules are still the same. However, Sec. 12 of the Act provides that parental authority shall be vested in the adopter during the trial custody.]

CRESENCIO LIBI, et al. vs. HON. INTERMEDIATE APPELLATE COURT, et al.
214 SCRA 16 [1992]

One of the ironic verities of life, it has been said, is that sorrow is some-

times a touchstone of love. A tragic illustration is provided by the instant case, wherein two lovers died while still in the prime of their years, a bitter episode for those whose lives they have touched. While we cannot expect to award complete assuagement to their families through seemingly prosaic legal verbiage, this disposition should at least terminate the acrimony and rancor of an extended judicial contest resulting from the unfortunate occurrence.

x x x

Synthesized from the findings of the lower courts, it appears that respondent spouses are the legitimate parents of Julie Ann Gotiong who, at the time of the deplorable incident which took place and from which she died on January 14, 1979, was an 18-year old first year commerce student of the University of San Carlos, Cebu City; while petitioners are the parents of Wendell Libi, then a minor between 18 and 19 years of age living with his aforesaid parents, and who also died in the same event on the same date.

For more than two (2) years before their deaths, Julie Ann Gotiong and Wendell Libi were sweethearts until December, 1978 when Julie Ann broke up her relationship with Wendell after she supposedly found him to be sadistic and irresponsible. During the first and second weeks of January, 1979, Wendell kept pestering Julie Ann with demands for reconciliation but the latter persisted in her refusal, prompting the former to resort to threats against her. In order to avoid him, Julie Ann stayed in the house of her best friend, Malou Alfonso, at the corner of Maria Cristina and Juana Osmeña Streets, Cebu City, from January 7 to 13, 1978.

On January 14, 1979, Julie Ann and Wendell died, each from a single gunshot wound inflicted with the same firearm, a Smith and Wesson revolver licensed in the name of petitioner Cresencio Libi, which was recovered from the scene of the crime inside the residence of private respondents at the corner of General Maxilom and D. Jakosalem streets of the same city.

Due to the absence of an eyewitness account of the circumstances surrounding the death of both minors, their parents, who are the contending parties herein, posited their respective theories drawn from their interpretation of circumstantial evidence, available reports, documents and evidence of physical facts.

Private respondents, bereaved over the death of their daughter, submitted that Wendell caused her death by shooting her with the aforesaid firearm and, thereafter, turning the gun on himself to commit suicide. On the other hand, petitioners, puzzled and likewise distressed over the death of their son, rejected the imputation and contended that an unknown third party, whom Wendell may have displeased or antagonized by reason of his work as a narcotics informer of the Constabulary Anti-Narcotics Unit (CANU), must have caused Wendell's death and then shot Julie Ann to eliminate any witness and thereby avoid identification.

x x x

[As a result of the tragedy, the parents of Julie Ann filed a civil case against the parents of Wendell to recover damages arising from the latter's vicarious liability under Article 2180 of the Civil Code. After trial, the court dismissed the complaint for insufficiency of evidence. On appeal to Intermediate Appellate Court, the decision was reversed and damages were awarded to the plaintiff. Hence, the petitioners-defendants elevated the case to the Supreme Court. The Supreme Court examined the evidence on record and concluded that it was not another man who shot Wendell and Julie Ann. The Supreme Court likewise rejected the trial court's theory "that Wendell Libi did not die by his own hand because of the overwhelming evidence — testimonial, documentary and pictorial — the confluence of which point to Wendell as the assailant of Julie Ann, his motive being revenge for her rejection of his persistent pleas for a reconciliation." The Court went on to rule on the submission that the petitioner exercised due diligence.]

Petitioners' defense that they had exercised the due diligence of a good father of a family, hence they should not be civilly liable for the crime committed by their minor son, is not borne out by the evidence on record either.

Petitioner Amelita Yap Libi, mother of Wendell, testified that her husband, Cresencio Libi, owns a gun which he kept in a safety deposit box inside a drawer in their bedroom. Each of these petitioners holds a key to the safety deposit box and Amelita's key is always in her bag, all of which facts were known to Wendell. They have never seen their son Wendell taking or using the gun. She admitted, however, that on that fateful night the gun was no longer in the safety deposit box. We, accordingly, cannot but entertain serious doubts that petitioner spouses had really been exercising the diligence of a good father of a family by safely locking the fatal gun away. Wendell could not have gotten hold thereof unless one of the keys to the safety deposit box was negligently left lying around or he had free access to the bag of his mother where the other key was.

The diligence of a good father of a family required by law in a parent and child relationship consists, to a large extent, of the instruction and supervision of the child. Petitioners were gravely remiss in their duties as parents in not diligently supervising the activities of their son, despite his minority and immaturity, so much so that it was only at the time of Wendell's death that they allegedly discovered that he was a CANU agent and that Cresencio's gun was missing from the safety deposit box. Both parents were sadly wanting in their duty and responsibility in monitoring and knowing the activities of their children who, for all they know, may be engaged in dangerous work such as being drug informers, or even drug users. Neither was a plausible explanation given for the photograph of Wendell, with a handwritten dedication to Julie Ann at the back thereof, holding upright what clearly appears as a revolver and on how or why he was in possession of that firearm.

In setting aside the judgment of the court *a quo* and holding petitioners civilly liable, as explained at the start of this opinion, respondent court waved aside the protestations of diligence on the part of petitioners and had this to say:

". . . It is still the duty of parents to know the activity of their children who may be engaged in this dangerous activity involving the menace of drugs. Had the defendants-appellees been diligent in supervising the activities of their son, Wendell, and in keeping said gun from his reach, they could have prevented Wendell from killing Julie Ann Gotiong. Therefore, appellants are liable under Article 2180 of the Civil Code which provides:

'The father, and in case of his death or incapacity, the mother, are responsible for the damages caused by their minor children who live in their company.'

"Having been grossly negligent in preventing Wendell Libi from having access to said gun which was allegedly kept in a safety deposit box, defendants-appellees are subsidiarily liable for the natural consequence of the criminal act of said minor who was living in their company. This vicarious liability of herein defendants-appellees has been reiterated by the Supreme Court in many cases, prominent of which is the case of *Fuellas vs. Cadano, et al.* (L-14409, Oct. 31, 1961, 3 SCRA 361-367), which held that:

'The subsidiary liability of parents for damages caused by their minor children imposed by Article 2180 of the New Civil Code covers obligations arising from both quasi-delicts and criminal offenses."

'The subsidiary liability of parent's arising from the criminal acts of their minor children who acted with discernment is determined under the provisions of Article 2180, N.C.C. and under Article 101 of the Revised Penal Code, because to hold that the former only covers obligations which arise from quasi-delicts and not obligations which arise from criminal offenses, would result in the absurdity that while for an act where mere negligence intervenes the father or mother may stand subsidiarily liable for the damages caused by his or her son, no liability would attach if the damage is caused with criminal intent.' (3 SCRA 361-362).

". . . In the instant case, minor son of herein defendants-appellees, Wendell Libi somehow got hold of the key to the drawer where said gun was kept under lock without defendant-spouses ever knowing that said gun had been missing from that safety box since 1978 when Wendell Libi had a picture taken wherein he proudly displayed said gun and dedicated this picture to his sweetheart, Julie Ann Gotiong; also since then, Wendell Libi was said to have kept said gun in his car, in keeping up with his supposed role of a CANU agent . . ."

x x x x x x x x x

"Based on the foregoing discussions of the assigned errors, this Court holds that the lower court was not correct in dismissing herein plaintiffs-appellants' complaint because as preponderantly shown by evidence, defendants-appellees utterly failed to exercise all the diligence of a good father of the family in preventing their minor son from committing this crime by means of the gun of defendants-appellees which

> was freely accessible to Wendell Libi for they have not regularly checked whether said gun was still under lock, but learned that it was missing from the safety deposit box only after the crime had been committed." (Emphasis ours.)

We agree with the conclusion of respondent court that petitioners should be held liable for the civil liability based on what appears from all indications was a crime committed by their minor son.

x x x

In the case at bar, whether the death of the hapless Julie Ann Gotiong was caused by a felony or a quasi-delict committed by Wendell Libi, respondent court did not err in holding petitioners liable for damages arising therefrom. Subject to the preceding modifications of the premises relied upon by it therefor and on the bases of the legal imperatives herein explained, we conjoin in its findings that said petitioners failed to duly exercise the requisite *diligentissimi patris familias* to prevent such damages.

D. LIABILITY OF GUARDIANS OF INCAPACITATED ADULTS.

A guardian is a person in whom the law has entrusted the custody and control of the person or estate or both of an infant, insane, or other persons incapable of managing his own affair. *(Jacinto, Commentaries and Jurisprudence on the Revised Rules of Court, Special Proceedings, 1991 Ed., p. 345).* Guardianship involves not only custody, that is immediate care and control, but those of one in *loco parentis* as well. *(Francisco vs. Court of Appeals, 127 SCRA 371 [1984]).* Hence, even if their ward is already of age, guardians have the same liability as persons exercising parental authority.

The procedure for appointment of guardians is governed by Rule 92 of the Revised Rules of Court. Section 2 of Rule 92 states that the word incompetent includes persons suffering the penalty of civil interdiction or who are hospitalized lepers, prodigals, deaf and dumb who are unable to read and write, those who are of unsound mind, even though they have lucid intervals, and persons not being of sound mind, but by reason of age, disease, weak mind, and other similar causes, cannot, without outside aid, take care of themselves and manage their property, becoming thereby an easy prey for deceit and exploitation.

Related statutory provisions are Articles 38 and 39 of the Civil Code which provides that:

> "Art. 38. Minority, insanity or imbecility, the state of being a deaf-mute, prodigality and civil interdiction are mere restrictions

> on capacity to act, and do not exempt the incapacitated persons from certain obligations, as when the latter arise from his acts or from property relations, such as easements.
>
> Art. 39. The following circumstances, among others, modify or limit capacity to act: age, insanity, imbecility, the state of being deaf-mute, penalty, prodigality, family relations, alienage, absence, insolvency and trusteeship. x x x"

Not all guardians of incompetents specified in Rule 92 and Articles 38 and 39 are vicariously liable. In Article 101 of the Revised Penal Code, liability is imposed only on guardians of imbecile and insane persons. On the other hand, Article 2180 of the Civil Code limits the liability of guardians to acts of incapacitated persons who are under their authority and who live in their company. The legal authority referred to in Article 2180 is legal authority over the person of the ward and not legal authority only with respect to the property of a person declared as incompetent although of majority age. Such limitation and the requirement that the ward must live in their company virtually limits the liability of guardians to the acts of persons of unsound mind who live in the company of the guardian (in addition to acts of minors).

E. SCHOOLS, TEACHERS AND ADMINISTRATORS.

a. Family Code.

Article 218 of the Family Code provides that the school, its administrators, and teachers or the individual, entity or institution engaged in child care shall have special parental authority and responsibility over the minor child under their supervision, instruction or custody. As a consequence of the substitute parental authority exercised by the school and other persons identified under Article 218, the Family Code provides that they are principally and solidarily liable for damages caused by the acts or omissions of the unemancipated minor. *(Article 219, Family Code).* They can only escape liability by proving that they exercised the proper diligence required under the particular circumstances.

Whenever the school or teacher is being made liable, the parents and those exercising substitute parental authority are not free from liability because Article 219 of the Family Code expressly provides that they are subsidiarily liable. The parents are only subsidiarily liable because persons exercising special parental authority replaces the primary authority of the parents when the minor is under their custody. Athough parental authority remains, the parent is not supposed to interfere with the discipline of the school nor with the

authority and supervision of the teacher while the child is under instruction. *(Amadora vs. Court of Appeals, 160 SCRA 315, 324, citing the dissenting opinion of Justice J.B.L. Reyes in Exconde vs. Capuno, 101 Phil. 843).*

(1) Persons Liable.

The persons liable under the Family Code are the school, administrators, teachers or the individual, entity or institution engaged in child care. The Code makes the school liable without distinguishing if it is a non-academic or academic school. Hence, a school, whether academic or non-academic is civilly liable for the acts of minors in their custody, instruction or supervision. Administrators and teachers include the principal and other persons who are involved in the supervision of the child. Examples of institutions engaged in child care are day-care centers and establishments found in shopping malls that charge on a per hour basis for taking care of children.

If the school is being sued together with administrators and teachers, the liability is joint and solidary. *(Article 219, Family Code).* The rule is in keeping with the rule under Article 2194 of the Civil Code that joint tortfeasors are solidarily liable.

(2) Supervision, Instruction or Custody.

Article 218 of the Family Code expressly provides that the responsibility and authority of the school and other persons exercising special parental authority shall apply to all authorized activities whether inside or outside the premises of the school, entity or institution. The present rule is broad enough to cover all the situations contemplated under Article 2180. The Supreme Court explained:

> "The other matter to be resolved is the duration of the responsibility of the teacher or the head of the school of arts and trades over the students. Is such responsibility co-extensive with the period when the student is actually undergoing studies during the school term, as contended by the respondents and impliedly admitted by the petitioners themselves?
>
> From a reading of the provision under examination, it is clear that while the custody requirement, to repeat *Palisoc vs. Brillantes,* does not mean that the student must be boarding with the school authorities, it does signify that the student should be within the control and under the influence of the school authorities at the time of the occurrence of the injury. This does not necessarily mean that such, custody be co-terminous with the semester, beginning with the start of classes and ending upon the

> close thereof, and excluding the time before or after such period, such as the period of registration, and in the case of graduating students, the period before the commencement exercises. In the view of the Court, the student is in the custody of the school authorities as long as he is under the control and influence of the school and within its premises, whether the semester has not yet begun or has already ended.
>
> It is too tenuous to argue that the student comes under the discipline of the school only upon the start of classes notwithstanding that before that day he has already registered and thus placed himself under its rules. Neither should such discipline be deemed ended upon the last day of classes notwithstanding that there may still be certain requisites to be satisfied for completion of the course, such as submission of reports, term papers, clearances and the like. During such periods, the student is still subject to the disciplinary authority of the school and cannot consider himself released altogether from observance of its rules.
>
> As long as it can be shown that the student is in the school premises in pursuance of a legitimate student objective, in the exercise of a legitimate student right, and even in the enjoyment of a legitimate student right, and even in the enjoyment of a legitimate student privilege, the responsibility of the school authorities over the student continues. Indeed, even if the student should be doing nothing more than relaxing in the campus in the company of his classmates and friends and enjoying the ambience and atmosphere of the school, he is still within the custody and subject to the discipline of the school authorities under the provisions of Article 2180." *(Amadora vs. Court of Appeals).*

Unlike Article 2180 where the child should be within the school premises, custody under Article 218 of the Family Code extends to acts committed inside or outside the school provided that the activity was an authorized activity.

Consequently, the activity involved in *Cuadra vs. Monfort* – weeding of grass in the school backyard — is now covered by Article 218 because the same is definitely an authorized activity. The same is true with respect to the activity in *Exconde vs. Capuno* which involved a parade outside the school premises.

In *St. Francis High School vs. Court of Appeals* (194 SCRA 341 [1991]), a case decided by the Supreme Court under Article 2180 of the Civil Code, no vicarious liability was imposed in connection with a picnic held outside the school premises, that is, in a private beach resort. Students belonging to two sections in the petitioner school went on said picnic together with their teachers. While they were

in the beach, one of the female teachers was apparently drowning. Some of the students came to her rescue but in the process, one of them died. Vicarious liability was sought to be enforced against the school as employers but the same was denied on the ground that the teachers were allegedly not negligent and that they (teachers) were not performing their assigned task because the picnic was a purely private affair.

Later, it was observed by the Supreme Court in *Valenzuela vs. Court of Appeals* that the *St. Francis High School* case cannot be relied upon as the controlling rule. The Court explained that the subject dealing with a school and its teacher's supervision during an extracurricular activity "now falls under the provision on special parental authority found in Art. 218 of the Family Code which generally encompasses all authorized school activities whether inside or outside school premises."

It is to be noted that the injury involved was not inflicted by another student. However, it is believed that if damage was caused by a student in the same factual milieu as in *St. Francis*, the school, its administrators and teachers should be held liable under Article 219 of the Family Code. It is believed that the picnic should be considered within the purview "authorized activity." It should be considered as a sanctioned extracurricular activity because the principal knew that the students and several teachers were planning a picnic. It is part of the responsibility of a person exercising special parental authority to see to it that all the necessary precautions are undertaken. It is believed that Justice Padilla was more convincing in his dissent in *St. Francis* when he argued that the silence of the principal should be taken as an implied sanction. He explained that: "Having preferred to remain silent and even indifferent, he (principal) now seeks excuse from such omission by invoking his alleged lack of consent to the excursion. But it is precisely his silence and negligence in performing his role as principal head of the school that must be construed as an implied consent to such activity."

b. Civil Code.

(1) Effect of Family Code.

Article 2180 of the Civil Code provides that teachers or heads of establishments of arts and trades shall be liable for damages caused by their pupils and students or apprentices, so long as they remain in their custody. With respect to pupils, students and apprentices who are minors, the controlling statutory provision is already Article 219

of the Family Code with all its modifications. The basis of liability under Article 219 is special parental authority.

However, the application of Article 2180 is not limited to pupils, students and apprentices who are minors. Its force extends to acts or omissions of students who are already beyond the majority age. The rule is unaffected by Article 219 of the Family Code. Justice Cruz observed in *Amadora,* that "the teacher will be held liable not only when he is acting in *loco parentis* for the law does not require that the offending student be of minority age. Unlike the parent, who will be liable only if his child is still a minor, the teacher is held answerable by the law for the act of the student under him regardless of the student's age. Thus, in the *Palisoc Case*, liability was attached to the teacher and the head of the technical school although the wrongdoer was already of age. In this sense, Article 2180 treats the parent more favorably than the teacher." Justice J.B.L. Reyes is of the same view in his concurring opinion in *Palisoc vs. Brilliantes* (41 Phil. 548, 562 [1971]):

> "I submit, finally, that while in the case of parents and guardians, their authority and supervision over the children and ward end by law upon the latter reaching majority age, the authority and custodial supervision over pupil exist regardless of age of the latter. A student over twenty-one, by enrolling and attending a school, places himself under the custodial supervision and disciplinary authority of the school authorities, which is the basis of the latter's correlative responsibility for his torts, committed while under such authority. Of course, the teacher's control is not as plenary as when the student is a minor; but the circumstance can only affect the degree of the responsibility but cannot negate the existence thereof. It is only a factor to be appreciated in determining whether or not the defendant has exercised due diligence in endeavoring to prevent the injury, as prescribed in the last paragraph of Article 2180."

(2) Rules under Article 2180.

As already stated earlier, Article 2180 and the doctrines laid down by the Supreme Court in connection thereto are still in force with respect to the acts of non-minor students. It is therefore still important to restate the doctrinal rules laid down by the Supreme Court in the leading case of *Amadora vs. Court of Appeals,* where it interpreted Article 2180 and discussed previous cases dealing with the same provision. Such rules may be summarized in this wise:

a. Article 2180 makes teachers and heads liable for acts of students and apprentices whether the latter are minors or

not.

b. The teacher-in-charge is liable for the acts of his students. The school and administrators are not liable.

c. By way of exception, it is only the head of the school, not the teacher, who is held liable where the injury is caused in a school of arts and trade.

d. The liability of the teacher subsists whether the school is academic or non-academic.

e. Liability is imposed only if the pupil is already in the custody of the teacher or head. The student is in the custody of the school authorities as long as he is under the control and influence of the school and within its premises, whether the semester has not yet begun or has already ended.

(3) Other Bases of Liability of Schools.

Our previous discussion of *St. Francis High School* case indicates another basis of liability of schools, the vicarious liability of an employer for negligence. The school can escape liability if it can establish that it exercised due diligence in the selection and supervision of their employees (including teachers) under Article 2180. (See also *Amadora vs. Court of Appeals, ibid.*, at 650).

In addition thereto, liability may be based on contract. *(Phil. School of Business Administration vs. Court of Appeals, 205 SCRA 729 [1992]; Soliman, Jr. vs. Tuazon, 209 SCRA 47 [1992]).* In both cases, the school as employer or as contracting party may be held liable even if the injury was inflicted by a non-student.

The Supreme Court explained in *Phil. School of Business Administration* (PSBA for short) the reason why a school can be held liable as an obligor for breach of contract:

> "When an academic institution accepts students for enrollment, there is established a contract between them, resulting in bilateral obligations which both parties are bound to comply with. For its part, the school undertakes to provide the student with an education that would presumably suffice to equip him with the necessary tools and skills to pursue higher education or a profession. On the other hand, the student covenants to abide by the school's academic requirements and observe its rules.
>
> Institutions of learning must also meet the implicit or 'built-in' obligation of providing their student with an atmosphere that promotes or assists in attaining its primary undertaking of imparting knowledge. Certainly no student can absorb the intrica-

> cies of physics or higher mathematics or explore the realm of arts and other sciences when bullets are flying or grenades exploding in the air or where there looms around the school premises a constant threat to life and limb. Necessarily, the school must ensure that adequate steps are taken to maintain peace and order within the campus premises and to prevent the breakdown thereof.

Nevertheless, it is believed that the Court was not correct when it observed in *PSBA* that "even if there be a finding of negligence, the same could give rise generally to a breach of contract only" and that "a contractual relation is a condition *sine qua non* to the school's liability." Even in the absence of contract, the school may still be liable as employer under Article 2176. The two basis of liability — contract and quasi-delict — may even concur; in which case, the injured student may choose to file an action for breach of contract or for quasi-delict subject only to the proscription against double recovery under Article 2177 of the Civil Code.

The school and other persons exercising special parental authority may also be held liable for their failure to exercise due diligence in the performance of the duties that are concomitant with the exercise of special parental authority. The school is not only liable for the injuries inflicted by a student under Article 219 of the Family Code. As a person exercising special parental authority, there is a corresponding responsibility to take care of the minor student with the diligence of a good father of a family. Included in the exercise of due diligence is the duty of the school to provide the students with adequate security and safe facilities. If due care is not exercised, damages may be imposed under Articles 19, 20, 21 and 2176 of the Civil Code.

c. Liability of Teachers under the Revised Penal Code.

Article 103 of the Revised Penal Code, provides that the subsidiary liability of the employer under Article 102 shall also apply to teachers for felonies committed by their pupils. Since the rule regarding employers shall apply, the requirement of insolvency of the accused as well as other elements to be discussed in the next section, is also applicable to teachers. It should be noted that Article 103 does not also distinguish if the teacher is a teacher in an academic or non-academic school. No distinction is also present with respect to the age of the pupil. Hence, a teacher is liable whether he is employed in an academic or non-academic institution and whether the pupil is a minor or not.

CASES:

JOSE S. AMADORA, et al. vs. COURT OF APPEALS, et al.
G.R. No. L-47745, April 15, 1988

Like any prospective graduate, Alfredo Amadora was looking forward to the commencement exercises where he would ascend the stage and in the presence of his relatives and friends receive his high school diploma. These ceremonies were scheduled on April 16, 1972. As it turned out, though, fate would intervene and deny him that awaited experience. On April 13, 1972, while they were in the auditorium of their school, the Colegio de San Jose-Recoletos, a classmate, Pablito Daffon, fired a gun that mortally hit Alfredo, ending all his expectations and his life as well. The victim was only seventeen years old.

Daffon was convicted of homicide thru reckless imprudence. Additionally, the herein petitioners, as the victim's parents, filed a civil action for damages under Article 2180 of the Civil Code against the Colegio de San Jose-Recoletos, its rector, the high school principal, the dean of boys, and the physics teacher, together with Daffon and two other students, through their respective parents. The complaint against the students was later dropped. After trial, the Court of First Instance of Cebu held the remaining defendants liable to the plaintiffs in the sum of P294,984.00, representing death compensation, loss of earning capacity, costs of litigation, funeral expenses, moral damages, exemplary damages, and attorney's fees. On appeal to the respondent court, however, the decision was reversed and all the defendants were completely absolved.

In its decision, which is now the subject of this petition for *certiorari* under Rule 45 of the Rules of Court, the respondent court found that Article 2180 was not applicable as the Colegio de San Jose-Recoletos was not a school of arts and trades but an academic institution of learning. It also held that the students were not in the custody of the school at the time of the incident as the semester had already ended, that there was no clear identification of the fatal gun, and that in any event the defendants had exercised the necessary diligence in preventing the injury.

The basic undisputed facts are that Alfredo Amadora went to the San Jose-Recoletos on April 13, 1972, and while in its auditorium was shot to death by Pablito Daffon, a classmate. On the implications and consequences of these facts, the parties sharply disagree.

The petitioners contend that their son was in the school to finish his physics experiment as a prerequisite to his graduation; hence, he was then under the custody of the private respondents. The private respondents submit that Alfredo Amadora had gone to the school only for the purpose of submitting his physics report and that he was no longer in their custody because the semester had already ended.

There is also the question of the identity of the gun used which the petitioners consider important because of an earlier incident which they claim underscores the negligence of the school and at least one of the private

respondents. It is not denied by the respondents that on April 7, 1972, Sergio Damaso, Jr., the dean of boys, confiscated from Jose Gumban an unlicensed pistol but later returned it to him without making a report to the principal or taking any further action. As Gumban was one of the companions of Daffon when the latter fired the gun that killed Alfredo, the petitioners contend that this was the same pistol that had been confiscated from Gumban and that their son would not have been killed if it had not been returned by Damaso. The respondents say, however, that there is no proof that the gun was the same firearm that killed Alfredo.

Resolution of all these disagreements will depend on the interpretation of Article 2180 which, as it happens, is invoked by both parties in support of their conflicting positions. The pertinent part of this article reads as follows:

> "Lastly, teachers or heads of establishments of arts and trades shall be liable for damages caused by their pupils and students or apprentices so long as they remain in their custody."

Three cases have so far been decided by the Court in connection with the above-quoted provision, to wit: *Exconde vs. Capuno, Mercado vs. Court of Appeals*, and *Palisoc vs. Brillantes*. These will be briefly reviewed in this opinion for a better resolution of the case at bar.

In the *Exconde Case*, Dante Capuno, a student of the Balintawak Elementary School and a Boy Scout, attended a Rizal Day parade on instructions of the city school supervisor. After the parade, the boy boarded a jeep, took over its wheel and drove it so recklessly that it turned turtle, resulting in the death of two of its passengers. Dante was found guilty of double homicide with reckless imprudence. In the separate civil action filed against them, his father was held solidarily liable with him in damages under Article 1903 (now Article 2180) of the Civil Code for the tort committed by the 15-year old boy.

This decision, which was penned by Justice Bautista Angelo on June 29, 1957, exculpated the school in an *obiter dictum* (as it was not a party to the case) on the ground that it was not a school of arts and trades. Justice J.B.L. Reyes, with whom Justices Sabino Padilla and Alex Reyes concurred, dissented, arguing that it was the school authorities who should be held liable. Liability under this role, he said, was imposed on (1) teachers in general; and (2) heads of schools of arts and trades in particular. The modifying clause "of establishments of arts and trades" should apply only to "heads" and not "teachers."

Exconde was reiterated in the *Mercado Case*, and with an elaboration. A student cut a classmate with a razor blade during recess time at the Lourdes Catholic School in Quezon City, and the parents of the victim sued the culprit's parents for damages. Through Justice Labrador, the Court declared in another obiter (as the school itself had also not been sued) that the school was not liable because it was not an establishment of arts and trades. Morever, the custody requirement had not been proved as this "contemplates a situation where the student lives and boards with the teacher, such that the control, direction and influences on the pupil supersede those of the parents."

Justice J.B.L. Reyes did not take part but the other members of the court concurred in this decision promulgated on May 30, 1960.

In *Palisoc vs. Brillantes*, decided on October 4, 1971, a 16-year old student was killed by a classmate with fist blows in the laboratory of the Manila Technical Institute. Although the wrongdoer — who was already of age — was not boarding in the school, the head thereof and the teacher in charge were held solidarily liable with him. The Court declared through Justice Teehankee:

"The phrase used in the cited article — 'so long as (the students) remain in their custody' — means the protective and supervisory custody that the school and its heads and teachers exercise over the pupils and students for as long as they are at attendance in the school, including recess time. There is nothing in the law that requires that for such liability to attach, the pupil or student who commits the tortious act must live and board in the school, as erroneously held by the lower court, and the dicta in Mercado (as well as in Exconde) on which it relied, must now be deemed to have been set aside by the present decision."

This decision was concurred in by five other members, including Justice J.B.L. Reyes, who stressed, in answer to the dissenting opinion, that even students already of age were covered by the provision since they were equally in the custody of the school and subject to its discipline. Dissenting with three others, Justice Makalintal was for retaining the custody interpretation in Mercado and submitted that the rule should apply only to torts committed by students not yet of age as the school would be acting only in *loco parentis*.

In a footnote, Justice Teehankee said he agreed with Justice Reyes' dissent in the Exconde Case but added that "since the school involved at bar is a non-academic school, the question as to the applicability of the cited codal provision to academic institutions will have to await another case wherein it may properly be raised."

This is the case.

Unlike in *Exconde* and *Mercado*, the Colegio de San Jose-Recoletos has been directly impleaded and is sought to be held liable under Article 2180; and unlike in Palisoc, it is not a school of arts and trades but an academic institution of learning. The parties herein have also directly raised the question of whether or not Article 2180 covers even establishments which are technically not schools of arts and trades, and, if so, when the offending student is supposed to be "in its custody."

After an exhaustive examination of the problem, the Court has come to the conclusion that the provision in question should apply to all schools, academic as well as non-academic. Where the school is academic rather than technical or vocational in nature, responsibility for the tort committed by the student will attach to the teacher in charge of such student, following the first part of the provision. This is the general rule. In the case of establishments of arts and trades, it is the head thereof, and only he, who shall be held liable

as an exception to the general rule. In other words, teachers in general shall be liable for the acts of their students except where the school is technical in nature, in which case it is the head thereof who shall be answerable. Following the canon of *reddendo singula singulis*, "teachers" should apply to the words "pupils and students" and "heads of establishments of arts and trades" to the word "apprentices."

The Court thus conforms to the dissenting opinion expressed by Justice J.B.L. Reyes in *Exconde* where he said in part:

> "I can see no sound reason for limiting Art. 1903 of the Old Civil Code to teachers of arts and trades and not to academic ones. What substantial difference is there between them insofar as concerns the proper supervision and vigilance over their pupils? It cannot be seriously contended that an academic teacher is exempt from the duty of watching that his pupils do not commit a tort to the detriment of third persons, so long as they are in a position to exercise authority and supervision over the pupil. In my opinion, in the phrase 'teachers or heads of establishments of arts and trades' used in Art. 1903 of the old Civil Code, the words 'arts and trades' does not qualify 'teachers' but only 'heads of establishments.' The phrase is only an updated version of the equivalent terms '*preceptores y artesanos*' used in the Italian and French Civil Codes.
>
> "If, as conceded by all commentators, the basis of the presumption of negligence of Art. 1903 in some *culpa in vigilando* that the parents, teachers, etc. are supposed to have incurred in the exercise of their authority, it would seem clear that where the parent places the child under the effective authority of the teacher, the latter, and not the parent, should be the one answerable for the torts committed while under his custody, for the very reason that the parent is not supposed to interfere with the discipline of the school nor with the authority and supervision of the teacher while the child is under instruction. And if there is no authority, there can be no responsibility."

There is really no substantial distinction between the academic and the non-academic schools insofar as torts committed by their students are concerned. The same vigilance is expected from the teacher over the students under his control and supervision, whatever the nature of the school where he is teaching. The suggestion in the Exconde and Mercado Cases is that the provision would make the teacher or even the head of the school of arts and trades liable for an injury caused by any student in its custody but if that same tort were committed in an academic school, no liability would attach to the teacher or the school head. All other circumstances being the same, the teacher or the head of the academic school would be absolved whereas the teacher and the head of the non-academic school would be held liable, and simply because the latter is a school of arts and trades.

The Court cannot see why different degrees of vigilance should be exercised by the school authorities on the basis only of the nature of their respective schools. There does not seem to be any plausible reason for relaxing that vigilance simply because the school is academic in nature and for increasing such vigilance where the school is non-academic. Notably, the injury subject of liability is caused by the student and not by the school itself nor is it a result of the operations of the school or its equipment. The injury contemplated may be caused by any student regardless of the school where he is registered. The teacher certainly should not be able to excuse himself by simply showing that he is teaching in an academic school where, on the other hand, the head would be held liable if the school were non-academic.

These questions, though, may be asked: If the teacher of the academic school is to be held answerable for the torts committed by his students, why is it the head of the school only who is held liable where the injury is caused in a school of arts and trades? And in the case of the academic or non-technical school, why not apply the rule also to the head thereof instead of imposing the liability only on the teacher?

The reason for the disparity can be traced to the fact that historically the head of the school of arts and trades exercised a closer tutelage over his pupils than the head of the academic school. The old schools of arts and trades were engaged in the training of artisans apprenticed to their master who personally and directly instructed them on the technique and secrets of their craft. The head of the school of arts and trades was such a master and so was personally involved in the task of teaching his students, who usually even boarded with him and so came under his constant control, supervision and influence. By contrast, the head of the academic school was not as involved with his students and exercised only administrative duties over the teachers who were the persons directly dealing with the students. The head of the academic school had then (as now) only a vicarious relationship with the students. Consequently, while he could not be directly faulted for the acts of the students, the head of the school of arts and trades, because of his closer ties with them, could be so blamed.

It is conceded that the distinction no longer obtains at present in view of the expansion of the schools of arts and trades, the consequent increase in their enrollment, and the corresponding diminution of the direct and personal contract of their heads with the students. Article 2180, however, remains unchanged. In its present state, the provision must be interpreted by the Court according to its clear and original mandate until the legislature, taking into account the changes in the situation subject to be regulated, sees fit to enact the necessary amendment.

The other matter to be resolved is the duration of the responsibility of the teacher or the head of the school of arts and trades over the students. Is such responsibility co-extensive with the period when the student is actually undergoing studies during the school term, as contended by the respondents and impliedly admitted by the petitioners themselves?

From a reading of the provision under examination, it is clear that while the custody requirement, to repeat *Palisoc vs. Brillantes,* does not mean that the student must be boarding with the school authorities, it does signify that the student should be within the control and under the influence of the school authorities at the time of the occurrence of the injury. This does not necessarily mean that such, custody be co-terminous with the semester, beginning with the start of classes and ending upon the close thereof, and excluding the time before or after such period, such as the period of registration, and in the case of graduating students, the period before the commencement exercises. In the view of the Court, the student is in the custody of the school authorities as long as he is under the control and influence of the school and within its premises, whether the semester has not yet begun or has already ended.

It is too tenuous to argue that the student comes under the discipline of the school only upon the start of classes notwithstanding that before that day he has already registered and thus placed himself under its rules. Neither should such discipline be deemed ended upon the last day of classes notwithstanding that there may still be certain requisites to be satisfied for completion of the course, such as submission of reports, term papers, clearances and the like. During such periods, the student is still subject to the disciplinary authority of the school and cannot consider himself released altogether from observance of its rules.

As long as it can be shown that the student is in the school premises in pursuance of a legitimate student objective, in the exercise of a legitimate student right, and even in the enjoyment of a legitimate student right, and even in the enjoyment of a legitimate student privilege, the responsibility of the school authorities over the student continues. Indeed, even if the student should be doing nothing more than relaxing in the campus in the company of his classmates and friends and enjoying the ambience and atmosphere of the school, he is still within the custody and subject to the discipline of the school authorities under the provisions of Article 2180.

During all these occasions, it is obviously the teacher-in-charge who must answer for his students' torts, in practically the same way that the parents are responsible for the child when he is in their custody. The teacher-in-charge is the one designated by the dean, principal, or other administrative superior to exercise supervision over the pupils in the specific classes or sections to which they are assigned. It is not necessary that at the time of the injury, the teacher be physically present and in a position to prevent it. Custody does not connote immediate and actual physical control but refers more to the influence exerted on the child and the discipline instilled in him as a result of such influence. Thus, for the injuries caused by the student, the teacher and not the parent shall be held responsible if the tort was committed within the premises of the school at any time when its authority could be validly exercised over him.

In any event, it should be noted that the liability imposed by this article is supposed to fall directly on the teacher or the head of the school of arts and trades and not on the school itself. If at all, the school, whatever its nature, may be held to answer for the acts of its teachers or even of the head

thereof under the general principle of *respondeat superior*, but then it may exculpate itself from liability by proof that it had exercised the diligence of a *bonus paterfamilias*.

Such defense is, of course, also available to the teacher or the head of the school of arts and trades directly held to answer for the tort committed by the student. As long as the defendant can show that he had taken the necessary precautions to prevent the injury complained of, he can exonerate himself from the liability imposed by Article 2180, which also states that:

> "The responsibility treated of in this article shall cease when the persons herein mentioned prove that they observed all the diligence of a good father of a family to prevent damages."

In this connection, it should be observed that the teacher will be held liable not only when he is acting in *loco parentis* for the law does not require that the offending student be of minority age. Unlike the parent, who will be liable only if his child is still a minor, the teacher is held answerable by the law for the act of the student under him regardless of the student's age. Thus, in the Palisoc Case, liability attached to the teacher and the head of the technical school although the wrongdoer was already of age. In this sense, Article 2180 treats the parent more favorably than the teacher.

The Court is not unmindful of the apprehensions expressed by Justice Makalintal in his dissenting opinion in Palisoc that the school may be unduly exposed to liability under this article in view of the increasing activism among the students that is likely to cause violence and resulting injuries in the school premises. That is a valid fear, to be sure. Nevertheless, it should be repeated that, under the present ruling, it is not the school that will be held directly liable. Moreover, the defense of due diligence is available to it in case it is sought to be held answerable as principal for the acts or omission of its head or the teacher in its employ.

The school can show that it exercised proper measures in selecting the head or its teachers and the appropriate supervision over them in the custody and instruction of the pupils pursuant to its rules and regulations for the maintenance of discipline among them. In almost all cases now, in fact, these measures are effected through the assistance of an adequate security force to help the teacher physically enforce those rules upon the students. This should bolster the claim of the school that it has taken adequate steps to prevent any injury that may be committed by its students.

A fortiori, the teacher himself may invoke this defense as it would otherwise be unfair to hold him directly answerable for the damage caused by his students as long as they are in the school premises and presumably under his influence. In this respect, the Court is disposed not to expect from the teacher the same measure of responsibility imposed on the parent for their influence over the child is not equal in degree. Obviously, the parent can expect more obedience from the child because the latter's dependence on him is greater than on the teacher. It need not be stressed that such depend-

ence includes the child's support and sustenance whereas submission to the teacher's influence, besides being co-terminous with the period of custody, is usually enforced only because of the students' desire to pass the course. The parent can instill more lasting discipline on the child than the teacher and so should be held to a greater accountability than the teacher for the tort committed by the child.

And if it is also considered that under the article in question, the teacher or the head of the school of arts and trades is responsible for the damage caused by the student or apprentice even if he is already of age — and therefore less tractable than the minor — then there should all the more be justification to require from the school authorities less accountability as long as they can prove reasonable diligence in preventing the injury. After all, if the parent himself is no longer liable for the student's acts because he has reached majority age and so is no longer under the former's control, there is then all the more reason for leniency in assessing the teacher's responsibility for the acts of the student.

Applying the foregoing considerations, the Court has arrived at the following conclusions:

> 1. At the time Alfredo Amadora was fatally shot, he was still in the custody of the authorities of Colegio de San Jose-Recoletos notwithstanding that the fourth year classes had formally ended. It was immaterial if he was in the school auditorium to finish his physics experiment or merely to submit his physics report for what is important is that he was there for a legitimate purpose. As previously observed, even the mere savoring of the company of his friends in the premises of the school is a legitimate purpose that would have also brought him in the custody of the school authorities.
>
> 2. The rector, the high school principal and the dean of boys cannot be held liable because none of them was the teacher-in-charge as previously defined. Each of them was exercising only a general authority over the student body and not the direct control and influence exerted by the teacher placed in charge of particular classes or sections and thus immediately involved in its discipline. The evidence of the parties does not disclose who the teacher-in-charge of the offending student was. The mere fact that Alfredo Amadora had gone to school that day in connection with his physics report did not necessarily make the physics teacher, respondent Celestino Dicon, the teacher-in-charge of Alfredo's killer.
>
> 3. At any rate, assuming that he was the teacher-in-charge, there is no showing that Dicon was negligent in enforcing discipline upon Daffon or that he had waived observance of the rules and regulations of the school or condoned their non-observance. His absence when the tragedy happened can-

not be considered against him because he was not supposed or required to report to school on that day. And while it is true that the offending student was still in the custody of the teacher-in-charge even if the latter was physically absent when the tort was committed, it has not been established that it was caused by his laxness in enforcing discipline upon the student. On the contrary, the private respondents have proved that they had exercised due diligence, through the enforcement of the school regulations, in maintaining that discipline.

4. In the absence of a teacher-in-charge, it is probably the dean of boys who should be held liable, especially in view of the unrefuted evidence that he had earlier confiscated an unlicensed gun from one of the students and returned the same later to him without taking disciplinary action or reporting the matter to higher authorities. While this was clearly negligence on his part, for which he deserves sanctions from the school, it does not necessarily link him to the shooting of Amador as it has not been shown that he confiscated and returned pistol was the gun that killed the petitioners' son.

5. Finally, as previously observed, the Colegio de San Jose-Recoletos cannot be held directly liable under the article because only the teacher or the head of the school of arts and trades is made responsible for the damage caused by the student or apprentice. Neither can it be held to answer for the tort committed by any of the other private respondents for none of them has been found to have been charged with the custody of the offending student or has been remiss in the discharge of his duties in connection with such custody.

In sum, the Court finds under the facts as disclosed by the record and in the light of the principles herein announced that none of the respondents is liable for the injury inflicted by Pablito Daffon on Alfredo Amadora that resulted in the latter's death at the auditorium of the Colegio de San Jose-Recoletos on April 13, 1972. While we deeply sympathize with the petitioners over the loss of their son under the tragic circumstances here related, we nevertheless are unable to extend them the material relief they seek, as a balm to their grief, under the law they have invoked.

PHIL. SCHOOL OF BUSINESS ADMINISTRATION vs. COURT OF APPEALS 205 SCRA 729 [1992]

A stabbing incident on 30 August 1985 which caused the death of Carlitos Bautista while on the second-floor premises of the Philippine School of Business Administration (PSBA) prompted the parents of the deceased to file suit in the Regional Trial Court of Manila (Branch 47) presided over by

Judge (now Court of Appeals justice) Regina Ordoñez-Benitez, for damages against the said PSBA and its corporate officers. At the time of his death, Carlitos was enrolled in the third year commerce course at the PSBA. It was established that his assailants were not members of the schools academic community but were elements from outside the school.

Specifically, the suit impleaded the PSBA and the following school authorities: Juan D. Lim (President), Benjamin P. Paulino (Vice-President), Antonio M. Magtalas (Treasurer/Cashier), Col. Pedro Sacro (Chief of Security) and a Lt. M. Soriano (Assistant Chief of Security). Substantially, the plaintiffs (now private respondents) sought to adjudge them liable for the victim's untimely demise due to their alleged negligence, recklessness and lack of security precautions, means and methods before, during and after the attack on the victim. During the proceedings *a quo*, Lt. M. Soriano terminated his relationship with the other petitioners by resigning from his position in the school.

Defendants *a quo* (now petitioners) sought to have the suit dismissed, alleging that since they are presumably sued under Article 2180 of the Civil Code, the complaint states no cause of action against them, as jurisprudence on the subject is to the effect that academic institutions, such as the PSBA, are beyond the ambit of the rule in the afore-stated article.

The respondent trial court, however, overruled petitioners' contention and thru an order dated 8 December 1987, denied their motion to dismiss. A subsequent motion for reconsideration was similarly dealt with by an order dated 25 January 1988. Petitioners then assailed the trial court's dispositions before the respondent appellate court which, in a decision promulgated on 10 June 1988, affirmed the trial court's orders. On 22 August 1988, the respondent appellate court resolved to deny the petitioners' motion for reconsideration. Hence, this petition.

At the outset, it is to be observed that the respondent appellate court primarily anchored its decision on the law of quasi-delicts, as enunciated in Articles 2176 and 2180 of the Civil Code. Pertinent portions of the appellate court's now assailed ruling state:

"Article 2180 (formerly Article 1903) of the Civil Code is an adaptation from the old Spanish Civil Code. The comments of Manresa and learned authorities on its meaning should give way to present day changes. The law is not fixed and flexible (sic); it must be dynamic. In fact, the greatest value and significance of law as a rule of conduct in (sic) its flexibility to adopt to changing social conditions and its capacity to meet the new challenges of progress.

Construed in the light of modern day educational systems, Article 2180 cannot be construed in its narrow concept as held in the old case of *Exconde vs. Capuno* and *Mercado vs. Court of Appeals*; hence, the ruling in the Palisoc case that it should apply to all kinds of educational institutions, academic or vocational.

At any rate, the law holds the teachers and heads of the school staff liable unless they relieve themselves of such liability pursuant to the last paragraph of Article 2180 by 'proving that they observed all the diligence to prevent damage.' This can only be done at a trial on the merits of the case."

While we agree with the respondent appellate court that the motion to dismiss the complaint was correctly denied and the complaint should be tried on the merits, we do not however agree with the premises of the appellate court's ruling.

Article 2180, in conjunction with Article 2176 of the Civil Code, establishes the rule in *in loco parentis*. This Court discussed this doctrine in the afore-cited cases of Exconde, Mendoza, Palisoc and, more recently, in *Amadora vs. Court of Appeals*. In all such cases, it had been stressed that the law (Article 2180) plainly provides that the damage should have been caused or inflicted by pupils or students of the educational institution sought to be held liable for the acts of its pupils or students while in its custody. However, this material situation does not exist in the present case for, as earlier indicated, the assailants of Carlitos were not students of the PSBA, for whose acts the school could be made liable.

However, does the appellate court's failure to consider such material facts mean the exculpation of the petitioners from liability? It does not necessarily follow.

When an academic institution accepts students for enrollment, there is established a contract between them, resulting in bilateral obligations which both parties are bound to comply with. For its part, the school undertakes to provide the student with an education that would presumably suffice to equip him with the necessary tools and skills to pursue higher education or a profession. On the other hand, the student covenants to abide by the school's academic requirements and observe its rules and regulations.

Institutions of learning must also meet the implicit or "built-in" obligation of providing their students with an atmosphere that promotes or assists in attaining its primary undertaking of imparting knowledge. Certainly, no student can absorb the intricacies of physics or higher mathematics or explore the realm of the arts and other sciences when bullets are flying or grenades exploding in the air or where there looms around the school premises a constant threat to life and limb. Necessarily, the school must ensure that adequate steps are taken to maintain peace and order within the campus premises and to prevent the breakdown thereof.

Because the circumstances of the present case evince a contractual relation between the PSBA and Carlitos Bautista, the rules on quasi-delict do not really govern. A perusal of Article 2176 shows that obligations arising from quasi-delicts or tort, also known as extra-contractual obligations, arise only between parties not otherwise bound by contract, whether express or implied. However, this impression has not prevented this Court from determining the existence of a tort even when there obtains a contract. In *Air France vs. Carroscoso* (124 Phil. 722), the private respondent was awarded damages

for his unwarranted expulsion from a first-class seat aboard the petitioner airline. It is noted, however, that the Court referred to the petitioner-airline's liability as one arising from tort, not one arising from a contract of carriage. In effect, Air France is authority for the view that liability from tort may exist even if there is a contract, for the act that breaks the contract may be also a tort. *(Austro-America S.S. Co. vs. Thomas, 248 Fed. 231).*

This view was not all that revolutionary, for even as early as 1918, this Court was already of a similar mind. In *Cangco vs. Manila Railroad* (38 Phil. 780), Mr. Justice Fisher elucidated thus:

> "The field of non-contractual obligation is much more broader than that of contractual obligation, comprising, as it does, the whole extent of juridical human relations. These two fields, figuratively speaking, concentric; that is to say, the mere fact that a person is bound to another by contract does not relieve him from extra-contractual liability to such person. When such a contractual relation exists the obligor may break the contract under such conditions that the same act which constitutes a breach of the contract would have constituted the source of an extra-contractual obligation had no contract existed between the parties."
>
> Immediately what comes to mind is the chapter of the Civil Code on Human Relations, particularly Article 21, which provides:
>
> "Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage." (emphasis supplied)

Air France penalized the racist policy of the airline which emboldened the petitioner's employee to forcibly oust the private respondent to cater to the comfort of a white man who allegedly "had a better right to the seat." In *Austro-American, supra*, the public embarrassment caused to the passenger was the justification for the Circuit Court of Appeals, (Second Circuit), to award damages to the latter. From the foregoing, it can be concluded that should the act which breaches a contract be done in bad faith and be violative of Article 21, then there is a cause to view the act as constituting a quasi-delict.

In the circumstances obtaining in the case at bar, however, there is, as yet, no finding that the contract between the school and Bautista had been breached thru the former's negligence in providing proper security measures. This would be for the trial court to determine. And, even if there be a finding of negligence, the same could give rise generally to a breach of contractual obligation only. Using the test of *Cangco, supra*, the negligence of the school would not be relevant absent a contract. In fact, that negligence becomes material only because of the contractual relation between PSBA and

Bautista. In other words, a contractual relation is a condition *sine qua non* to the school's liability. The negligence of the school cannot exist independently on the contract, unless the negligence occurs under the circumstances set out in Article 21 of the Civil Code.

This Court is not unmindful of the attendant difficulties posed by the obligation of schools, above-mentioned for conceptually a school, like a common carrier, cannot be an insurer of its students against all risks. This is specially true in the populous student communities of the so-called "university belt" in Manila where there have been reported several incidents ranging from gang wars to other forms of hooliganism. It would not be equitable to expect of schools to anticipate all types of violent trespass upon their premises, for notwithstanding the security measures installed, the same may still fail against an individual or group determined to carry out a nefarious deed inside school premises and environs. Should this be the case, the school may still avoid liability by proving that the breach of its contractual obligation to the students was not due to its negligence, here statutorily defined to be the omission of that degree of diligence which is required by the nature of the obligation and corresponding to the circumstances of persons, time and place.

As the proceedings *a quo* have yet to commence on the substance of the private respondents' complaint, the record is bereft of all the material facts. Obviously, at this stage, only the trial court can make such a determination from the evidence still to unfold.

ST. MARY'S ACADEMY v. WILLIAM CARPITANOS et al
G.R. No. 143363, February 6, 2002

"From the records it appears that from 13 to 20 February 1995, defendant-appellant St. Mary's Academy of Dipolog City conducted an enrollment drive for the school year 1995-1996. A facet of the enrollment campaign was the visitation of schools from where prospective enrollees were studying. As a student of St. Mary's Academy, Sherwin Carpitanos was part of the campaigning group. Accordingly, on the fateful day, Sherwin, along with other high school students were riding in a Mitsubishi jeep owned by defendant Vivencio Villanueva on their way to Larayan Elementary School, Larayan, Dapitan City. The jeep was driven by James Daniel II then 15 years old and a student of the same school. Allegedly, the latter drove the jeep in a reckless manner and as a result the jeep turned turtle.

"Sherwin Carpitanos died as a result of the injuries he sustained from the accident."

[*Claiming damages for the death of their only son, Sherwin Carpitanos, spouses William Carpitanos and Lucia Carpitanos filed on June 9, 1995 a case against James Daniel II and his parents, James Daniel Sr. and Guada Daniel, the vehicle owner, Vivencio Villanueva and St. Mary's Academy before the Regional Trial Court of Dipolog City. On 20 February 1997, Branch 6 of the Regional Trial Court of Dipolog City rendered its decision ordering the*

defendant school to pay damages. The parents of the minor and defendant Vicencio were absolved from liability. The decision was affirmed by the Court of Appeals.]

The Issues

1) Whether the Court of Appeals erred in holding the petitioner liable for damages for the death of Sherwin Carpitanos.

2) Whether the Court of Appeals erred in affirming the award of moral damages against the petitioner.

The Court's Ruling

We reverse the decision of the Court of Appeals.

The Court of Appeals held petitioner St. Mary's Academy liable for the death of Sherwin Carpitanos under Articles 218 and 219 of the Family Code, pointing out that petitioner was negligent in allowing a minor to drive and in not having a teacher accompany the minor students in the jeep.

x x x

However, for petitioner to be liable, there must be a finding that the act or omission considered as negligent was the proximate cause of the injury caused because the negligence must have a causal connection to the accident.

"In order that there may be a recovery for an injury, however, it must be shown that the 'injury for which recovery is sought must be the legitimate consequence of the wrong done; the connection between the negligence and the injury must be a direct and natural sequence of events, unbroken by intervening efficient causes.' In other words, the negligence must be the proximate cause of the injury. For, 'negligence, no matter in what it consists, cannot create a right of action unless it is the proximate cause of the injury complained of.' And 'the proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.'"

In this case, the respondents failed to show that the negligence of petitioner was the proximate cause of the death of the victim.

Respondents Daniel spouses and Villanueva admitted that the immediate cause of the accident was not the negligence of petitioner or the reckless driving of James Daniel II, but the detachment of the steering wheel guide of the jeep.

In their comment to the petition, respondents Daniel spouses and Villanueva admitted the documentary exhibits establishing that the cause of the accident was the detachment of the steering wheel guide of the jeep. Hence, the cause of the accident was not the recklessness of James Daniel II but the mechanical defect in the jeep of Vivencio Villanueva. Respondents, including the spouses Carpitanos, parents of the deceased Sherwin Carpitanos, did not

dispute the report and testimony of the traffic investigator who stated that the cause of the accident was the detachment of the steering wheel guide that caused the jeep to turn turtle.

Significantly, respondents did not present any evidence to show that the proximate cause of the accident was the negligence of the school authorities, or the reckless driving of James Daniel II. Hence, the respondents' reliance on Article 219 of the Family Code that "those given the authority and responsibility under the preceding Article shall be principally and solidarily liable for damages caused by acts or omissions of the unemancipated minor" was unfounded.

Further, there was no evidence that petitioner school allowed the minor James Daniel II to drive the jeep of respondent Vivencio Villanueva. It was Ched Villanueva, grandson of respondent Vivencio Villanueva, who had possession and control of the jeep. He was driving the vehicle and he allowed James Daniel II, a minor, to drive the jeep at the time of the accident.

Hence, liability for the accident, whether caused by the negligence of the minor driver or mechanical detachment of the steering wheel guide of the jeep, must be pinned on the minor's parents primarily. The negligence of petitioner St. Mary's Academy was only a remote cause of the accident. Between the remote cause and the injury, there intervened the negligence of the minor's parents or the detachment of the steering wheel guide of the jeep.

"The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

Considering that the negligence of the minor driver or the detachment of the steering wheel guide of the jeep owned by respondent Villanueva was an event over which petitioner St. Mary's Academy had no control, and which was the proximate cause of the accident, petitioner may not be held liable for the death resulting from such accident.

x x x

Incidentally, there was no question that the registered owner of the vehicle was respondent Villanueva. He never denied and in fact admitted this fact. We have held that the registered owner of any vehicle, even if not used for public service, would primarily be responsible to the public or to third persons for injuries caused the latter while the vehicle was being driven on the highways or streets." Hence, with the overwhelming evidence presented by petitioner and the respondent Daniel spouses that the accident occurred because of the detachment of the steering wheel guide of the jeep, it is not the school, but the registered owner of the vehicle who shall be held responsible for damages for the death of Sherwin Carpitanos.

[The decision of the Court of Appeals and the trial court was set aside and the case was remanded to the trial court except as to the school]

F. EMPLOYERS.

The responsibility of employers for the negligence of their employees in the performance of their duties is primary, that is, the injured party may recover from the employers directly, regardless of the solvency of their employees. *(Philtranco Service Enterprises, Inc. v. Court of Appeals, 273 SCRA 562 [1997])*

In one case, the Supreme Court explained that what has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the tort of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large. Added to this is the makeweight argument that an employer who is held strictly liable is under the greatest incentive to be careful in the selection, instruction and supervision of his servants, and to take every precaution to see that the enterprise is conducted safely. *(Metro Manila Transit Corporation v. Court of Appeals, G.R. No. 116617, November 16, 1998, 298 SCRA 495 citing Prosser and Keeton, The Law of Torts, pp. 500-501, 5th Edition;Victory Liner, Inc. v. Heirs of Andres Malecdan, G.R. No. 154278, December 27, 2002).*

a. Liability of Employers under the Civil Code.

Article 2180 states that owners and managers of a establishment or enterprise are responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions. It further provides that employers shall be liable for the damages caused by their employees and household helpers acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry. The liability is direct and primary.

The term "manager" in Article 2180 is used in the sense of employer. A managerial employee within the contemplation of the Labor Code is not a manager referred to in Article 2180 because he himself may be regarded as an employee or *dependiente* of the employer. *(Philippine Rabbit Bus Lines, Inc. vs. Phil. American Forwarders,*

Inc., 63 SCRA 231 [1975]).

The liability of the employer can be established by proving the existence of an employer-employee relationship with the actor and that the latter caused the injury while performing his assigned task or functions. The employer can escape liability by establishing that he exercised due diligence in the selection and supervision of the employee.

It should also be noted that it is not necessary that the employer is engaged in some kind of industry or work. The Supreme Court explained in *Castilex Industrial Corporation vs. Vicente Vasquez, Jr., et al.* (G.R. No. 132266, December 21, 1999):

> "The negligence of ABAD is not an issue at this instance. Petitioner CASTILEX presumes said negligence but claims that it is not vicariously liable for the injuries and subsequent death caused by ABAD.
>
> Petitioner contends that the fifth paragraph of Article 2180 of the Civil Code should only apply to instances where the employer is not engaged in business or industry. Since it is engaged in the business of manufacturing and selling furniture it is therefore not covered by said provision. Instead, the fourth paragraph should apply.
>
> Petitioner's interpretation of the fifth paragraph is not accurate. The phrase "even though the former are not engaged in any business or industry" found in the fifth paragraph should be interpreted to mean that it is not necessary for the employer to be engaged in any business or industry to be liable for the negligence of his employee who is acting within the scope of his assigned task.
>
> A distinction must be made between the two provisions to determine what is applicable. Both provisions apply to employers: the fourth paragraph, to owners and managers of an establishment or enterprise; and the fifth paragraph, to employers in general, whether or not engaged in any business or industry. The fourth paragraph covers negligent acts of employees committed either in the service of the branches or on the occasion of their functions, while the fifth paragraph encompasses negligent acts of employees acting within the scope of their assigned task. The latter is an expansion of the former in both employer coverage and acts included. Negligent acts of employees, whether or not the employer is engaged in a business or industry, are covered so long as they were acting within the scope of their assigned task, even though committed neither in the service of the branches nor on the occasion of their functions. For, admittedly, employees

oftentimes wear different hats. They perform functions which are beyond their office, title or designation but which, nevertheless, are still within the call of duty.

This court has applied the fifth paragraph to cases where the employer was engaged in a business or industry such as truck operators and banks. The Court of Appeals cannot, therefore, be faulted in applying the said paragraph of Article 2180 of the Civil Code to this case.

Under the fifth paragraph of Article 2180, whether or not engaged in any business or industry, an employer is liable for the torts committed by employees within the scope of his assigned tasks. But it is necessary to establish the employer-employee relationship; once this is done, the plaintiff must show, to hold the employer liable, that the employee was acting within the scope of his assigned task when the tort complained of was committed. It is only then that the employer may find it necessary to interpose the defense of due diligence in the selection and supervision of the employee.

(1) Proof of Employer-Employee Relationship.

In an action against an employer under Article 2180, it is imperative that the presence of employer-employee relationship be established although it is not necessary that the employer be engaged in any business or industry. *(Martin vs. Court of Appeals, 205 SCRA 591 [1992])*. The fact that an employee is not listed in the payroll is not controlling. It may be established by other circumstances. *(Cauticio v. Nuval, G.R. No. 138054, Sept. 28, 2000)*. For instance, the Supreme Court ruled that the trial courts cannot rely on the presumption that one who drives the motor vehicle is an employee of the owner thereof. *(ibid.)*. The Supreme Court explained in the last cited *Martin* case that:

"A presumption is defined as an inference as to the existence of a fact not actually known, arising from its usual connection with another which is known or a conjecture based on past experience as to what course human affairs ordinarily take. It is either presumption *juris*, or of law,or a presumption *hominis* or of fact.

There is no law directing the deduction made by the courts below from the particular facts presented to them by the parties. Such deduction is not among the conclusive presumptions under Section 2 or the disputable presumptions under Section 3 of Rule 131 of the Rules of Court. In other words, it is not presumption *juris*.

Neither is it presumption *hominis,* which is a reasonable deduction from facts proved without express direction of law to that effect. The facts proved or not denied, *viz.,* the ownership of the car and the circumstances of the accident, are not enough bases for the inference that the petitioner is the employer of Nestor Martin.

In the modern urban society, most male persons know how to drive and do not have to employ others to drive for them unless this is needed for business reasons. Many cannot afford this luxury, and even if they could, may consider it an unnecessary expense and inconvenience. In the present case, the more plausible assumption is that Nestor Martin is a close relative of Ernesto Martin and on the date in question borrowed the car for some private purpose. Nestor would probably not have been accommodated if he were a mere employee for employees do not usually enjoy the use of their employer's car at two o'clock in the morning.

As the employment relationship between Ernesto Martin and Nestor Martin could not be presumed, it was necessary for the plaintiff to establish it by evidence. Meralco had the burden of proof, or the duty "to present evidence on the fact in issue necessary to establish his claim" as required by Rule 131, Section 1 of the Revised Rules of Court. Failure to do this was fatal to its action.

It was enough for the defendant to deny the alleged employment relationship, without more, for he was not under obligation to prove this negative averment. *Ei incumbit probotio qui dicit, non qui negat.* This Court has consistently applied the ancient rule that "if the plaintiff, upon whom rests the burden of proving his cause of action, fails to show in a satisfactory manner the facts upon which he bases his claim, the defendant is under no obligation to prove his exception or defense.

The case of *Amor vs. Soberano*, a Court of Appeals decision not elevated to this Court, was misapplied by the respondent court in support of the petitioner's position. The vehicle involved in that case was a six-by-six truck, which reasonably raised the factual presumption that it was engaged in business and that its driver was employed by the owner of the vehicle. The case at bar involves a private vehicle as its license plate indicates. No evidence was ever offered that it was being used for business purposes or that, in any case, its driver at the time of the accident was an employee of the petitioner.

It is worth mentioning in this connection that in *Filamer Christian Institute vs. Court of Appeals*, the owner of the jeep

> involved in the accident was absolved from liability when it was shown that the driver of the vehicle was not employed as such by the latter but was a "working scholar" as that term is defined by the Omnibus Rules Implementing the Labor Code. He was assigned to janitorial duties. Evidence was introduced to establish the employment relationship but it failed nonetheless to hold the owner responsible. Significantly, no similar evidence was even presented in the case at bar, the private respondent merely relying on its mere allegation that Nestor Martin was the petitioner's employee. Allegation is not synonymous with proof.
>
> The above observations make it unnecessary to examine the question of the driver's alleged negligence or the lack of diligence on the part of the petitioner in the selection and supervision of his employee. These questions have not arisen because the employment relationship contemplated in Article 1860 of the Civil Code has not been established.

Employer-employee relationship between the defendant and the driver of a vehicle cannot be established by the mere fact that the defendant is the registered owner of the vehicle. Hence, if the defendant was engaged in a rent-a-car business and it leased a vehicle to another, the defendant who is the registered owner, will not be liable for the negligence of the lessee. There is no employer-employee relationship between the lessor and the lessee. *(FGU Insurance Corporation vs. Court of Appeals, 287 SCRA 719 [1998]).*

(2) Determination of Employer-Employee Relationship.

The presence of employer-employee may be established by using what is known as the control test. Under the control test, a person can still be considered the employer even if he does not consider another who works for him as his employee. If the person for whom the services are to be performed controls only the result or the end to be achieved, the worker is the contractor; if the former controls not only the end but also the manner and means to be used, the latter is an employee. *(LVN Pictures, Inc. vs. Phil. Musicians Guild, Jan. 28, 1961).* Consequently, one who hires an independent contractor but controls the latter's work, is responsible also for the latter's negligence. *(5 Paras 1132; Cuison vs. Norton and Harrison Co., 55 Phil. 18).*

If the person hired is really a contractor, the person who hired him is not liable under Article 2180. The contractor is liable for all the claims of laborers and others employed by him, and of third persons for death or physical injuries during the construction. *(Article 1728,*

Civil Code).

Consistent with the rule, a school is not liable as employer for the acts of the guard manning its premises if the latter was employed by a security agency which is separate and distinct from the school. There is no employer-employee relationship between the school and the guards and the contractual relationship is between the school and the security agency. "Liability for illegal or harmful acts committed by the security guards attaches to the employer agency, and not to the clients or customers of such agency. As a general rule, a client or customer of a security agency has no hand in selecting who among the pool of security guards or watchmen employed by the agency shall be assigned to it; the duty to observe the diligence of a good father of a family in the selection of the guards cannot, in the ordinary course of events, be demanded from the client whose premises or property are protected by the security guards. The fact that the client company may give instructions or directions to the security guards assigned to it, does not, by itself, render the client responsible as an employer of the security guards concerned and liable for their wrongful acts or omissions. Those instructions or directions are ordinarily no more than requests commonly envisaged in the contract for services entered into with the security agency." *(Maximo Soliman, Jr. vs. Hon. Ramon Tuazon, et al., 209 SCRA 47, 76 [1992]).*

However, the employer-employee relationship still exists even if the employee was loaned by the employer to another person or entity. The temporary assignment does not sever the relationship because control over the employee subsists. *(2 Sanco, 444, citing Lastoa v. Bretania, CA, G.R. No. 11321-R, Sept. 5, 1955; Filipinas Shell Petroleum Corp. vs. Court of Appeals, 221 SCRA 389 [1993]).*

(2.1) Working Scholars.

Working scholars are still considered employees for purposes of applying Article 2180 of the Civil Code. The employer is still vicariously liable for the acts of the working scholar. In *Filamer Christian Institute vs. Intermediate Appellate Court* (212 SCRA 637), the trial court absolved the petitioner of liability on the ground that the person who caused the injury was merely a working scholar who, under Section 14, Rule X, Book III of the Rules and Regulations Implementing the Labor Code, is not an employee of the petitioner. The Supreme Court reversed such finding holding that:

> "Section 14, Rule X, Book III of the Rules implementing the Labor Code, on which the petitioner anchors its defense, has been

promulgated by the Secretary of Labor and Employment only for the purpose of administering and enforcing the provisions of the Labor Code on conditions of employment. Particularly, Rule X of Book III provides guidelines on the manner by which the powers of the Labor Secretary shall be exercised; on what records should be kept, maintained and preserved; on payroll; and on the exclusion of working scholars from, and inclusion of resident physicians in the employment coverage as far as compliance with the substantive labor provisions on working conditions, rest periods, and wages, is concerned.

In other words, Rule X is merely a guide to the enforcement of the substantive law on labor. The Court, thus, makes the distinction and so holds that Section 14, Rule X, Book III of the Rules is not the decisive law in a civil suit for damages instituted by an injured person during a vehicular accident against a working student of a school and against the school itself.

The present case does not deal with a labor dispute on conditions of employment between an alleged employee and an alleged employer. It invokes a claim brought by one for damages for injury caused by the patently negligent acts of a person, against both doer-employee and his employer. Hence, the reliance on the implementing rule on labor to disregard the primary liability of an employer under Article 2180 of the Civil Code is misplaced. An implementing rule on labor cannot be used by an employer as a shield to avoid liability under the substantive provisions of the Civil Code."

(2.2) Labor-only Contracting.

In *National Power Corporation (NPC) vs. Court of Appeals* (294 SCRA 209 [1998]), one of the trucks owned by petitioner NPC figured in a head-on-collision with another vehicle resulting in death of three (3) passengers of the latter as well as physical injuries to the other passengers. NPC denied liability by claiming that the driver of the truck was not its employee but that of PHESCO Incorporated. The Supreme Court rejected the argument ruling that NPC was liable as a direct employer of the driver under Article 2180 of the Civil Code, PHESCO being a "labor-only" contractor. The Court ruled that liability was direct, primary and solidary with PHESCO and the driver. It was explained further that:

"Before we decide who is the employer of Ilumba, it is evidently necessary to ascertain the contractual relationship between NPC and PHESCO. Was the relationship one of employer and job (independent) contractor or one of employer and "labor only" contractor?

Job (independent) contracting is present if the following conditions are met: (a) the contractor carries on an independent business and undertakes the contract work on his own account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except to the result thereof; and (b) the contractor has substantial capital or investments in the form of tools, equipment, machineries, work premises and other materials which are necessary in the conduct of his business. Absent these requisites, what exists is a "labor only" contract under which the person acting as contractor is considered merely as an agent or intermediary of the principal who is responsible to the workers in the same manner and to the same extent as if they had been directly employed by him. Taking into consideration the above distinction and the provisions of the "Memorandum of Understanding" entered into by PHESCO and NPC, we are convinced that PHESCO was engaged in "labor-only" contracting.

It must be noted that under the Memorandum, NPC had mandate to approve the "critical path network and rate of expenditure to be undertaken by PHESCO." Likewise, the manning schedule and pay scale of the workers hired by PHESCO were subject to confirmation by NPC. Then too, it cannot be ignored that if PHESCO enters into any sub-contract or lease, again NPC's concurrence is needed. Another consideration is that even in the procurement of tools and equipment that will be used by PHESCO, NPC's favorable recommendation is still necessary before these tools and equipment can be purchased. Notably, it is NPC that will provide the money or funding that will be used by PHESCO to undertake the project. Furthermore, it must be emphasized that the project being undertaken by PHESCO, *i.e.*, construction of power energy facilities, is related to NPC's principal business of power generation. In sum, NPC's control over PHESCO in matters concerning the performance of the latter's work is evident. It is enough that NPC has the right to wield such power to be considered as the employer.

Under this factual milieu, there is no doubt that PHESCO was engaged in "labor-only" contracting vis-a-vis NPC and as such, it is considered merely an agent of the latter. In labor-only contracting, an employer-employee relationship between the principal employer and the employees of the "labor-only" contractor is created. Accordingly, the principal employer is responsible to the employees of the "labor-only" contractor as if such employees had been directly employed by the principal employer. Since PHESCO is only a "labor-only" contractor, the workers it supplied to NPC, including the driver of the ill-fated truck, should be considered as employees of NPC. After all, it is axiomatic that any person

(the principal employer) who enters into an agreement with a job contractor, either for the performance of a specified work or for the supply of manpower, assumes responsibility over the employees of the latter.

However, NPC maintains that even assuming that a "labor-only" contract exists between it and PHESCO, its liability will not extend to third persons who are injured due to the tortious acts of the employee of the "labor-only" contractor. Stated otherwise, its liability shall only be limited to violations of the Labor Code and not quasi-delicts.

To bolster its position, NPC cites Section 9(b), Rule VII, Book III of the Omnibus Rules Implementing the Labor Code which reads:

"(b) Labor-only contracting as defined herein is hereby prohibited and the person acting as contractor shall be considered merely as an agent or intermediary of the employer who shall be responsible to the workers in the same manner and extent as if the latter were directly employed by him."

In other words, NPC posits the theory that its liability is limited only to compliance with the substantive labor provisions on working conditions, rest periods, and wages and shall not extend to liabilities suffered by third parties, *viz.:*

"Consequently, the responsibilities of the employer contemplated in a 'labor-only' contract, should, consistent with the terms expressed in the rule, be restricted 'to the workers.' The same cannot be expanded to cover liabilities for damages to third persons resulting from the employees' tortious acts under Article 2180 of the Civil Code."

The reliance is misplaced. It bears stressing that the action was premised on the recovery of damages as a result of quasi-delict against both NPC and PHESCO, hence, it is the Civil Code and not the Labor Code which is the applicable law in resolving this case.

x x x

Given the above considerations, it is apparent that Article 2180 of the Civil Code and not the Labor Code will determine the liability of NPC in a civil suit for damages instituted by an injured person for any negligent act of the employees of the "labor-only" contractor. This is consistent with the ruling that a finding that a contractor was a "labor-only" contractor is equivalent to a finding that an employer-employee relationship existed between the owner (principal contractor) and the "labor-only" contractor, including the latter's workers.

(3) Performance of Assigned Task.

The employer is liable only if the employee was performing his assigned task at the time the injury was caused. *(St. Francis High School vs. Court of Appeals, p. 351)*. This includes any act done by the employee in furtherance of the interest of the employer at the time of the infliction of the injury or damage. *(Filamer Christian Institute vs. Intermediate Appellate Court, 212 SCRA 637 [1992])*. It is not necessary that the task performed by the employee is his regular job or that which was expressly given to him by the employer. It is enough that the task is indispensable to the business or beneficial to the employer. (*ibid*., p. 645).

In other words, "the vicarious liability attaches only when the tortious conduct of the employee relates to, or is in the course of his employment. The question to ask should be whether, at the time of the damage or injury, the employer is engaged in the affairs or concerns of the employer, or, independently, in that of his own. While the employer incurs no liability when an employee's conduct, act or omission is beyond the range of employment, a minor deviation from the assigned task of an employee, however, does not affect the liability of an employer." *(Valenzuela vs. Court of Appeals, 253 SCRA 303, 329 [1996]; Marquez vs. Castillo, 68 Phil. 568; De Leon Brokerage Co., Inc. vs. Court of Appeals, 4 SCRA 517).*

The requirement that the employee must be performing his functions is due to the fact that the employer is not expected to exercise supervision over their employee's private activity or during the performance of tasks either unsanctioned by the former or unrelated to the employee's task. *(Valenzuela vs. Court of Appeals, 253 SCRA 303 [1996])*.

An interesting case study is presented by a driver who deviated from his work in driving the vehicle assigned to him by the employer. The Supreme Court ruled in *Castilex Industrial Corporation vs. Vicente Vasquez, Jr., et al.*:

> "Before we pass upon the issue of whether ABAD was performing acts within the range of his employment, we shall first take up the other reason invoked by the Court of Appeals in holding petitioner CASTILEX vicariously liable for ABAD's negligence, *i.e.*, that the petitioner did not present evidence that ABAD was not acting within the scope of his assigned tasks at the time of the motor vehicle mishap. Contrary to the ruling of the Court of Appeals, it was not incumbent upon the petitioner to prove the same. It was enough for petitioner CASTILEX to deny

that ABAD was acting within the scope of his duties; petitioner was not under obligation to prove this negative averment. *Ei incumbit probatio qui dicit, non qui negat* (He who asserts, not he who denies, must prove). The Court has consistently applied the ancient rule that if the plaintiff, upon whom rests the burden of proving his cause of action, fails to show in a satisfactory manner facts which he bases his claim, the defendant is under no obligation to prove his exception or defense.

Now on the issue of whether the private respondents have sufficiently established that ABAD was acting within the scope of his assigned tasks.

ABAD, who was presented as a hostile witness, testified that at the time of the incident, he was driving a company-issued vehicle, registered under the name of petitioner. He was then leaving the restaurant where he had some snacks and had a chat with his friends after having done overtime work for the petitioner.

No absolutely hard and fast rule can be stated which will furnish the complete answer to the problem of whether at a given moment, an employee is engaged in his employer's business in the operation of a motor vehicle, so as to fix liability upon the employer because of the employee's action or inaction; but rather, the result varies with each state of facts.

In *Filamer Christian Institute vs. Intermediate Appellate Court*, this Court had the occasion to hold that acts done within the scope of the employee's assigned tasks includes "any act done by an employee in furtherance of the interests of the employer or for the account of the employer at the time of the infliction of the injury or damages."

The court *a quo* and the Court of Appeals were one in holding that the driving by a manager of a company-issued vehicle is within the scope of his assigned tasks regardless of the time and circumstances.

We do not agree. The mere fact that ABAD was using a service vehicle at the time of the injurious incident is not of itself sufficient to charge petitioner with liability for the negligent operation of said vehicle unless it appears that he was operating the vehicle within the course or scope of his employment.

The following are principles in American Jurisprudence on the employer's liability for the injuries inflicted by the negligence of an employee in the use of an employer's motor vehicle:

I. Operation of Employer's Motor Vehicle in Going to or from Meals

It has been held that an employee who uses his employer's vehicle in going from his work to a place where he intends to eat or in returning to work from a meal is not ordinarily acting within the scope of his employment in the absence of evidence of some special business benefit to the employer. Evidence that by using the employer's vehicle to go to and from meals, an employee is enabled to reduce his time-off and so devote more time to the performance of his duties supports the findings that an employee is acting within the scope of his employment while so driving the vehicle.

II. Operation of Employer's Vehicle in Going to or from Work

In the same vein, traveling to and from the place of work is ordinarily a personal problem or concern of the employee, and not a part of his services to his employer. Hence, in the absence of some special benefit to the employer other than the mere performance of the services available at the place where he is needed, the employee is not acting within the scope of his employment even though he uses his employer's motor vehicle.

The employer may, however, be liable where he derives some special benefit from having the employee drive home in the employer's vehicle as when the employer benefits from having the employee at work earlier and, presumably, spending more time at his actual duties. Where the employee's duties require him to circulate in a general area with no fixed place or hours of work, or to go to and from his home to various outside places of work, and his employer furnishes him with a vehicle to use in his work, the courts have frequently applied what has been called the "special errand" or "roving commission" rule, under which it can be found that the employee continues in the service of his employer until he actually reaches home. However, even if the employee be deemed to be acting within the scope of his employment in going to or from work in his employer's vehicle, the employer is not liable for his negligence where at the time of the accident, the employee has left the direct route to his work or back home and is pursuing a personal errand of his own.

III. Use of Employer's Vehicle Outside Regular Working Hours

An employer who loans his motor vehicle to an employee for the latter's personal use outside of regular working hours is generally not liable for the employee's negligent operation of the vehicle during the period of permissive use, even where the employer contemplates that a regularly assigned motor vehicle will be used by the employee for personal as well as business purposes and there is some incidental benefit to the employer.

> Even where the employee's personal purpose in using the vehicle has been accomplished and he has started the return trip to his house where the vehicle is normally kept, it has been held that he has not resumed his employment, and the employer is not liable for the employee's negligent operation of the vehicle during the return trip.
>
> The foregoing principles and jurisprudence are applicable in our jurisdiction albeit based on the doctrine of *respondeat superior*, not on the principle of *bonus pater familias* as in ours. Whether the fault or negligence of the employee is conclusive on his employer as in American law or jurisprudence, or merely gives rise to the presumption *juris tantum* of negligence on the part of the employer as in ours, it is indispensable that the employee was acting in his employer's business or within the scope of his assigned task.

In *Castilex,* a manager of the petitioner (referred to as ABAD) did some overtime work at the petitioner's office, which was located in Cabangcalan, Mandaue City. Thereafter, he went to Goldie's Restaurant in Fuente Osmeña, Cebu City, which is about seven kilometers away from petitioner's place of business. A witness for the private respondents, a sidewalk vendor, testified that Fuente Osmeña is a "lively place" even at dawn because Goldie's Restaurant and Back Street are still open and people are drinking thereat. Moreover, prostitutes, pimps, and drug addicts litter the place. At the Goldie's Restaurant, ABAD took some snacks and had a chat with friends. It was when ABAD was leaving the restaurant that the incident in question occurred. That same witness for the private respondents testified that at the time of the vehicular accident, ABAD was with a woman in his car, who then shouted: "Daddy, Daddy!" The Supreme Court observed that the woman could not have been ABAD's daughter, for ABAD was only 29 years old at the time.

The Court concluded that ABAD was engaged in affairs of his own or was carrying out a personal purpose not in line with his duties at the time he figured in a vehicular accident. It was then about 2:00 a.m. of 28 August 1988, way beyond the normal working hours. ABAD's working day had ended; his overtime work had already been completed. His being at a place which, as petitioner put it, was known as a "haven for prostitutes, pimps, and drug pushers and addicts," had no connection to petitioner's business; neither had it any relation to his duties as a manager. Rather, using his service vehicle even for personal purposes was a form of a fringe benefit or one of the perks attached to his position. The High Court further ruled that since there is paucity of evidence that ABAD was acting within the

scope of the functions entrusted to him, petitioner CASTILEX had no duty to show that it exercised the diligence of a good father of a family in providing ABAD with a service vehicle. Finally, the Court stated that justice and equity require that petitioner be relieved of vicarious liability for the consequences of the negligence of ABAD in driving its vehicle.

(4) Presumption.

The employer is presumed to be negligent and the presumption flows from the negligence of the employee. The premise for the employer's liability is negligence or fault on the part of the employee. Once such fault is established, the employer can then be made liable on the basis of the presumption that the employer failed to exercise *diligentissimi patris families* in the selection and supervision of its employees *(Light Rail Transic Authority et al. v. Marjorie Navidad et al., G. R. No. 145804, February 6, 2003;Metro Manila Transit Corporation v. Court of Appeals, G.R. No. 141089, August 1, 2002).* However, that presumption is only *juris tantum,* not *juris et de jure. (McKee vs. Intermediate Appellate Court, 211 SCRA 517, 544 [1992]; Umali vs. Bacani, 69 SCRA 623 [1976]; Ramos vs. Pepsi Cola Bottling Co., 19 SCRA 289 [1967]; Lilius vs. Manila Railroad Company, 59 Phil. 758 [1934]; Bahia vs. Litonjua, 30 Phil. 624 [1915]).*

It is a notable peculiarity of the Spanish law of negligence carried over to the Civil Code. It is in striking contrast to the American doctrine that, in relation with strangers, the negligence of the servant is conclusively the negligence of the master. *(Yamada vs. Manila Railroad Company, 33 Phil. 8, 25 [1915]).* Nevertheless, before the presumption of negligence can operate, the negligence of the employee must first be established. Failure to prove the employee's negligence is fatal to the enforcement of the employer's vicarious liability. *(Jose vs. Court of Appeals, G.R. Nos. 118441-53, January 18, 2000).* In *Campo v. Camarote, (100 Phil. 459, 463-64 [1956])* Supreme Court explained the basis of the presumption of negligence in this wise:

> "The reason for the law is obvious. It is indeed difficult for any person injured by the carelessness of a driver to prove the negligence or lack of due diligence of the owner of the vehicle in the choice of the driver. Were we to require the injured party to prove the owner's lack of diligence, the right will in many cases prove illusory, as seldom does a person in the community, especially in the cities, have the opportunity to observe the conduct of all possible car owners therein. So the law imposes the burden of proof of innocence on the vehicle owner. If the driver is negligent and causes damage, the law presumes that the owner was negli-

gent and imposes upon him the burden of proving the contrary."

(5) Defense.

The employer can escape liability if he can establish that he exercised proper diligence in the selection and supervision of his negligent employee. The facts indicating exercise of due diligence must be shown by concrete proof, including documentary evidence *(Victory Liner, Inc. v. Heirs of Andres Malecdan, supra., citing Metro Manila Transit Corporation v. Court of Appeals, 298 SCRA 495 [1998] & Central Taxicab Corporation v. Ex-Meralco Employees Transportation Corporation, 54 O.G. 7415 [1958]).*

As the law merely imposes the standard of a good father of a family, no particular acts are required for the employer to establish that he exercised proper diligence. Supervision depends on the circumstances of employment. *(Valenzuela vs. Court of Appeals, supra).* It has been observed, however, that the exercise of diligence may include promulgation of proper rules and regulations and the formulation and publication of proper instructions for the employees' guidance in case where such rules and regulations and instructions are necessary. *(Yamada vs. Manila Railroad Company, ibid.).* It may also include the requirement that the employee-applicant submit the necessary license or clearances and that the employee be required to undergo examination, tests and training. Employers are required to examine the employees as to their qualifications, experience and service records *(Victory Liner, Inc. v. Heirs of Andres Malecdan, supra., citing Campo v. Camarote, 100 Phil. 459 [1956]).* In this connection, although no law requires the passing of psychological and physical test prior to employment, such circumstance would be a reliable indicia of the exercise of due diligence *(Sanitary Steam Laundry, Inc. v. Court of Appeals, 300 SCRA 20 [1998]).*

Nevertheless, the mere issuance of rules and regulations and the formulation of various company policies on safety, without showing that they are being complied with, are not sufficient to exempt the employer from liability arising from the negligence of the employee. It is incumbent upon the employer to show that in recruiting and employing the erring employee, the recruitment procedures and company policies on efficiency and safety were followed. *(Pantranco North Express, Inc. vs. Baesa, 179 SCRA 384, 394 [1989]).* In other words, with respect to the supervision of employees, employers must formulate standard operating procedures, monitor their implementation and impose discipline for breaches thereof *(Victory Liner, Inc. v. Heirs of Andres Malecdan, supra., citing MetroManila Transit*

Corporation v. Court of Appeals, 223 SCRA 521 [1993]).

Moreover, recent decisions emphasize that the employer must not merely present testimonial evidence to prove that he observed the diligence of a good father of a family in the selection and supervision of his employee, but he must also support such testimonial evidence with concrete or documentary evidence. The reason for this is to obviate the biased nature of the employer's testimony or that of his witnesses *(Raymundo Odani Secosa et al v. Heirs of Erwin Suarez Francisco, No. 160039, June 29, 2004; Ernesto Pleyto v. Maria D. Lomboy, No. 14737, June 16, 2004; Ernesto Syki v. Salvador Begasa, No. 149149, October 23, 2003; Metro Manila Transit Corporation v. Court of Appeals, 298 SCRA 495 [1998]).*

(6) Solidary Liability.

The weight of authority is to hold the employer and the employee solidarily liable. The aggrieved party may choose to sue either of them or both of them. If only the employer is sued and made liable for the damages caused by his employee, he may recover from the employee what he has paid or delivered in satisfaction of his claim *(Article 2181, Civil Code).* If the plaintiff decides to sue only the employee, no right of reimbursement accrues. If the offended party sues both of them, the court may hold them solidarily liable subject to the same right of reimbursement given to the employer under Article 2181 of the Civil Code.

Thus, in *Metro Manila Transit Corporation v. Court of Appeals (298 SCRA495, 515 [1998])* the Supreme Court reversed the ruling of the trial court in so far as it made the employer primarily liable and the employee secondarily liable. The Court explained:

> "As already stated, MMTC is primarily liable for damages for the negligence of its employee in view of Art. 2180. Pursuant to Art. 2181, it can recover from its employee what it may pay. This does not make the employee's liability subsidiary. It only means that if the judgment for damages is satisfied by the common carrier, the latter has a right to recover what it has paid from its employee who committed the fault or negligence which gave rise to the action based on quasi-delict. *[See Philtranco Service Enterprises, Inc. v. Court of Appeals, 273 SCRA 562 (1997)]* Hence, the spouses Rosales have the option of enforcing the judgment against either MMTC or Musa.
>
> "From another point of view, Art. 2194 provides that "the responsibility of two or more persons who are liable for a quasi-delict is solidary." We ruled in *Gelisan v. Alday [154 SCRA 388,*

> *394 (1987)]* that "the registered owner/operator of a public service vehicle is jointly and severally liable with the driver for damages incurred by passengers or third persons as a consequence of injuries sustained in the operation of said vehicle." In *Baliwag Transit, Inc. v. Court of Appeals [262 SCRA 230, 234 (1996) (emphasis added)]* it was held that "to escape solidary liability for a quasi-delict committed by an employee, the employer must adduce sufficient proof that it exercised such degree of care." Finally, we held in the recent case of *Philtranco Service Enterprises, Inc. v. Court of Appeals [Supra note 59 at 572.]* that "the liability of the registered owner of a public service vehicle . . . for damages arising from the tortious acts of the driver is primary, direct, and joint and several or solidary with the driver."

Thus, despite the opinion to the contrary (*see Appendix),* the weight of authority is to hold the employer and employee solidarily liable.

As a consequence, the employee is not an indispensable party in a suit against an employer. In a solidary obligation, each debtor is liable to pay for the entire obligation, either party indispensable and it is not necessary to join the other. *(Cerezo v. Tuazon, No. 141538, March 23, 2004).*

However, the employer is not solidarily liable with his insurer. Although the plaintiff may opt to sue the employer and the latter's insurer who issued a Third Party Liability insurance, the insurer of the offending vehicle who is directly liable is not solidarily liable. While it is true that third persons can directly sue the insurer where the insurance contract provides for indemnity against liability to such third persons, the direct liability of the insurer under indemnity contracts against third party liability does not mean that the insurer can be held solidarily liable with the insured and/or the other parties found at fault. The liability of the insurer is based on contract; that of the insured is based on tort *(Figuracion Vda. de Maglana v. Consolacion, G.R. No. 60506, August 6, 1992, 212 SCRA 218, 272-274).*

(7) Registered Owner Rule.

(7.1) Rationale

The rule in this jurisdiction is that the person who is the registered owner of a vehicle is liable for any damages caused by the negligent operation of the vehicle although the same was already sold or conveyed to another person at the time of the accident. The registered owner is liable to the injured party subject to his right of recourse against the transferee or the buyer. The Supreme Court

expounded on the rationale for the rule in *Gaudioso Erezo, et al v. Aguedo Jepte* (*G.R. No. L-9605, September 30, 1957*):

> "The Revised Motor Vehicles Law (Act No. 3992, as amended) provides that no vehicle may be used or operated upon any public highway unless the same is properly registered. It has been stated that the system of licensing and the requirement that each machine must carry a registration number, conspicuously displayed, is one of the precautions taken to reduce the danger of injury to pedestrians and other travellers from the careless management of automobiles, and to furnish a means of ascertaining the identity of persons violating the laws and ordinances, regulating the speed and operation of machines upon the highways (2 R. C. L. 1176). Not only are vehicles to be registered and that no motor vehicles are to be used or operated without being properly registered for the current year, but that dealers in motor vehicles shall furnish the Motor Vehicles Office a report showing the name and address of each purchaser of motor vehicle during the previous month and the manufacturer's serial number and motor number. (Section 5[c], Act No. 3992, as amended.)
>
> Registration is required not to make said registration the operative act by which ownership in vehicles is transferred, as in land registration cases, because the administrative proceeding of registration does not bear any essential relation to the contract of sale between the parties (Chinchilla vs. Rafael and Verdaguer, 39 Phil. 888), but to permit the use and operation of the vehicle upon any public highway (section 5[a], Act No. 3992, as amended). The main aim of motor vehicle registration is to identify the owner so that if any accident happens, or that any damage or injury is caused by the vehicle on the public highways, responsibility therefor can be fixed on a definite individual, the registered owner. Instances are numerous where vehicles running on public highways caused accidents or injuries to pedestrians or other vehicles without positive identification of the owner or drivers, or with very scant means of identification. It is to forestall these circumstances, so inconvenient or prejudicial to the public, that the motor vehicle registration is primarily ordained, in the interest of the determination of persons responsible for damages or injuries caused on public highways.
>
> "'One of the principal purposes of motor vehicles legislation is identification of the vehicle and of the operator, in case of accident; and another is that the knowledge that means of detection are always available may act as a deterrent from lax observance of the law and of the rules of conservative and safe operation. Whatever purpose there may be in these statutes, it is subordinate at the last to the primary purpose of rendering it certain that the violator of the law or of the rules of safety shall

not escape because of lack of means to discover him.' The purpose of the statute is thwarted, and the displayed number becomes a 'snare and delusion,' if courts would entertain such defenses as that put forward by appellee in this case. No responsible person or corporation could be held liable for the most outrageous acts of negligence, if they should be allowed to place a "middleman' between them and the public, and escape liability by the manner in which they recompense their servants." (King vs. Brenham Automobile Co., 145 S. W. 278, 279.)

With the above policy in mind, the question that defendant-appellant poses is: should not the registered owner be allowed at the trial to prove who the actual and real owner is, and in accordance with such proof escape or evade responsibility and lay the same on the person actually owning the vehicle? We hold with the trial court that the law does not allow him to do so; the law, with its aim and policy in mind, does not relieve him directly of the responsibility that the law fixes and places upon him as an incident or consequence of registration. Were a registered owner allowed to evade responsibility by proving who the supposed transferee or owner is, it would be easy for him, by collusion with others or otherwise, to escape said responsibility and transfer the same to an indefinite person, or to one who possesses no property with which to respond financially for the damage or injury done. A victim of recklessness on the public highways is usually without means to discover or identify the person actually causing the injury or damage. He has no means other than by a recourse to the registration in the Motor Vehicles Office to determine who is the owner. The protection that the law aims to extend to him would become illusory were the registered owner given the opportunity to escape liability by disproving his ownership. If the policy of the law is to be enforced and carried out, the registered owner should not be allowed to prove the contrary to the prejudice of the person injured, that is, to prove that a third person or another has become the owner, so that he may thereby be relieved of the responsibility to the injured person.

The above policy and application of the law may appear quite harsh and would seem to conflict with truth and justice. We do not think it is so. A registered owner who has already sold or transferred a vehicle has the recourse to a third-party complaint, in the same action brought against him to recover for the damage or injury done, against the vendee or transferee of the vehicle. The inconvenience of the suit is no justification for relieving him of liability; said inconvenience is the price he pays for failure to comply with the registration that the law demands and requires."

(7.2) Quasi-Delict Cases.

Although the rule is usually applied to common carriers, the rule had already been extended by the Supreme Court to quasi-delict cases involving private vehicles. The registered owner rule had been applied to cases involving enforcement of liability against an employer under Article 2180 of the New Civil Code even if the employer is not engaged in business.

Thus, in *Conrado Aguilar, Sr. v. Commercial Savings Bank (G.R. No. 128705, June 29, 2001, 360 SCRA 395)* the registered owner was held liable even if the offending car was already sold to the person who was driving the same at the time of the accident.

In *St. Mary's Academy v. William Carpitanos et al (G.R. No. 143363, February 6, 2002),* the registered owner was made liable for damages arising from an accident that resulted in the death of a student who joined a campaign to visit the public schools in Dipolog City to solicit enrollment. The registered owner was made liable together with the parents of the minor (another student) who was driving the vehicle. The minor-driver allegedly drove the vehicle negligently causing it to turn turtle.

In *Equitable Leasing Corporation v. Lucita Suyon et al (G.R. No. 143360, September 5, 2002)* the registered owner was held solidarily liable with the driver for the injuries and damages caused by the negligence of the driver, in spite of the fact that the vehicle may have already been the subject of an unregistered Deed of Sale in favor of another person. Unless registered with the Land Transportation Office, the sale — while valid and binding between the parties — does not affect third parties, especially the victims of accidents involving the said transport equipment. Thus, in the same case, petitioner, which is the registered owner, was held liable for the acts of the driver employed by its former lessee who has become the owner of that vehicle by virtue of an unregistered Deed of Sale. The Supreme Court ruled that the registered owner rule is applicable even if the Certificate of Registration issued by the Land Transportation Office qualifies the name of the registered owner as "EQUITABLE LEASING CORPORATION/Leased to Edwin Lim."

(7.3) Leased Vehicles.

The Supreme Court declared in *BA Finance Corporation v. Court of Appeals* (*215 SCRA 715 [1992])* that the registered owner of any vehicle, even if not for public service, is primarily liable to third persons for deaths, injuries and damages that it caused. According to the High Court, the rule is applicable even if the vehicle is leased

to third persons. The truck involved in the said case was on lease to another corporation at the time of the accident but the truck's registered owner was still made liable.

In the above-cited *Equitable Leasing Corporation v. Lucita Suyon (supra.)* the Supreme Court ruled that:

> "Further, petitioner's insistence on *FGU Insurance Corp. v. Court of Appeals* is misplaced. First, in FGU Insurance, the registered vehicle owner, which was engaged in a rent-a-car business, rented out the car. In this case, the registered owner of the truck, which is engaged in the business of financing motor vehicle acquisitions, has actually sold the truck to Ecatine, which in turn employed Tutor. Second, in FGU Insurance, the registered owner of the vehicle was not held responsible for the negligent acts of the person who rented one of its cars, because Article 2180 of the Civil Code was not applicable. We held that no vinculum juris as employer and employee existed between the owner and the driver. In this case, the registered owner of the tractor is considered under the law to be the employer of the driver, while the actual operator is deemed to be its agent.Thus, Equitable, the registered owner of the tractor, is — for purposes of the law on quasi delict — the employer of Raul Tutor, the driver of the tractor. Ecatine, Tutor's actual employer, is deemed as merely an agent of Equitable."

It is not clear, however, if the Supreme Court actually intended the situation in *FGU Insurance v.Court of Appeals (287 SCRA 719 [1998])* as an exception when it pointed out the above-quoted distinctions. It is believed that there is no valid distinction between the factual situation in *Equitable Leasing* case and the *FGU Insurance* case with respect to the requisite facts for the application of the "registered owner rule." It should be remembered that the Supreme Court clarified in *BA Finance Corporation* case that the rule still applies even if the property is leased to another.

Thus, if there would be strict application of the "registered owner rule" even to quasi-delict cases involving leased vehicles, the said rule should have been applied in *FGU Insurance v Court of Appeals* case. The ruling in *FGU Insurance* case is therefore inconsistent with the prevailing doctrine. It cannot even be an exception because there appears no reason to distinguish a lease entered into with a "rent-a-car" business (as in the *FGU Insurance Case*) and a lease entered into with a person who is not engaged in such business (as in the *BA Finance Corporation Case*). If the "registered owner rule" cannot be applied in a situation similar to the factual backdrop in *FGU Insurance* case, then it should not be applied to all cases involving vehicles that are

on lease (rather than already sold) at the time of the accident.

It is believed that this latter view is more acceptable where the vehicle involved is not a common carrier. It is believed that the registered owner of a leased vehicle can only be liable in the situation mentioned in *FGU Insurance Corporation vs. Court of Appeals, 287 SCRA 719 [1998]* - if it can be established that the true nature of the alleged lease contract was nothing more than a disguise effected by the alleged lessor to relieve itself of the burdens and responsibilities of an employer. *(ibid., citing MYC-Agro Industrial Corporation vs. Vda. De Caldo, 132 SCRA 10 [1984]).* It is submitted that the registered owner should be allowed to prove that the vehicle was legitimately leased to another person without intent to evade any existing law.

(7.4) Stolen Vehicles.

The registered owner is also not liable if the vehicle was taken from his garage without his knowledge and consent. To hold the registered owner liable would be absurd as it would be like holding liable the owner of a stolen vehicle for an accident caused by the person who stole such vehicle *(Duavit vs. Court of Appeals, 173 SCRA 490, 496 [1989]).* In this situation, the reason for the application of the "registered owner rule" is not extant.

(7.5) Effect on Vicarious Nature of Liability.

It should be recalled that vicarious liability of employers under Article 2180 of the Civil Code requires the presence of an employer-employee relationship. The provision also requires that the employee was performing his assigned task at the time of the accident. Obviously, these requirements can never be established if the "registered owner" is the only person who is sought to be held liable for the negligent act of the driver of another. The reality is that the "registered owner" is not the employer of the driver.

There are at least two (2) possible situations: either the new owner or transferee was the driver at the time of the accident or it could be the employee or agent of the transferee who was driving the vehicle. It is believed, however, that the nature of the liability as vicarious liability can (and should) still be maintained even if the "registered owner rule" will be applied in a situation where the employee of the transferee was the driver. It is believed that it is necessary to maintain the vicarious nature of liability so that Article 2180 of the Civil Code can be properly invoked. What should be avoided is for the liability to be turned into an absolute or strict liability because it is not a liability contemplated under the Article 2180.

The Supreme Court explained in *Equitable Leasing Corporation v. Suyom et al. (supra. citing First Malayan Leasing and Finance Corporation v. Court of Appeals, 209 SCRA 660, June 9, 1992)* that in contemplation of law, the owner/operator of record is the employer of the driver, the actual operator and employer being considered as merely its agent. In order to maintain the vicarious nature of the liability of the "registered owner", the requisites under Article 2180 must be present bearing in mind that the new owner is deemed an extension of the personality of the registered owner. This means that there must be employer-employee relationship between the driver and the present owner-buyer-lessee (who is deemed the agent of the registered owner) and the driver must have caused the injury in the performance of his functions. Under this conceptual framework, the registered owner should be allowed set up the defense of due diligence in the selection and supervision of the employee by allowing him to prove that the new owner exercised due diligence in the selection and supervision of the driver. Exercise of due diligence by the new owner should benefit the registered owner because he is being made liable under Article 2180 of the Civil Code. A contrary rule would make the liability absolute.

The situation would be different, however, if the driver is the present owner/buyer/lessee himself. In this case, the liability is not vicarious but direct liability under Article 2176 of the Civil Code. It is as if the registered owner is the actor - the person who acted negligently. He will be considered in legal contemplation as the tortfeasor. Thus, if the present owner or the buyer is the one negligently driving the vehicle at the time accident, then it is no longer necessary to establish the requisites of vicarious liability of employers under Article 2180. This situation obtains in *Conrado Aguilar Sr. v. Commercial Savings Bank*.

Unfortunately, it appears that the Supreme Court is hewing to the opposite direction. More and more, the liability is being transformed into strict or absolute liability. For example, in *Nostradamus Villanueva v. Prescilla R. Domingo (No. 144274, September 20, 2004)*, the Supreme Court rejected the defense that the registered owner is not liable for damages since the driver of the vehicle at the time of the accident was not an authorized driver of the new (actual) owner of the vehicle. The Court explained that whether the driver is authorized or not by the actual owner is irrelevant to determining the liability of the registered owner who the law holds primarily and direct liability responsible for any accident, injury or death caused by the operation of the vehicle. The Court ruled that it is only the new owner who could have raised the defense of theft to prove that he is not liable.

(7.6) Kabit System.

The "registered owner" rule is applicable whenever the persons involved are engaged in what is known as the "*kabit* system." The "*kabit* system" is an arrangement whereby a person who has been granted a certificate of public convenience allows other persons who own motor vehicles to operate them under his license, sometimes for a fee or percentage of the earnings. Although the parties to such an agreement are not outrightly penalized by law, the *kabit* system is invariably recognized as being contrary to public policy and therefore void and inexistent under Art. 1409 of the Civil Code *(Aberlardo Lim et al. v. Court of Appeals, et al., No. 125817, January 16, 2002; Baliwag Transit Inc. v. Court of Appeals, G.R. No. 57493, 7 January 1987, 147 SCRA 82; Teja Marketing v. IAC, G.R. No. 65510, 9 March 1987, 148 SCRA 347; Lita Enterprises, Inc. v. Second Civil Cases Division, IAC, G.R. No. 64693, 27 April 1984, 129 SCRA 79).*

In the early case of *Dizon v. Octavio (51 O.G. 4059 [1955]),* the Supreme Court explained that one of the primary factors considered in the granting of a certificate of public convenience for the business of public transportation is the financial capacity of the holder of the license, so that liabilities arising from accidents may be duly compensated. The "*kabit* system" renders illusory such purpose and, worse, may still be availed of by the grantee to escape civil liability caused by a negligent use of a vehicle owned by another and operated under his license. If a registered owner is allowed to escape liability by proving who the supposed owner of the vehicle is, it would be easy for him to transfer the subject vehicle to another who possesses no property with which to respond financially for the damage done. Thus, for the safety of passengers and the public who may have been wronged and deceived through the baneful "*kabit* system," the registered owner of the vehicle is not allowed to prove that another person has become the owner so that he may be thereby relieved of responsibility *(See also: Santos v. Sibug, No. L-26815, 26 May 1981, 104 SCRA 520; Vargas v. Langcay, 116 Phil. 478 (1962); Tamayo v. Aquino 105 Phil. 949 (1959); Erezo v. Jepte, 102 Phil. 103 (1957).*

Consistent with the policy on "*kabit* system," the registered owner who is sought to be made liable for quasi-delict cannot be allowed to prove the actual operator of the vehicle involved in the accident. He should not be allowed to escape liability even if in fact another person is operating the carrier under a "*kabit* system."

However, the Supreme Court explained in *Abelardo Lim et al v. Court of Appeals et al., (supra.)* that the thrust of the law in enjoin-

ing the *kabit* system is not so much as to penalize the parties but to identify the person upon whom responsibility may be fixed in case of an accident with the end view of protecting the riding public. The policy therefore loses its force if the public at large is not deceived, much less involved.

Thus, the policy cannot be applied if the plaintiff is the person who is allegedly involved in such system. *Abelardo Lim et al. v. Court of Appeals, et al.* involved the private respondent who was the owner of a passenger jeepney that was damaged because of the negligence of the driver of the petitioner. The private respondent purchased the passenger jeepney in 1982 from another person who was the holder of a certificate of public convenience for the operation of a public utility vehicle plying the Monumento-Bulacan route. While private respondent continued offering the jeepney for public transport services he did not have the registration of the vehicle transferred in his name nor did he source for himself a certificate of public convenience for its operation. Thus, when the private respondent sued for damages, the petitioner argued that he (private respondent) has no legal personality to bring the action because he is allegedly not the real party in interest in the suit. The petitioner argued that petitioner is not the real party in interest because he is not the registered owner under the certificate of public convenience. The Supreme Court rejected the argument of the petitioner explaining that:

> "In the present case it is at once apparent that the evil sought to be prevented in enjoining the *kabit* system does not exist. *First*, neither of the parties to the pernicious *kabit* system is being held liable for damages. *Second*, the case arose from the negligence of another vehicle in using the public road to whom no representation, or misrepresentation, as regards the ownership and operation of the passenger jeepney was made and to whom no such representation, or misrepresentation, was necessary. Thus it cannot be said that private respondent Gonzales and the registered owner of the jeepney were in estoppel for leading the public to believe that the jeepney belonged to the registered owner. *Third*, the riding public was not bothered nor inconvenienced at the very least by the illegal arrangement. On the contrary, it was private respondent himself who had been wronged and was seeking compensation for the damage done to him. Certainly, it would be the height of inequity to deny him his right."

CASES:

VALENZUELA vs. COURT OF APPEALS

253 SCRA 303 [1996]

[The employee of Alexander Commercial, Inc. was found negligent in causing injury to the petitioner. The employer is sought to be held liable under Article 2180.]

We now come to the question of the liability of Alexander Commercial, Inc. Li's employer. In denying liability on the part of Alexander Commercial, the respondent court held that:

There is no evidence, not even defendant Li's testimony, that the visit was in connection with official matters. His functions as assistant manager sometimes required him to perform work outside the office as he has to visit buyers and company clients, but he admitted that on the night of the accident he came from BF Homes Parañaque he did not have 'business from the company.' (pp. 25-26, tsn, Sept. 23, 1991). The use of the company car was partly required by the nature of his work, but the privilege of using it for non-official business is a 'benefit,' apparently referring to the fringe benefits attaching to his position.

Under the civil law, an employer is liable for the negligence of his employees in the discharge of their respective duties, the basis of which liability is not *respondeat superior*, but the relationship of *pater familias*, which theory bases the liability of the master ultimately on his own negligence and not on that of his servant. *(Cuison vs. Norton and Harrison Co., 55 Phil. 18)*. Before an employer may be held liable for the negligence of his employee, the act or omission which caused damage must have occurred while an employee was in the actual performance of his assigned tasks or duties. *(Francis High School vs. Court of Appeals, 194 SCRA 341)*. In defining an employer's liability for the acts done within the scope of the employee's assigned tasks, the Supreme Court has held that this includes any act done by an employee, in furtherance of the interests of the employer or for the account of the employer at the time of the infliction of the injury or damage. *(Filamer Christian Institute vs. Intermediate Appellate Court, 212 SCRA 637)*. An employer is expected to impose upon its employees the necessary discipline called for in the performance of any act 'indispensable to the business and beneficial to their employer.' (at p. 645).

In light of the foregoing, We are unable to sustain the trial court's finding that since defendant Li was authorized by the company to use the company car 'either officially or socially or even bring it home,' he can be considered as using the company car in the service of his employer or on the occasion of his functions. Driving the company car was not among his functions as assistant manager; using it for non-official purposes would appear to be a fringe benefit, one of the perks attached to his position. But to impose liability upon the employer under Article 2180 of the Civil Code, earlier quoted, there must be a showing that the damage was caused by their employees in the service of the employer or on the occasion of their functions. There is no evidence that Richard Li was at the time of the accident performing any act in furtherance of the company's business or its interests, or at least for

its benefit. The imposition of solidary liability against defendant Alexander Commercial Corporation must therefore fail.

We agree with the respondent court that the relationship in question is not based on the principle of *respondeat superior*, which holds the master liable for acts of the servant, but that of *pater familias*, in which the liability ultimately falls upon the employer, for his failure to exercise the diligence of a good father of the family in the selection and supervision of his employees. It is up to this point, however, that our agreement with the respondent court ends. Utilizing the *bonus pater familias* standard expressed in Article 2180 of the Civil Code, we are of the opinion that Li's employer, Alexander Commercial, Inc. is jointly and solidarily liable for the damage caused by the accident of June 24, 1990.

First, the case of *St. Francis High School vs. Court of Appeals,* upon which respondent court has placed undue reliance, dealt with the subject of a school and its teacher's supervision of students during an extracurricular activity. These cases now fall under the provision on special parental authority found in Art. 218 of the Family Code which generally encompasses all authorized school activities, whether inside or outside school premises.

Second, the employer's primary liability under the concept of *pater familias* embodied by Art. 2180 (in relation to Art. 2176) of the Civil Code is quasi-delictual or tortious in character. His liability is relieved on a showing that he exercised the diligence of a good father of the family in the selection and supervision of its employees. Once evidence is introduced showing that the employer exercised the required amount of care in selecting its employees, half of the employer's burden is overcome. The question of diligent supervision however, depends on the circumstances of employment.

Ordinarily, evidence demonstrating that the employer has exercised diligent supervision of its employee during the performance of the latter's assigned tasks would be enough to relieve him of the liability imposed by Article 2180 in relation to Article 2176 of the Civil Code. The employer is not expected to exercise supervision over either the employee's private activities or during the performance of tasks either unsanctioned by the former or unrelated to the employee's tasks. The case at bench presents a situation of a different character, involving a practice utilized by large companies with either their employees of managerial rank or their representatives.

It is customary for large companies to provide certain classes of their employees with courtesy vehicles. These company cars are either wholly owned and maintained by the company itself or are subject to various plans through which employees eventually acquire their vehicles after a given period of service, or after paying a token amount. Many companies provide liberal "car plans" to enable their managerial or other employees of rank to purchase cars, which, given the cost of vehicles these days, they would not otherwise be able to purchase on their own.

Under the first example, the company actually owns and maintains the car up to the point of turnover of ownership to the employee; in the second

example, the car is really owned and maintained by the employee himself. In furnishing vehicles to such employees, are companies totally absolved of responsibility when an accident involving a company-issued car occurs during private use after normal office hours?

Most pharmaceutical companies, for instance, which provide cars under the first plan, require rigorous tests of road worthiness from their agents prior to turning over the car (subject of company maintenance) to their representatives. In other words, like a good father of a family, they entrust the company vehicle only after they are satisfied that the employee to whom the car has been given full use of the said company car for company or private purposes will not be a threat or menace to himself, the company or to others. When a company gives full use and enjoyment of a company car to its employee, it in effect guarantees that it is, like every good father, satisfied that its employee will use the privilege reasonably and responsively.

In the ordinary course of business, not all company employees are given the privilege of using a company-issued car. For large companies other than those cited in the example of the preceding paragraph, the privilege serves important business purposes either related to the image of success an entity intends to present to its clients and to the public in general, or — for practical and utilitarian reasons — to enable its managerial and other employees of rank or its sales agents to reach clients conveniently. In most cases, providing a company car serves both purposes. Since important business transactions and decisions may occur at all hours in all sorts of situations and under all kinds of guises, the provision for the unlimited use of a company car therefore principally serves the business and goodwill of a company and only incidentally the private purposes of the individual who actually uses the car, the managerial employee or company sales agent. As such, in providing for a company car for business use and/or for the purpose of furthering the company's image, a company owes a responsibility to the public to see to it that the managerial or other employees to whom it entrusts virtually unlimited use of a company issued car are able to use the company issue capably and responsibly.

In the instant case, Li was an Assistant Manager of Alexander Commercial, Inc. In his testimony before the trial court, he admitted that his functions as Assistant Manager did not require him to scrupulously keep normal office hours as he was required quite often to perform work outside the office, visiting prospective buyers and contacting and meeting with company clients. These meetings, clearly, were not strictly confined to routine hours because, as a managerial employee tasked with the job of representing his company with its clients, meetings with clients were both social as well as work-related functions. The service car assigned to Li by Alexander Commercial, Inc. therefore enabled both Li — as well as the corporation — to put up the front of a highly successful entity, increasing the latter's goodwill before its clientele. It also facilitated meeting between Li and its clients by providing the former with a convenient mode of travel.

Moreover, Li's claim that he happened to be on the road on the night of the accident because he was coming from a social visit with an officemate in Parañaque was a bare allegation which was never corroborated in the court below. It was obviously self-serving. Assuming he really came from his officemate's place, the same could give rise to speculation that he and his officemate had just been from a work-related function, or they were together to discuss sales and other work related strategies.

In fine, Alexander Commercial, Inc. has not demonstrated, to our satisfaction that it exercised the care and diligence of a good father of the family in entrusting its company car to Li. No allegations were made as to whether or not the company took the steps necessary to determine or ascertain the driving proficiency and history of Li, to whom it gave full and unlimited use of a company car. Not having been able to overcome the burden of demonstrating that it should be absolved of liability for entrusting its company car to Li, said company, based on the principle of *bonus pater familias*, ought to be jointly and severally liable with the former for the injuries sustained by Ma. Lourdes Valenzuela during the accident.

THE SPOUSES BERNABE AFRICA, et al. vs. CALTEX (PHILS.), INC., MATEO BOQUIREN and THE COURT OF APPEALS
G.R. No. L-12986, March 31, 1966

It appears that in the afternoon of March 18, 1948 a fire broke out at the Caltex service station at the corner of Antipolo street and Rizal Avenue, Manila. It started while gasoline was being hosed from a tank truck into the underground storage, right at the opening of the receiving tank where the nozzle of the hose was inserted. The fire spread to and burned several neighboring houses, including the personal properties and effects inside them. Their owners, among them petitioners here, sued respondents Caltex (Phils.), Inc. and Mateo Boquiren, the first as alleged owner of the station and the second as its agent in charge of operation. Negligence on the part of both of them was attributed as the cause of the fire. The Supreme Court, applying the doctrine of *res ipsa loquitur*, found that there was negligence on the part of Boquiren.

The next issue is whether Caltex should be held liable for the damages caused to appellants. This issue depends on whether Boquiren was an independent contractor, as held by the Court of Appeals, or an agent of Caltex. This question, in the light of the facts not controverted, is one of law and hence may be passed upon by this Court. These facts are: (1) Boquiren made an admission that he was an agent of Caltex; (2) at the time of the fire Caltex owned the gasoline station and all the equipment therein; (3) Caltex exercised control over Boquiren in the management of the station; (4) the delivery truck used in delivering gasoline to the station had the name CALTEX painted on it; and (5) the license to store gasoline at the station was in the name of Caltex, which paid the license fees. (Exhibit T-Africa; Exhibit U-Africa; Exhibit X-5 Africa; Exhibit X-6 Africa; Exhibit Y-Africa).

In Boquiren's amended answer to the second amended complaint, he denied that he directed one of his drivers to remove gasoline from the truck into the tank and alleged that the "alleged driver, if one there was, was not in his employ, the driver being an employee of the Caltex (Phils.), Inc. and/or the owners of the gasoline station." It is true that Boquiren later on amended his answer, and that among the changes was one to the effect that he was not acting as agent of Caltex. But then again, in his motion to dismiss appellants' second amended complaint the ground alleged was that it stated no cause of action since under the allegations thereof he was merely acting as agent of Caltex, such that he could not have incurred personal liability. A motion to dismiss on this ground is deemed to be an admission of the facts alleged in the complaint.

Caltex admits that it owned the gasoline station as well as the equipment therein, but claims that the business conducted at the service station in question was owned and operated by Boquiren. But Caltex did not present any contract with Boquiren that would reveal the nature of their relationship at the time of the fire. There must have been one in existence at that time. Instead, what was presented was a license agreement manifestly tailored for purposes of this case, since it was entered into shortly before the expiration of the one-year period it was intended to operate. This so-called license agreement (Exhibit 5-Caltex) was executed on November 29, 1948, but made effective as of January 1, 1948 so as to cover the date of the fire, namely, March 18, 1948. This retroactivity provision is quite significant, and gives rise to the conclusion that it was designed precisely to free Caltex from any responsibility with respect to the fire, as shown by the clause that Caltex "shall not be liable for any injury to person or property while in the property herein licensed, it being understood and agreed that LICENSEE (Boquiren) is not an employee, representative or agent of LICENSOR (Caltex)."

But even if the license agreement were to govern, Boquiren can hardly be considered an independent contractor. Under that agreement Boquiren would pay Caltex the purely nominal sum of P1.00 for the use of the premises and all the equipment therein. He could sell only Caltex products. Maintenance of the station and its equipment was subject to the approval, in other words control, of Caltex. Boquiren could not assign or transfer his rights as licensee without the consent of Caltex. The license agreement was supposed to be from January 1, 1948 to December 31, 1948, and thereafter until terminated by Caltex upon two days prior written notice. Caltex could at any time cancel and terminate the agreement in case Boquiren ceased to sell Caltex products, or did not conduct the business with due diligence, in the judgment of Caltex. Termination of the contract was therefore a right granted only to Caltex but not to Boquiren. These provisions of the contract show the extent of the control of Caltex over Boquiren. The control was such that the latter was virtually an employee of the former.

"Taking into consideration the fact that the operator owed his position to the company and the latter could remove him or terminate his services at will; that the service station belonged to the company and bore its tradename

and the operator sold only the products of the company; that the equipment used by the operator belonged to the company and were just loaned to the operator and the company took charge of their repair and maintenance; that an employee of the company supervised the operator and conducted periodic inspection of the company's gasoline and service station; that the price of the products sold by the operator was fixed by the company and not by the operator; and that the receipts signed by the operator indicated that he was a mere agent, the finding of the Court of Appeals that the operator was an agent of the company and not an independent contractor should not be disturbed.

"To determine the nature of a contract courts do not have or are not bound to rely upon the name or title given it by the contracting parties, should there be a controversy as to what they really had intended to enter into, but the way the contracting parties do or perform their respective obligations stipulated or agreed upon may be shown and inquired into, and should such performance conflict with the name or title given the contract by the parties, the former must prevail over the latter." *(Shell Company of the Philippines, Ltd. vs. Firemens' Insurance Company of Newark, New Jersey, 100 Phil. 757).*

"The written contract was apparently drawn for the purpose of creating the apparent relationship of employer and independent contractor, and of avoiding liability for the negligence of the employees about the station; but the company was not satisfied to allow such relationship to exist. The evidence shows that it immediately assumed control, and proceeded to direct the method by which the work contracted for should be performed. By reserving the right to terminate the contract at will, it retained the means of compelling submission to its orders. Having elected to assume control and to direct the means and methods by which the work has to be performed, it must be held liable for the negligence of those performing service under its direction. We think the evidence was sufficient to sustain the verdict of the jury." *(Gulf Refining Company vs. Rogers 57 S.W. 2d 183).*

Caltex further argues that the gasoline stored in the station belonged to Boquiren. But no cash invoices were presented to show that Boquiren had bought said gasoline from Caltex. Neither was there a sales contract to prove the same.

PILIPINAS SHELL PETROLEUM vs. COURT OF APPEALS 221 SCRA 389 [1993]

Was the hydro-pressure test of the underground storage tank in private respondent Clarita T. Camacho's gasoline station conducted by an independent contractor or not? A negative answer will make petitioner Pilipinas Shell Petroleum Corporation (Shell, for brevity) liable for the said independent contractor's acts or omissions; otherwise, no. This is the issue that this Court is called upon to resolve in this case.

The facts are as follows:

Private respondent Clarita T. Camacho (private respondent for short) was the operator of a gasoline station in Naguilian Road, Baguio City, wherein she sells petitioner Shell's petroleum products. Sometime in April 1983, private respondent requested petitioner to conduct a hydro-pressure test on the underground storage tanks of the said station in order to determine whether or not the sales losses she was incurring for the past several months were due to leakages therein. Petitioner acceded to the said request and on April 27, 1983, one Jesus "Jessie" Feliciano together with other workers, came to private respondent's station with a Job Order from petitioner to perform the hydro-pressure test.

On the same day, Feliciano and his men drained the underground storage tank which was to be tested of its remaining gasoline. After which, they filled the tank with water through a water hose from the deposit tank of private respondent. Then, after requesting one of private respondent's gasoline boys to shut off the water when the tank was filled, Feliciano and his men left. At around 2:00 a.m. the following day, private respondent saw that the water had reached the lip of the pipe of the underground storage tank and so, she shut off the water faucet.

At around 5:30 a.m., private respondent's husband opened the station and started selling gasoline. But at about 6:00 a.m., the customers who had bought gasoline returned to the station complaining that their vehicles stalled because there was water in the gasoline that they bought. On account of this, private respondent was constrained to replace the gasoline sold to the said customers. However, a certain Eduardo Villanueva, one of the customers, filed a complaint with the police against private respondent for selling the adulterated gasoline. In addition, he caused the incident to be published in two local newspapers.

Feliciano, who arrived later that morning, did not know what caused the water pollution of the gasoline in the adjacent storage tank. So he called up Nick Manalo, Superintendent of Shell's Poro Point Installation at San Fernando, La Union, and referred the matter to the latter. Manalo went up to Baguio in the afternoon to investigate. Thereafter, he and Feliciano again filled with water the underground storage tank undergoing hydro-pressure test whereat they noticed that the water was transferring to the other tanks from whence came the gasoline being sold. Manalo asked permission from Shell's Manila Office to excavate the underground pipes of the station. Upon being granted permission to do so, Feliciano and his men began excavating the driveway of private respondent's station in order to expose the underground pipeline. The task was continued by one Daniel "Danny" Pascua who replaced Feliciano, Pascua removed the corroded pipeline and installed new independent vent pipe for each storage tank.

Meanwhile, petitioner undertook to settle the criminal complaint filed by Villanueva. Subsequently, Villanueva filed an Affidavit of Desistance, declaring, *inter alia* —

> "THAT, after careful evaluation of the surrounding cir-

> cumstances, especially the explanation of the representatives of SHELL Phils., that the gasoline tanks of Mrs. Camacho were subject to Hydro test, in such a way that water was used for the said test, I believe that she may not have had anything to do with the filling of water in the tank of my car;
>
> x x x x x x x x x
>
> THAT, said representatives of SHELL Phils. have interceded for and in behalf of Mrs. Camacho and have fully satisfied my claim against her.
>
> THAT, in view of all the foregoing I do not intend to prosecute the case and I am therefore asking for the dismissal of the case against Mrs. Camacho."

Thereafter, private respondent demanded from petitioner the payment of damages in the amount of P10,000.00. Petitioner, instead, offered private respondent additional credit line and other beneficial terms, which offer was, however, rejected.

Subsequently, or on October 12, 1983, private respondent filed before the trial court a complaint for damages against petitioner due to the latter's alleged negligence in the conduct of the hydro-pressure test in her gasoline station. For its part, petitioner denied liability because, according to it, the hydro-pressure test on the underground storage tanks was conducted by an independent contractor.

[The trial court dismissed private respondent's complaint for damages for the reason that the hydro-pressure test which brought about the incident was conducted by Jesus Feliciano, who was neither an employee nor agent nor representative of the defendant. From the adverse decision of the trial court, private respondent appealed to the Court of Appeals which court reversed the decision of the trial court and order the defendant to pay damages.]

Petitioner moved to have the above decision reconsidered but the same was denied in a Resolution dated March 9, 1992. Hence, this recourse.

As stated at the very outset, the pivotal issue in this case is whether or not petitioner should be held accountable for the damage to private respondent due to the hydro-pressure test conducted by Jesus Feliciano.

It is a well-entrenched rule that an employer-employee relationship must exist before an employer may be held liable for the negligence of his employee. It is likewise firmly settled that the existence or non-existence of the employer-employee relationship is commonly to be determined by examination of certain factors or aspects of that relationship. These include: (a) the manner of selection and engagement of the putative employee; (b) the mode of payment of wages; (c) the presence or absence of a power to control the putative employee's conduct, although the latter is the most important element.

In this case, respondent Court of Appeals held petitioner liable for the damage caused to private respondent as a result of the hydro-pressure test conducted by Jesus Feliciano due to the following circumstances:

1. Feliciano was hired by petitioner;

2. He received his instructions from the Field Engineer of petitioner, Mr. Roberto Mitra;

3. While he was at private respondent's service station, he also received instructions from Nick Manalo, petitioner's Poro Point Depot Superintendent;

4. Instructions from petitioner's Manila Office were also relayed to him while he was at the job site at Baguio City;

5. His work was under the constant supervision of petitioner's engineer;

6. Before he could complete the work, he was instructed by Mr. Manalo, petitioner's Superintendent, to discontinue the same and it was turned over to Daniel Pascua, who was likewise hired by petitioner.

Based on the foregoing, respondent Court of Appeals concluded that Feliciano was not an independent contractor but was under the control and supervision of petitioner in the performance of the hydro-pressure test, hence, it held petitioner liable for the former's acts and omissions.

We are not in accord with the above finding of respondent Court of Appeals. As aptly held by the trial court, petitioner did not exercise control and supervision over Feliciano with regard to the manner in which he conducted the hydro-pressure test. All that petitioner did, through its Field Engineer, Roberto Mitra, was relay to Feliciano the request of private respondent for a hydro-pressure test, to determine any possible leakages in the storage tanks in her gasoline station. The mere hiring of Feliciano by petitioner for that particular task is not the form of control and supervision contemplated by law which may be the basis for establishing an employer-employee relationship between petitioner and Feliciano. The fact that there was no such control is further amplified by the absence of any Shell representative in the job site time when the test was conducted. Roberto Mitra was never there. Only Feliciano and his men were.

True, it was petitioner who sent Feliciano to private respondent's gasoline station in conduct the hydro-pressure test as per the request of private respondent herself. But this single act did not automatically make Feliciano an employee of petitioner. As discussed earlier, more than mere hiring is required. It must further be established that petitioner is the one who is paying Feliciano's salary on a regular basis; that it has the power to dismiss said employee, and more importantly, that petitioner has control and supervision over the work of Feliciano. The last requisite was sorely missing in the instant case.

A careful perusal of the records will lead to the conclusion that Feliciano is an independent contractor. Section 8 of Rule VIII, Book III of the Omnibus Rules Implementing the Labor Code provides:

> "Sec. 8. *Job contracting*. — There is job contracting permissible under the Code if the following conditions are met:
>
> (1) The contractor carries on an independent business and undertakes the contract work on his own account under his own responsibility according to his own manner and method, free from the control and direction of his employer or principal in all matters connected with the performance of the work except as to the results thereof; and
>
> (2) The contractor has substantial capital or investment in the form of tools, equipment, machineries, work premises, and other materials which are necessary in the conduct of his business."

Feliciano is independently maintaining a business under a duly registered business name, "JFS Repair and Maintenance Service," and is duly registered with the Bureau of Domestic Trade. He does not enjoy a fixed salary but instead charges a lump sum consideration for every piece of work he accomplishes. If he is not able to finish his work, he does not get paid, as what happened in this case. Further, Feliciano utilizes his own tools and equipment and has a complement of workers. Neither is he required to work on a regular basis. Instead, he merely awaits calls from clients such as petitioner whenever repairs and maintenance services are requested. Moreover, Feliciano does not exclusively service petitioner because he can accept other business but not from other oil companies. All these are the hallmarks of an independent contractor.

Being an independent contractor, Feliciano is responsible for his own acts and omissions. As he alone was in control over the manner of how he was to undertake the hydro-pressure test, he alone must bear the consequences of his negligence, if any, in the conduct of the same.

Anent the issue of damages, the same has been rendered moot by the failure of private respondent to establish an employer-employee relationship between petitioner and Feliciano. Absent said relationship, petitioner cannot be held liable for the acts and omissions of the independent contractor, Feliciano.

b. Liability of Employer under the Revised Penal Code.

(1) Requisites.

Vicarious liability of the employer *ex delicto* is governed by Article 103 of the Revised Penal Code; the liability imposed is subsidiary. The statutory provision requires the concurrence of the following: a) that the employer is engaged in any kind of industry; b) that the

employee was convicted of the offense committed in the discharge of his duties and c) that the employee is insolvent. *(Carpio vs. Doroja, et al., 180 SCRA 1 [1989]; Heirs of Diaz-Leus vs. Melvida, 158 SCRA 21 [1988]; Joaquin vs. Aniceto, 128 SCRA 308; Basa Marketing Corporation vs. Bolinao, 117 SCRA 156).*

(1.1) Industry or Work.

Industry has been defined as any department or branch of arts, occupation or business especially one which employs such labor and capital and is a distinct branch of trade as the sugar industry. *(Heirs of Diaz-Leuz vs. Melvida, supra, p. 28).* Thus, an owner of a motor vehicle that is strictly for family use or private purpose, is not subsidiarily liable under Article 103 because he is not engaged in industry or work. *(Steinmetz vs. Valdez, 72 Phil. 92).*

(1.2) Conviction and Binding Effect of Findings.

Before the employer's subsidiary liability may be proceeded against, it is imperative that there is a criminal action whereby the employee's criminal negligence or delict and corresponding liability therefor are proved. If no criminal action was instituted, the employer's liability will not be predicated on Article 103. Conviction is a condition *sine qua non*. It would be absurd if conviction is not required because it will then result in a situation where there is subsidiary liability even without the primary liability being previously established. *(Franco vs. Intermediate Appellate Court, 178 SCRA 331 [1989]).* The employer becomes *ipso facto* subsidiarily liable upon the conviction of his employee and upon proof of the latter's insolvency. *(Matinez vs. Barredo, 81 Phil. 1 [1948]; Almeida, et al. vs. Abaroa, 8 Phil. 178; Wise & Co. vs. Larion, 45 Phil. 314; Francisco vs. Onrubia, 46 Phil. 327; Province of Ilocos Sur vs. Tolentino, 56 Phil. 829).* In the same manner, the acquittal of the employee wipes out not only the said employee's primary liability but the subsidiary liability as well. *(Alvarez vs. Court of Appeals, 158 SCRA 57 [1988]).*

The subsidiary liability arises after conviction. The conviction is conclusive on the negligence or fault of the employee and the employer cannot present evidence to prove that his employee was not at fault. The defense that he exercised due diligence in the selection and supervision of the employee is not even available to him under Article 103. *(Connel Bors. vs. Aduana, 91 Phil. 79; Yumul vs. Juliano and Pampanga Bus Co., 72 Phil. 94).*

The conviction is conclusive on the employer not only with regard to entitlement of the offended party to the civil liability but also to

the amount awarded. *(Carpio vs. Doroja, 180 SCRA 1, 8 [1989]; Vda. de Paman vs. Seneris, 115 SCRA 709).* In enforcing the subsidiary liability of the employer, the court has no other function than to render decision based upon the indemnity awarded in the criminal case. It has no power to amend or modify it even if in its opinion an error has been committed in the decision. *(Carpio vs. Doroja, supra; Rotea vs. Halili, 109 Phil. 495).* The subsidiary liability is co-extensive with that of the judgment rendered against the employee. *(Arambulo vs. Manila Electric Co., 55 Phil. 75; Gonzales vs. Halili, 104 Phil. 1059).* Necessarily, the employer cannot present evidence that the damage that the offended party suferred is less than what was awarded by the court. Neither can the private offended party seek an increase of the award because the master cannot incur greater liability than his convicted employee. *(Bantoto vs. Bobis, 18 SCRA 690 [1966]).*

Consistently, the employer cannot also appeal the conviction. In absence of collusion between the accused-employee and one offended party, the conviction is binding on the employer. *(Philippine Rabbit Bus Line Inc. v. People, No. 147703, April 14, 2004).*

(1.3) Performance of Assigned Task.

The subsidiary liability of the employer does not arise from any and all offenses that the employee may commit. It is limited to those which he shall be found guilty of in the discharge of his duties. The law does not say that the law must be one that was committed while in the discharge of duties. It could not be contemplated that an employer will be held responsible for any misdeed that his employee could have done whether or not he was performing his assigned task. *(Basa Marketing Corporation vs. Bolinao Security and Investigation Service, Inc., September 30, 1982).*

(1.4) Insolvency.

Jurisprudence cites as one of the requisites for the enforcement of the subsidiary liability of the employer the insolvency on the part the employee. Insolvency has been defined as the inability or the lack of means to pay one's debts as they fall due. *(Aquino, Revised Penal Code, 1997 Ed., p. 891).* The employee's insolvency may be established using the return of the sheriff that writ of execution was returned unsatisfied because the accused had no property. *(Manalo vs. Robles Transportation Co., Inc., 99 Phil. 729; Quiambao vs. Mora, May 25, 1960; see also Annotation, 18 SCRA 695).* It can also be established through the certificate of the Director of Prisons that the employee

is serving or has served subsidiary imprisonment by reason of insolvency. *(Nagrampa vs. Mulvancy, McMillan & Co., Inc., 97 Phil. 724; Martinez vs. Barredo, 81 Phil. 1).*

Justice J.B.L. Reyes in his ponencia in *Bantoto, et al. vs. Bobis, et al.* (18 SCRA 690 [1966]), expressed the view that insolvency is not required under Article 103. He explained that the insolvency of the servant or employee is nowhere mentioned in the said article as a condition precedent. He further explained that in truth, such insolvency is required only when the liability of the master is being made effective by execution levy, but not for the rendition of judgment against the master. He said: "The subsidiary character of the employer's responsibility merely imports that the latter's property is not to be seized without first exhausting that of the servant. And by analogy to a regular guarantor (who is the prototype of persons subsidiarily responsible), the master may not demand prior exhaustion of the servant's (principal obligors) properties if he cannot 'point out to the creditor available property of the debtor within Philippine territory, sufficient to cover the amount of the debt.' *(cf. Civil Code, Article 1060)*. The rule is logical, for as between the offended party (as creditor) and the culprit's master or employer, it is the latter who is in better position to determine the resources and solvency of the servant or employee." The statement in *Marquez vs. Castillo* (68 Phil. 571) to the effect that insolvency is required was considered by Justice J.BL. Reyes as a mere *obiter*.

(2) Enforcement of Subsidiary Liability.

The controlling rule is that the subsidiary liability of the employer can be enforced in the same criminal case where the employee was convicted. The proper remedy is to file a motion for a subsidiary writ of execution in the said case. The Supreme Court observed in *Yonaha vs. Court of Appeals* (255 SCRA 397, 401 [1996]), that execution against the employer must not issue just a matter of course, and it behooves the court, as a measure of due process to the employer, to determine and resolve *a priori*, in a hearing set for the purpose, the legal applicability and propriety of the employer's liability.

There are those who still subscribe to the view that the subsidiary liability should be enforced in another case. Thus, it was explained in the dissenting opinion in *Martinez vs. Barredo (supra),* that the binding effect of the conviction of the employee is contrary to the fundamental principle that no one shall be condemned or made answerable without an opportunity to defend; that in order to bind

one by a judgment to which he is not a party, he should be allowed all means of defense open to him had he been made a party. Judge Sanco, on the other hand, explains that to hold the employer "subsidiarily liable without instituting a separate civil action to enforce that liability would not only deprive him of his right to be heard on the issues in connection therewith but the court would also be rendering judgment without jurisdiction over both the employer's person and over the subject matter of his subsidiary liability." *(2 Sanco 461).*

It appears that the ruling in *Yonaha* addresses the right of the employer to be heard by requiring a hearing. During the said hearing, the employer must be allowed to adduce evidence to establish any defense that is appropriate.

G. INNKEEPERS AND HOTELKEEPERS.

Art. 102 of the Revised Penal Code provides that innkeepers, tavernkeepers, and any other persons or corporations shall be civilly liable for crimes committed in their establishments, in all cases where a violation of municipal ordinances or some general or special police regulation shall have been committed by them or their employees, in default of the persons criminally liable.

Innkeepers are also subsidiarily liable for the restitution of goods taken by robbery or theft within their houses from guests lodging therein, or for the payment of the value thereof, provided that such guests shall have notified in advance the innkeeper himself, or the person representing him, of the deposit of such goods within the inn; and shall furthermore have followed the directions which such innkeeper or his representative may have given them with respect to the care and vigilance over such goods. No liability shall attach in case of robbery with violence against or intimidation of persons unless committed by the innkeeper's employees. *(Art. 102, Revised Penal Code).*

H. PARTNERSHIP.

Under the mutual agency rule in partnership law, each partner is an agent of the other partners and the partnership for acts done within the apparent scope of business of the latter. The presumption is that a partner is authorized to act for the partnership and bind it in pursuit of partnership transactions. *(Munasque vs. Court of Appeals, 139 SCRA 533 [1985]).*

Consistent with the mutual agency rule, "the partnership or every member of a partnership, is liable for torts committed by one

of the members acting within the scope of the firm business, though they do not participate in, ratify, or have knowledge of such torts." *(Bautista, Treatise on Philippine Partnership Law, 1995 Ed., p. 249 citing Madsen vs. Cawthorne, 85 P. 2d 909 [1938]).* "The test of liability is whether the wrong was committed in behalf of the partnership and within the reasonable scope of its business, and, if so committed, the partners are all liable as joint tortfeasors" *(ibid., citing Caplan vs. Caplan, 198 N.E. 23, 101 A.L.R. 1223 [1935]).*

The liability of the partnership for the tort committed by partners is a vicarious liability similar to the common law rule on *respondeat superior*. *(De Leon, Comments and Cases on Partnership, Agency and Trust, 1996 Ed., p. 179, citing Teller).* The liability is entirely imputed and the partnership cannot obviously invoke diligence in the selection and supervision of the partner.

The provisions in the Civil Code that embody the vicarious liability of the partnership are Articles 1822, 1823 and 1824:

> Art. 1822. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor for the same extent as the partner so acting or omitting to act.
>
> Art. 1823. The partnership is bound to make good the loss:
>
> (1) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and
>
> (2) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.
>
> Art. 1824. All partners are liable solidarily with the partnership for everything chargeable to the partnership under Articles 1822 and 1823.

The reason why all the partners are solidarily liable under Article 1824 is the policy to protect any person who, in good faith, relied on the apparent authority of the actor as partner. *(Munasque vs. Court of Appeals, supra).*

I. SPOUSES.

a. Absolute Community Property.

The Family Code provides that in the absence of a marriage settlement, or when the marriage settlement agreed upon is void, the system of absolute community property shall govern. *(Art. 75).* Under the system, all properties of the marriage are jointly owned by the spouses. The absolute community property shall consist of all properties owned by the spouses at the time of the celebration of the marriage or acquired thereafter subject only to few exceptions. *(Arts. 91 and 92, Family Code).*

A specie of vicarious liability is imposed under the system of absolute community property because it is expressly provided in paragraph (9) of Art. 94 of the Family Code that the absolute community property shall be liable for "liabilities incurred by either spouses by reason of a crime or a quasi-delict, in the case of absence or insufficiency of the exclusive property of the debtor-spouse. Payments made shall be considered advances to be deducted from the share of the debtor-spouse upon liquidation of the community."

b. Conjugal Partnership of Gains.

Future spouses may agree in the marriage settlement that the regime of conjugal partnership of gains shall govern their property relations during marriage instead of the absolute community property regime. *(Art. 105, Family Code).* Likewise, in the absence of any marriage settlement or if the marriage settlement agreed upon is void, the system of conjugal partnership of gains governs the property relations of those who were married prior to the effectivity of the Family Code. *(Article 119, Civil Code).* In which case, the general rule is that pecuniary indemnities imposed upon the husband or wife are not chargeable against the conjugal partnership but against the separate properties of the wrongdoer. *(1 Tolentino 457, citing Reyes vs. Santos, et al., S.C. 52 O.G. 6548).*

However, in *Juaniza vs. Jose* (89 SCRA 306), the Supreme Court imposed liability on the conjugal partnership for the tort committed by the driver of a vehicle who was hired in furtherance of the husband's business. Since the profits inured to the benefit of the partnership, the liabilities to it must also be born by the partnership. Consistent with such ruling, the conjugal partnership should be made liable if one of the spouses committed the tort while performing a business or if the act was supposed to benefit the partnership. The rule is consistent with the provisions of Article 122 of the Family Code which states "the payment of personal debts contracted by the husband or the wife before or during the marriage shall not be charged to the conjugal partnership except insofar as they redounded to the benefit of the

family." Under the said provision, tort indemnity may be enforced against the partnership assets provided that liabilities mentioned in Article 121 are satisfied.

c. Regime of Separation of Property.

If separation of property was agreed upon in the marriage settlement or approved by the court, each spouse shall own, dispose of, possess, administer and enjoy his or her own separate estate. To each spouse shall belong all earnings from his or her profession, business or industry and all fruits, natural, industrial or civil, due or received during the marriage from his or her separate property. *(Art. 145, Family Code).* Consequently, each spouse is responsible for his or her separate obligation. This includes obligation arising from quasi-delict for the act or omission committed by one of the spouses.

J. STATE.

It is a basic Constitutional rule that the State cannot be sued without its consent. Consent of the State to be sued can be manifested through a special law or general law allowing the State to be sued. An example of such law is the fifth paragraph of Article 2180 of the Civil Code:

> The State is responsible in like manner when it acts through a special agent; but not when the damage has been caused by the official to whom the task done properly pertains, in which case what is provided in Article 2176 shall be applicable.

The liability under the above-quoted provision is limited to acts of special agents. A special agent is one who receives definite and fixed order or commission, foreign to the exercise of the duties of his office if he is a special official. *(Merrit vs. Government of Philippine Islands, 34 Phil. 311; Rosete vs. Auditor General, 81 Phil. 454 [1948]).* The Supreme Court, citing the Supreme Court of Spain, explained the reason for this vicarious liability of the State in *Merrit*:

> "That the obligation to indemnify for damages which a person causes to another by his fault or negligence is based, as is evidenced by the same Law 3, Title 15, Partida 7, on that the person obligated, by his own fault or negligence, takes part in the act or omission of the third party who caused the damage. It follows therefrom that the state, by virtue of such provisions of law, is not responsible for the damage suffered by private individuals in consequence of acts performed by its employees in the discharge of the functions pertaining to their office, because neither fault nor even negligence can be presumed on the part of the state in

> the organization of its branches of the public service and in the appointment of its agents; on the contrary, we must presuppose all foresight humanly possible on its part in order than of private persons interested in its operation. Between these latter and the state, therefore, no relations of a private nature governed by civil law can arise except in a case where the state acts as a juridical person capable of acquiring rights and contracting obligations.' *(Supreme Court of Spain, January 7, 1898; 83 Jur. Civ., 24).*
>
> x x x
>
> 'That the responsibility of the state is limited by Article 1903 to the case wherein it acts through a special agent x x x so that in representation of the state and being bound to act as an agent thereof, he executes the trust confided to him. This concept does not apply to any executive agent who is an employee of the active administration and who on his own responsibility performs the functions which are inherent in and naturally pertain to his office and which are regulated by law and the regulations.' *(Supreme Court of Spain, May 18, 1904; 98 Jur. Civ., 389, 390)."*

With respect to other government agencies, the rule on immunity from suit for tort was explained in *Philippine National Railway vs. Intermediate Appellate Court* (217 SCRA 637 [1992]):

> The bone of contention for exculpation is premised on the familiar maxim in political law that the State, by virtue of its sovereign nature and as reaffirmed by constitutional precept, is insulated from suits without its consent. *(Article 16, Section 3, 1987 Constitution).* However, equally conceded is the legal proposition that the acquiescence of the State to be sued can be manifested expressly through a general or special law, or indicated implicitly, as when the State commences litigation for the purpose of asserting an affirmative relief or when it enters into a contract. *(Cruz, Philippine Political Law, 1991 edition, page 33; Sinco, Philippine Political Law, Eleventh Edition, 1962, page 34).* When the State participates in a covenant, it is deemed to have descended from its superior position to the level of an ordinary citizen and thus virtually opens itself to judicial process. Of course, We realize that this Court qualified this form of consent only to those contracts concluded in a proprietary capacity and therefore immunity will attach for those contracts entered into in a governmental capacity, following the ruling in the 1985 case of *United States of America vs. Ruiz* (136 SCRA 487 [1985], cited by *Cruz, supra* at pages 36-37). But the restrictive interpretation laid down therein is of no practical worth nor can it give rise to herein petitioner PNR's exoneration since the case of *Malong vs. Philippine National Railways* (138 SCRA 63 [1985]; 3 Padilla, 1987 Constitution with Comments and Cases, 1991 edition, page

644), decided three months after Ruiz was promulgated, was categorical enough to specify that the Philippine National Railways "is not performing any governmental function." (*supra*, at page 68).

In Malong, Justice Aquino, speaking for the Court *en banc*, declared:

"The Manila Railroad Company, the PNR's predecessor, as a common carrier, was not immune from suit under Act No. 1510, its charter.

The PNR Charter, Republic Act No. 4156, as amended by Republic Act No. 6366 and Presidential Decree No. 741, provides that the PNR is a government instrumentality under government ownership during its 50-year term, 1964 to 2014. It is under the Office of the President of the Philippines. Republic Act No. 6366 provides:

'SECTION 1-a. *Statement of policy*. — The Philippine National Railways, being a factor for socio-economic development and growth, shall be a part of the infrastructure program of the government and as such shall remain in and under government ownership during its corporate existence. The Philippine National Railways must be administered with the view of serving the interests of the public by providing them the maximum of service and, while aiming at its greatest utility by the public, the economy of operation must be ensured so that service can be rendered at the minimum passenger and freight prices possible.'

The charter also provides:

'SEC. 4. *General powers*. — The Philippine National Railways shall have the following general powers:

(a) To do all such other things and to transact all such business directly or indirectly necessary, incidental or conducive to the attainment of the purpose of the corporation; and

(b) Generally, to exercise all powers of a railroad corporation under the Corporation Law. (This refers to Sections 81 to 102 of the Corporation Law on railroad corporations, not reproduced in the Corporation Code.)'

Section 36 of the Corporation Code provides that every corporation has the power to sue and be sued in its corporate name. Section 13(2) of the Corporation Law provides that every corporation has the power to sue and be sued in any court.

'A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority

that makes the law on which the right depends.' *(Justice Holmes in Kawananakoa vs. Polyblank, 205 U.S. 353, 51 L. 3d 834).*

'The public service would be hindered, and public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen and, consequently, controlled in the use and disposition of the means required for the proper administration of the Government.' *(The Siren vs. U.S., 7 Wall. 152, 19 L. ed. 129).* (at pp. 65-66)

To the pivotal issue of whether the State acted in a sovereign capacity when it organized the PNR for the purpose of engaging in transportation, Malong continued to hold that:

> ". . . in the instant case the State divested itself of its sovereign capacity when it organized the PNR which is no different from its predecessor, the Manila Railroad Company. The PNR did not become immune from suit. It did not remove itself from the operation of Articles 1732 to 1766 of the Civil Code on common carriers.

The correct rule is that 'not all government entities, whether corporate or noncorporate, are immune from suits. Immunity from suit is determined by the character of the objects for which the entity was organized.' *(Nat. Airports Corp. vs. Teodoro and Phil. Airlines, Inc., 91 Phil. 203, 206; Santos vs. Santos, 92 Phil. 281, 285; Harry Lyons, Inc. vs. USA, 104 Phil. 593).*

'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against the State.' (81 C.J.S. 1319).

'Suits against State agencies with relation to matters in which they have assumed to act in a private or nongovernmental capacity, and various suits against certain corporations created by the State for public purposes, but to engage in matters partaking more of the nature of ordinary business rather than functions of a governmental or political character, are not regarded as suits against the State.

'The latter is true, although the State may own the stock or property of such a corporation, for by engaging in business operations through a corporation the State divests itself so far of its sovereign character, and by implicating consents to suits against the corporation. (81 O.J.S. 1319).

The foregoing rule was applied to State Dock Commissions carrying on business relating to pilots, terminals and transportation *(Standard Oil Co. of New Jersey vs. U.S., 27 Fed. 2nd 370)* and to State Highways Commissions created to build public roads and given appropriations in advance to discharge obligations incurred in their behalf. *(Arkansas State Highway Commission*

vs. Dodge, 26 SW 2nd 879 and State Highway Commission of Missouri vs. Bates, 296 SW 418, cited in National Airports case).

The point is that when the government enters into a commercial business it abandons its sovereign capacity and is to be treated like any other private corporation. *(Bank of the U.S. vs. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244, cited in Manila Hotel Employees Association vs. Manila Hotel Company, et al., 73 Phil. 374, 388).* The Manila Hotel case also relied on the following rulings:

'By engaging in a particular business through the instrumentality of a corporation, the government divests itself *pro hac vice* of its sovereign character, so as to render the corporation subject to the rules of law governing private corporations.'

'When the State acts in its proprietary capacity, it is amenable to all the rules of law which bind private individuals.'

'There is not one law for the sovereign and another for the subject; but when the sovereign engages in business and the conduct of business enterprises and contracts with individuals, whenever the contract in any form comes before the courts, the rights and obligation of the contracting parties must be adjusted upon the same principles as if both contracting parties were private persons. Both stand upon equality before the law, and the sovereign is merged in the dealer, contractor and suitor.' *(People vs. Stephens, 71 N.Y. 549).*

It should be noted that in *Philippine National Railways vs. Union de Maquinistas, etc.*, L-31948, July 25, 1978, 84 SCRA 223, it was held that the PNR funds could be garnished at the instance of a labor union.

It would be unjust if the heirs of the victim of an alleged negligence of the PNR employees could not sue the PNR for damages. Like any private common carrier, the PNR is subject to the obligations of persons engaged in that private enterprise. It is not performing any governmental function.

Thus, the National Development Company is not immune from suit. It does not exercise sovereign functions. It is an agency for the performance of purely corporate, proprietary or business functions. *(National Development Company vs. Tobias, 117 Phil. 703, 705 and cases cited therein; National Development Company vs. NDC Employees and Workers' Union, L-32387, August 19, 1975, 66 SCRA 181, 184).*

Other government agencies not enjoying immunity from suit are the Social Security System *(Social Security System vs. Court of Appeals, L-41299, February 21, 1983, 120 SCRA 707),*

and the Philippine National Bank *(Republic vs. Philippine National Bank, 121 Phil. 26)*." (at pp. 66-68).

K. MUNICIPAL CORPORATIONS.

The liability of public corporations for damages arising from injuries suffered by pedestrians from the defective condition of roads is expressed in the Civil Code as follows:

> Article 2189. Provinces, cities and municipalities shall be liable for damages for the death of, or injuries suffered by, any person by reason of the defective condition of roads, streets, bridges, public buildings, and other public works under their control or supervision.

It is not necessary for the defective road or street to belong to the province, city or municipality for liability to attach. The article only requires that either control or supervision is exercised over the defective road or street *(Guilatco v. City of Dagupan, G.R. No. 61516, March 21, 1989)*.

In *Guilatco v. City of Dagupan (ibid.),* the plaintiff, while she was about to board a motorized tricycle at a sidewalk located at Perez Blvd. (a National Road, under the control and supervision of the City of Dagupan) accidentally fell into a manhole located on said sidewalk, thereby causing her right leg to be fractured. Damages were awarded against the City of Dagupan although the street involved is a National Road. Exemplary damages were awarded to serve warning to the city or cities concerned to be more conscious of their duty and responsibility to their constituents, especially when they are engaged in construction work or when there are manholes on their sidewalks or streets which are uncovered, to immediately cover the same, in order to minimize or prevent accidents to the poor pedestrians. The Court also explained that too often in the zeal to put up "public impact" projects such as beautification drives, the end is more important than the manner in which the work is carried out. Because of this obsession for showing off, such trivial details as misplaced flower pots betray the careless execution of the projects, causing public inconvenience and inviting accidents.

3. PUBLIC OFFICERS

Public officers who are guilty of tortious conduct are personally liable for their actions. They cannot raise the defense that the State is immune from suits. It is a well settled principle of law that a public

official may be held liable in his personal private capacity for whatever damage he may have caused by his act done with malice, bad faith or gross negligence or beyond the scope of his authority or jurisdiction. *(Genson vs. Adarle, 153 SCRA 512 [1987]; Dumlao vs. Court of Appeals, 114 SCRA 247; Mindanao Realty Corp. vs. Kintanar, 6 SCRA 814)*. The fact that the duties and position of the public officer were indicated in the complaint does not mean that he is being sued in his official capacity. *(Belizar vs. Brazas, 2 SCRA 526)*.

The Revised Administrative Code of 1987 provides the basic rules on the liability of public officers and employees:

Sec. 38. *Liability of Superior Officers.* — (1) A public officer shall not be civilly liable for acts done in the performance of his official duties, unless there is a clear showing of bad faith, malice or gross negligence.

(2) Any public officer who, without just cause, neglects to perform a duty within a period fixed by law or regulation, or within a reasonable period if none is fixed, shall be liable for damages to the private party concerned without prejudice to such other liability as may be prescribed by law.

(3) A head of a department or a superior officer shall not be civilly liable for the wrongful acts, omissions of duty, negligence, or misfeasance of his subordinates, unless he has actually authorized by written order the specific act or misconduct complained of.

Sec. 39. Liability of Subordinate Officers. — No subordinate officer or employee shall be civilly liable for acts done by him in good faith in the performance of his duties. However, he shall be liable for willful or negligent acts done by him which are contrary to law, morals, public policy and good customs even if he acted under orders or instructions of his superiors.

THE DEFENDANTS

CHAPTER 11

STRICT LIABILITY

There is strict liability if one is made liable independent of fault, negligence or intent after establishing certain facts specified by law. Strict liability tort can be committed even if reasonable care was exercised and regardless of the state of mind of the actor at that time.

Black's Law Dictionary defines strict liability as liability without fault. A case is one of strict liability "when neither care nor negligence, neither good nor bad faith, neither knowledge nor ignorance will save the defendant." *(Black's Law Dictionary, 1968 Ed., p. 1968).*

In American law, the traditional bastion of strict liability includes liability for conversion and for injuries caused by animals, ultra-hazardous activities and nuisance. In this chapter, we will discuss the provisions of the Civil Code concerning some of those torts. A separate section will be devoted to product liability, a new area of tort which deserves special attention because of the policy of the state to protect consumers.

Two of the torts discussed in this chapter — those covered by Article 2183 and 2193 of the New Civil Code — are Roman law in origin. It is well to point out that there are legal writers who believe that these torts impose strict liability even in Roman law. In fact, they believe that the "strict" nature of the liability is the common characteristic of all the acts considered *quasi-ex delicto* in the Institutes of Roman law.

1. ANIMALS

The Civil Code contains a provision imposing liability for damages caused by animals. Article 2183 of the Civil Code provides:

> "Art. 2183. The possessor of an animal or whoever may make use of the same is responsible for the damage which it may cause, although it may escape or be lost. This responsibility shall cease only in case the damage should come from *force majeure* or

from the fault of the person who has suffered damage. (1905)"

The language of the above-quoted provision reveals an evident intent to make the possessor or whoever makes use of the animal, liable independent of fault. The only exception is when the damage was caused by *force majeure* or by the person who suffered the damage. *(see: Defiras v. Escaño, [CA] 40 O.G. [Supp. 12] 326).*

Additionally, there is an opinion to the effect that the owner or posssesor of the animal is still liable even if damage was caused by the animal through the fault of third persons. If the acts of a third person cannot be foreseen or prevented, then the situation is similar to that of *force majeure* and the possessor is not liable. *(Francisco, Torts and Damages, pp. 80-81, citing 12 Manresa, 659-668).*

Manresa explained Article 1905 of the Old Civil Code, which is more or less the same as Article 2183, in this wise:

> "x x x this (Code) does not base the said obligation in an absolute presumption nor even a relative fault on the part of the owner or user of the animal causing the damage, since it is even imposed in the case in which it could not be avoided because the animal is not in his possession for having escaped or gone astray, and for this reason, it does not admit in this class of damages, unlike in damages caused by a person other than the one responsible, evidence of diligence of a good father of a family which is referred to by the last paragraph of Article 1903; it recognizes in Article 1903 as sufficient reasons for the cessation of responsibility, *force majeure* and fault on the part of the person damaged.
>
> "What we have been saying with respect to the extent and basis of the responsibility imposed upon the possessor of animals by our Civil Code, has been fully confirmed by jurisprudence. A bull having escaped from its pasture, assaults and kills a person. The father of the victim having claimed civil indemnity, the Supreme Court granted the same declaring that Article 1905 of the Civil Code admits of no other interpretation than what is clearly and evidently expressed in its literal terms, it being sufficient, according to the same, that an animal causes damage in order that responsibility of the owner arises, even though no fault or negligence could be imputed to him, the legislator, having undoubtedly taken into account that such concept of ownership is sufficient in order to make him liable for the favorable or unfavorable consequences from this class of property, saying the exception contained therein, and this, whether inflicted upon things or with more reason, upon persons, for its greater transcendency, regardless of the result of the criminal case (dismissed), the nature of responsibility in one being distinct from

that of the other.'

x x x

"x x x the spirit of Article 1905 is clear and explicit by its own terms. Therein is published the fault or negligence of one of who being able and duty bound to prevent the consequences of the use of animals, does not prevent it, for not adopting convenient and adequate means of precaution, or because, even exercising them, he could not attain said results, the risk may occur in their use being imputed to him, inasmuch as in making use of them, he voluntarily accepts, by reason of this act, the responsibilities arising from the consequences of the same.

"By virtue thereof, provided the damage that is caused is a consequence of the natural use of the animal causing it, independent of all extraneous intervention or of whatever cause not imputable to the possessor or to the person who makes use of it, these should bear said consequence, repairing the damage caused, there having been no negligence or lack of care, because having his possession said animal, or in using it, they already know to what they may be exposed." *(12 Manresa, 4th ed., 572-574, cited in Francisco, Torts and Damages, pp. 79-80).*

In English law, the owner or possessor of nondomesticated animals known as animals *ferae naturae,* was subject to strict liability if the animals attacked a person. The owners or possessors of domestic animals are liable only if they knew or had reason to know that the animal had vicious properties. On the other hand, Article 2183 by the Civil Code, does not admit of the distinction under English law. The Civil Code provision, is therefore, applicable whether the animal is domestic, domesticated or wild. (See *Vestil vs. Intermediate Appellate Court*, G.R. No. 74431, November 6, 1989).

The Court of Appeals applied Article 2183 in a situation where the plaintiff was injured by a dog. The plaintiff was on her way to the house of a certain Tomasa Nava in order to have a foot-wound treated. To reach said house, she had to pass through the yard of Pelagia Nava. Finding the gate of Pelagia Nava open, she did not at once enter the yard but called Pelagia, who was near the gate, and told her of the presence of the dog in the premises. Upon the assurance of Pelagia that the dog would not bite her, she entered the yard and, while walking along the path, the dog bit her. The dog belonged to a certain Melecio Servino but Pelagia also made use thereof to guard their copras. The Court of Appeals ruled that the owner and Pelagia are both liable under Article 2183 of the Civil Code because they exercised joint control over the dog. The question of ownership is inconsequential under Article 2183. Even if the dog really belonged

to another, Pelagia was still liable not only because the dog was kept on her premises with her knowledge and consent but also because she made use thereof *(Milagros Ibardo v. Pelagia Nava et al., CA G.R. No. 28587-R, January 8, 1963, 3 CAR2s 37).*

CASE:

PURITA MIRANDA VESTIL and AGUSTIN VESTIL
vs. INTERMEDIATE APPELLATE COURT, et al.
G.R. No. 74431, November 6, 1989

Little Theness Tan Uy was dead at the age of three. Her parents said she died because she was bitten by a dog of the petitioners, but the latter denied this, claiming they had nothing to do with the dog. The Uys sued the Vestils, who were sustained by the trial court. On appeal, the decision of the court *a quo* was reversed in favor of the Uys. The Vestils are now before us. They ask us to set aside the judgment of the respondent court and to reinstate that of the trial court.

On July 29, 1975, Theness was bitten by a dog while she was playing with a child of the petitioners in the house of the late Vicente Miranda, the father of Purita Vestil, at F. Ramos Street in Cebu City. She was rushed to the Cebu General Hospital, where she was treated for "multiple lacerated wounds on the forehead" and administered an anti-rabies vaccine by Dr. Antonio Tautjo. She was discharged after nine days but was re-admitted one week later due to "vomiting of saliva." The following day, on August 15, 1975, the child died. The cause of death was certified as broncho-pneumonia.

Seven months later, the Uys sued for damages, alleging that the Vestils were liable to them as the possessors of "Andoy," the dog that bit and eventually killed their daughter. The Vestils rejected the charge, insisting that the dog belonged to the deceased Vicente Miranda, that it was a tame animal, and that in any case no one had witnessed it bite Theness. After trial, Judge Jose R. Ramolete of the Court of First Instance of Cebu sustained the defendants and dismissed the complaint.

The respondent court arrived at a different conclusion when the case was appealed. It found that the Vestils were in possession of the house and the dog and so should be responsible under Article 2183 of the Civil Code for the injuries caused by the dog. It also held that the child had died as a result of the dog bites and not for causes independent thereof as submitted by the appellees. Accordingly, the Vestils were ordered to pay the Uys damages in the amount of P30,000.00 for the death of Theness, P12,000.00 for medical and hospitalization expenses, and P2,000.00 as attorney's fees.

In the proceedings now before us, Purita Vestil insists that she is not the owner of the house or of the dog left by her father as his estate has not yet been partitioned and there are other heirs to the property. Pursuing the

logic of the Uys, she claims, even her sister living in Canada would be held responsible for the acts of the dog simply because she is one of Miranda's heirs. However, that is hardly the point. What must be determined is the possession of the dog that admittedly was staying in the house in question, regardless of the ownership of the dog or of the house.

Article 2183 reads as follows:

> The possessor of an animal or whoever may make use of the same is responsible for the damage which it may cause, although it may escape or be lost. This responsibility shall cease only in case the damage should come from *force majeure* or from the fault of the person who has suffered damage.

Thus, in *Afialda vs. Hisole,* a person hired as caretaker of a carabao gored him to death and his heirs thereupon sued the owner of the animal for damages. The complaint was dismissed on the ground that it was the caretaker's duty to prevent the Carabao from causing injury to any one, including himself.

Purita Vestil's testimony that she was not in possession of Miranda's house is hardly credible. She said that the occupants of the house left by her father were related to him ("one way or the other") and maintained themselves out of a common fund or by some kind of arrangement (on which, however, she did not elaborate). She mentioned as many as ten of such relatives who had stayed in the house at one time or another although they did not appear to be close kin. She at least implied that they did not pay any rent, presumably because of their relation with Vicente Miranda notwithstanding that she herself did not seem to know them very well.

There is contrary evidence that the occupants of the house were boarders (or more of boarders than relatives) who paid the petitioners for providing them with meals and accommodations. It also appears that Purita Vestil had hired a maid, Dolores Jumao-as, who did the cooking and cleaning in the said house for its occupants. Her mother, Pacita, who was a nursemaid of Purita herself, categorically declared that the petitioners were maintaining boarders in the house where Theness was bitten by a dog. Another witness, Marcial Lao, testified that he was indeed a boarder and that the Vestils were maintaining the house for business purposes. And although Purita denied paying the water bills for the house, the private respondents submitted documentary evidence of her application for water connection with the Cebu Water District, which strongly suggested that she was administering the house in question.

While it is true that she is not really the owner of the house, which was still part of Vicente Miranda's estate, there is no doubt that she and her husband were its possessors at the time of the incident in question. She was the only heir residing in Cebu City and the most logical person to take care of the property, which was only six kilometers from her own house. Moreover, there is evidence showing that she and her family regularly went to the house, once or twice weekly, according to at least one witness, and used it virtually as a second house. Interestingly, her own daughter was playing in

the house with Theness when the little girl was bitten by the dog. The dog itself remained in the house even after the death of Vicente Miranda in 1973 and until 1975, when the incident in question occurred. It is also noteworthy that the petitioners offered to assist the Uys with their hospitalization expenses although Purita said she knew them only casually.

The petitioners also argue that even assuming that they were the possessors of the dog that bit Theness, there was no clear showing that she died as a result thereof. On the contrary, the death certificate declared that she died of broncho-pneumonia, which had nothing to do with the dog bites for which she had been previously hospitalized.

The Court need not involve itself in an extended scientific discussion of the causal connection between the dog bites and the certified cause of death except to note that, first, Theness developed hydrophobia, a symptom of rabies, as a result of the dog bites, and second, that asphyxia broncho-pneumonia, which ultimately caused her death, was a complication of rabies.

That Theness became afraid of water after she was bitten by the dog is established by the following testimony of Dr. Tautjo:

COURT: I think there was mention of rabies in the report in the second admission?

A: Now, the child was continuously vomiting just before I referred to Dr. Co earlier in the morning and then the father, because the child was asking for water, the father tried to give the child water and this child went under the bed, she did not like to drink the water and there was fright in her eyeballs. For this reason, because I was in danger there was rabies, I called Dr. Co.

Q: In other words, the child had hydrophobia?

A: Yes, sir.

As for the link between rabies and broncho-pneumonia, the doctor had the following to say under oath:

A: Now, as I said before, broncho-pneumonia can result from physical, chemical and bacterial means . . . It can be the result of infection, now, so if you have any other disease which can lower your resistance you can also get pneumonia.

x x x x x x x x x

Q: Would you say that a person who has rabies may die of complication which is broncho-pneumonia?

A: Yes.

Q: For the record, I am manifesting that this book shown the witness is known as CURRENT DIAGNOSIS & TREATMENT, 1968 by Henry Brainerd, Sheldon Margen and

> Milton Chaton. Now, I invite your attention, doctor, to page 751 of this book under the title "Rabies." There is on this page, "Prognosis" as a result of rabies and it says:
>
> Once the symptoms have appeared, death inevitably occurs after 2-3 days as a result of cardiac or respiratory failure or generalized paralysis.
>
> After a positive diagnosis of rabies or after a bite by a suspected animal if the animal cannot be observed or if the bite is on the head, give rabies vaccine (duck embryo). Do you believe in this statement?

A: Yes.

Q: Would you say therefore that persons who have rabies may die of respiratory failure which leave in the form of broncho-pneumonia?

A: Broncho-pneumonia can be a complication of rabies.

On the strength of the foregoing testimony, the Court finds that the link between the dog bites and the certified cause of death has been satisfactorily established. We also reiterate our ruling in *Sison vs. Sun Life Assurance Company of Canada*, that the death certificate is not conclusive proof of the cause of death but only of the fact of death. Indeed, the evidence of the child's hydrophobia is sufficient to convince us that she died because she was bitten by the dog even if the death certificate stated a different cause of death.

The petitioner's contention that they could not be expected to exercise remote control of the dog is not acceptable. In fact, Article 2183 of the Civil Code holds the possessor liable even if the animal should "escape or be lost" and so be removed from his control. And it does not matter either that as the petitioners also contend, the dog was tame and was merely provoked by the child into biting her. The law does not speak only of vicious animals but covers even tame ones as long as they cause injury. As for the alleged provocation, the petitioners forget that Theness was only three years old at the time she was attacked and can hardly be faulted for whatever she might have done to the animal.

It is worth observing that the above defenses of the petitioners are an implied rejection of their original posture that there was no proof that it was the dog in their father's house that bit Theness.

According to Manresa, the obligation imposed by Article 2183 of the Civil Code is not based on the negligence or on the presumed lack of vigilance of the possessor or user of the animal causing the damage. It is based on natural equity and on the principle of social interest that he who possesses animals for his utility, pleasure or service must answer for the damage which such animal may cause.

We sustain the findings of the Court of Appeals and approve the monetary awards except only as to the medical and hospitalization expenses,

which are reduced to P2,026.69, as prayed for in the complaint. While there is no recompense that can bring back to the private respondents the child they have lost, their pain should at least be assuaged by the civil damages to which they are entitled.

2. FALLING OBJECTS

Another provision in the Civil Code which imposes liability without fault is Article 2193. The cases contemplated in this provision are cases identified in Roman law where the liability arises *ex quasi-delicto*.

> "Art. 2193. The head of a family that lives in a building or a part thereof, is responsible for damages caused by things thrown or falling from the same. (1910) "

It is also evident from the text of Article 2193 that the liability is absolute. It does not indicate a presumption or admit proof of care. *(Reyes and Puno, p. 165).*

Unlike Article 2183, the provision does not exempt cases involving *force majeure*. However, there is an opinion to the effect that the same are still exempt in extraordinary circumstances. *(VI Caguioa).*

The term head of the family is not limited to the owner of the building and it may even include the lessee thereof. *(Dingcong vs. Kanaan, 72 Phil. 14).* The petitioner in *Dingcong* was a co-lessee of the property. He was made liable for the act of a guest who left the faucet open causing water to fall from the second floor and to damage the goods of Kanaan in the floor below. It should be noted however that although Article 1910 of the Old Civil Code (now Article 2183) was cited, there was no finding that the liability under the said Article is strict liability; Dingcong was held liable for his failure to exercise diligence of a good father of a family.

3. LIABILITY OF EMPLOYERS

Article 1711 of the Civil Code imposes an obligation on owners of enterprises and other employers to pay for the death or injuries to their employees. The language of the provision indicates that the same is strict liability because liability exists even if the cause is purely accidental. The provision states:

> "Art. 1711. Owners of enterprises and other employers are obliged to pay compensation for the death of or injuries to their laborers, workmen, mechanics, or other employees, even though the event may have been purely accidental or entirely due to a fortuitous cause, if the death or personal injury arose out of

and in the course of the employment. The employer is liable for compensation if the employee contracts any illness or disease caused by such employment or as a result of the nature of the employment. If the mishap was due to the employee's own notorious negligence, or voluntary act, or drunkenness, the employer shall not be liable for compensation. When the employee's lack of due care contributed to his death or injury, the compensation shall be equitably reduced."

It should be noted, however, that if the death or injury is due to the negligence of a fellow-worker, the latter and the employer shall be solidarily liable for compensation. If a fellow-worker's intentional or malicious act is the only cause of the death or injury, the employer shall not be answerable, unless it should be shown that the latter did not exercise due diligence in the selection or supervision of the plaintiff's fellow-worker. *(Article 1712, Civil Code).*

4. NUISANCE

A. DEFINITION.

Under the Civil Code, a nuisance is any act, omission, establishment, business, condition of property, or anything else which:

"(1) Injures or endangers the health or safety of others; or

(2) Annoys or offends the senses; or

(3) Shocks, defies or disregards decency or morality; or

(4) Obstructs or interferes with the free passage of any public highway or street, or any body of water; or

(5) Hinders or impairs the use of property. *(Art. 694).*"

Similarly, the Code on Sanitation of the Philippines (Pres. Decree No. 856) defines nuisance as anything that injures health, endangers life, offends the senses or produces discomfort to the community. *(Section 84).* The same statute likewise considers the following as nuisance:

a. Public or private premises maintained and used in a manner injurious to health;

b. Breeding places and harborages of vermin;

c. Animals and their carcasses which are injurious to health;

d. Accumulation of refuse;

e. Noxious matter or waste water discharged improperly in streets;

f. Animals stockage maintained in a manner injurious to health;

g. Excessive noise; and

h. Illegal shanties in public or private properties. *(Section 85, P.D. No. 856).*

It should likewise be noted that the Civil Code makes the protection against nuisance a legal easement. Article 702 provides that every building or piece of land is subject to the easement which prohibits the proprietor or possessor from committing nuisance through noise, jarring, offensive odor, smoke, heat, dust, water, glare and other causes. The Code Commission explained that this easement against nuisance was adopted from American law. It explained that the easement is "created by law and is inherent in every land. It is a proper limitation upon ownership, as easements of distances, and light and view. It is a manifestation of the principle that every person should so use his property as not to cause damage or injury to others." *(Report of Code Commission, p. 51).*

B. KINDS.

Nuisance is either public or private. A public nuisance affects a community or neighborhood or any considerable number of persons, although the extent of the annoyance, danger or damage upon individuals may be unequal. A private nuisance is one that is not included in the foregoing definition. *(Article 695, Civil Code).*

Nuisance may also be considered nuisance *per se* or nuisance *per accidens*. Nuisance *per se* is a nuisance under any and all circumstances while nuisance *per accidens* becomes such under certain conditions and circumstances. *(Salao vs. Santos, 67 Phil. 550).*

An example of nuisance *per se* is a construction without provision for accumulation or disposal of waste matters and constructed without building permits contiguously to and therefore liable to pollute one of the main water pipelines which supplies potable water to the Greater Manila area. As such it may be abated without judicial proceedings under the Civil Code. *(The Homeowners Associations of El Deposito, Barrio Corazon de Jesus, San Juan, Rizal vs. Lood, 47 SCRA 174 [1972]).*

Examples of nuisance *per accidens* are certain business establishments. Commercial and industrial activities which are lawful in themselves may become nuisances if they are so offensive to the senses that they render the enjoyment of life and property uncom-

fortable. *(Velasco vs. Manila Electric Company, 40 SCRA 342).* For example, a business of building cars may be considered under certain circumstances as nuisance *per accidens*. It is not nuisance *per se* because it becomes a nuisance only on account of its location. *(Ramcar, Inc. vs. Millar, 6 SCRA 517 [1962]).*

In *Bengzon vs. Province of Pangasinan* (62 Phil. 816), the respondent was held liable when it constructed and operated a water pumping plant in close proximity to the residence of the plaintiff. The plaintiff's property was rendered uninhabitable because of the noise, smoke, vibrations, odors and sparks coming from the plant. The plant was considered a nuisance because it caused damage to the health and comfort of the petitioner and his family.

The contrary conclusion was reached in *De Ayala, et al. vs. Barreto, et al.* (33 Phil. 538), where the Court ruled that the construction of a brewery was not nuisance. The brewery was supposed to be operated with a minimum offense to nearby residents. Furthermore, in view of the semi-industrial character of the locality, what noise or smell that is produced thereof cannot be held to be unreasonable.

It has been observed that "no one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in which he dwells. The location and surroundings, must be considered, since noise which amounts to a nuisance in one locality may be entirely proper in another. The character and magnitude of the industry or business complained of and the manner in which it is conducted must also be taken into consideration, and so must the character and volume of the noise, the time and duration of its occurrence, the number of people affected by it, and all the facts and circumstances of the case." *(Velasco vs. Manila Electric Co., 40 SCRA 342 [1971], citing France, Cour de Cassation, Decisions of, 19 April 1905 and 24 July 1908; Chambre des Requtes, 5 Dec. 1904; Cf. 33 Am. Jur. Nuisances, Section 47, pages 330-333).*

C. STRICT LIABILITY AND PERSONS LIABLE.

There is strict liability on the part of the owner or possessor of the property where a nuisance is found because he is obliged to abate the same irrespective of the presence or absence of fault or negligence. Moreover, the Civil Code provides that every successive owner or possessor of property who fails or refuses to abate a nuisance in that property started by a former owner or possessor is liable therefor in the same manner as the one who created it. *(Art. 696, Civil Code).*

It is also settled that the award of damages arising from a nuisance is authorized under Articles 697 and 2196 of the Civil Code. *(Ramcar, Inc., vs. Millar, 6 SCRA 517 [1962])*. Under Article 697, the abatement of a nuisance does not preclude the right of any person injured to recover damages for its past existence. It appears, however, that although the owner or possesor is strictly liable for abatement of nuisance, the liability for damages is not considered strict in the said provision.

D. ABATEMENT.

The Civil Code provides for abatement of nuisance because nuisance, whether public or private, is considered one of the most serious hindrances to the enjoyment of life and property. The provisions for its abatement, both judicial and extrajudicial, was therefore considered indispensable in a well-rounded Civil Code. *(Report of Code Commission, p. 51)*.

a. Public Nuisance.

Art. 699 of the Civil Code states that the remedies against a public nuisance are prosecution under the Penal Code or any local ordinance, or a civil action or abatement, without judicial proceedings. Abatement without judicial proceedings is justified by the exercise of the police power of the State. *(The Homeowners Association of El Deposito, Barrio Corazon de Jesus, San Juan, Rizal vs. Lood, 47 SCRA 174)*.

It is required for the district health officer to take care that one or all of the remedies against a public nuisance are availed of. *(Article 700, Civil Code)*. If a civil action is brought by reason of the maintenance of a public nuisance, such action shall be commenced by the city or municipal mayor. *(Article 701, Civil Code)*. The law mandates that the district health officer shall determine whether or not abatement, without judicial proceedings, is the best remedy against a public nuisance. *(Article 702, Civil Code)*. An officer who failed to perform said duty may be held liable for damages. However, failure to observe the provisions of Article 702 is not itself a ground for the award of damages. *(Farrales vs. City Mayor of Baguio, 44 SCRA 239)*.

A private person may file an action on account of a public nuisance, if it is specially injurious to himself. *(Art. 703, Civil Code)*. Such private person may abate a public nuisance which is specially injurious to him by removing, or if necessary, by destroying the thing which constitutes the same, without committing a breach of the peace, or doing unnecessary injury. *(Article 704, Civil Code)*. Nevertheless,

before a private person can abate a public nuisance, he must comply with the following requirements:

(1) That demand be first made upon the owner or possessor of the property to abate the nuisance;

(2) That such demand has been rejected;

(3) That the abatement be approved by the district health officer and executed with the assistance of the local police; and

(4) That the value of the destruction does not exceed three thousand pesos. *(ibid.)*

b. Private Nuisance.

The remedies against a private nuisance are a civil action and abatement, without judicial proceedings. *(Art. 705, Civil Code)*. Any person injured by a private nuisance may abate it by removing, or if necessary, by destroying the thing which constitutes the nuisance, without committing a breach of the peace or doing unnecessary injury. However, it is indispensable that the procedure for extrajudicial abatement of a public nuisance by a private person be followed. *(Art. 706, Civil Code)*.

c. Fire Code of the Philippines.

Section 10 of Presidential Decree No. 1185 otherwise known as the "Fire Code of the Philippines" declares that fire hazards shall be abated immediately. For such purpose, the Director General of the Bureau of Fire Protection or his duly authorized representative may issue an order for such abatement.

The Fire Code likewise provides that if the owner, administrator or occupant of buildings, structure and their premises or facilities does not abate the same within the period fixed in said order, the occupancy permit or permit to operate shall be cancelled. Any building or structure declared as a firetrap or is causing clear and present fire danger to adjoining establishments and habitations shall be declared a public nuisance, as defined in the Civil Code of the Philippines. *(ibid.)*.

If the assessed value of the building or structure is not more than twenty thousand (P20,000.00) pesos, the owner, administrator or occupant thereof shall abate the hazard within thirty (30) days or if the assessed value is more than twenty thousand (P20,000.00) pesos, within sixty (60) days from receipt of the order declaring said

building or structure a public nuisance; otherwise, the Director General or his duly authorized representative shall forthwith cause its summary abatement. Summary abatement as used in the Fire Code means all corrective measures undertaken to abate hazards which shall include but not limited to remodelling, repairing, strengthening, reconstructing, removal and demolition, either partial or total, of the building or structure. The expenses incurred by the government for such summary abatement shall be borne by the owner, administrator or occupant and shall constitute a prior lien upon such property. *(ibid.)*.

d. Liability for Damages.

A private person or a public official extrajudicially abating a nuisance shall be liable for damages in two cases, to wit:

(1) If he causes unnecessary injury; or

(2) If an alleged nuisance is later declared by the courts to be not a real nuisance. *(Article 707, Civil Code)*.

e. Prescription and Estoppel.

An action to abate a nuisance is imprescriptible. *(Sangalang vs. Intermediate Appellate Court, August 25, 1989)*. Lapse of time cannot legalize any nuisance, whether public or private. *(Article 698, Civil Code)*. The Civil Code expressly provides that the right to bring an action to abate a public or private nuisance is not extinguished by prescription. *(Article 1143[2])*. The reason for this is that the abatement of nuisance is brought about by the demands of public health and safety. Neglect to protect the health and safety of every citizen will not justify continuation of the danger to them.

There is an opinion to the effect that estoppel is a valid defense against abatement of nuisance. *(Sangalang, et al. vs. Intermediate Appellate Court*, *G.R. No. 74376, August 25, 1989, citing II Paras, Civil Code of the Philippines, 556 [1975 ed.])*. It is believed, however, that the opinion is not consistent with the policy authorizing abatement of nuisance. If, as the Code Commission declared, nuisance is the most serious hindrance to the enjoyment of life and property, the government or private persons should not be considered estopped from questioning the nuisance. It is believed that the only effect of estoppel at most is that the private party who is so estopped may be deemed to have waived his or her right to damages.

CASE:

VELASCO vs. MANILA ELECTRIC COMPANY
40 SCRA 342 [1971]

In 1948, appellant Velasco bought from the People's Homesite and Housing Corporation three (3) adjoining lots situated at the corner of South D and South 6 Streets, Diliman, Quezon City. These lots are within an area zoned out as a "first residence" district by the City Council of Quezon City. Subsequently, the appellant sold two (2) lots to the Meralco, but retained the third lot, which was farthest from the street-corner, whereon he built his house.

In September, 1953, the appellee company started the construction of the sub-station in question and finished it the following November, without prior building permit or authority from the Public Service Commission. *(Meralco vs. Public Service Commission, 109 Phil. 603).* The facility reduces high voltage electricity to a current suitable for distribution to the company's consumers, numbering not less than 8,500 residential homes, over 300 commercial establishments and about 30 industries. (T.s.n., 19 October 1959, page 1765). The substation has a rated capacity of "2 transformers at 5000 Kva each or a total of 10,000 Kva without fan cooling; or 6250 Kva each or a total of 12,500 Kva with fan cooling" (Exhibit "A-3"). It was constructed at a distance of 10 to 20 meters from the appellant's house. (T.s.n., 16 July 1956, page 62; 19 December 1956, page 343; 1 June 1959, page 29). The company built a stone and cement wall at the sides along the streets but along the side adjoining the appellant's property it put up a *sawali* wall but later changed it to an interlink wire fence.

It is undisputed that a sound unceasingly emanates from the substation. Whether this sound constitutes an actionable nuisance or not is the principal issue in this case.

Plaintiff-appellant Velasco contends that the sound constitutes an actionable nuisance under Article 694 of the Civil Code of the Philippines, x x x because subjection to the sound since 1954 had disturbed the concentration and sleep of said appellant, and impaired his health and lowered the value of his property. Wherefore, he sought a judicial decree for the abatement of the nuisance and asked that he be declared entitled to recover compensatory, moral and other damages under Article 2202 of the Civil Code.

x x x

[After the trial, trial court dismissed the claim of the plaintiff, finding that the sound of the substation was unavoidable and did not constitute nuisance; that it could not have caused the diseases of anxiety neurosis, pyelonephritis, ureteritis, lumbago and anemia; and that the items of damage claimed by plaintiff were not adequately proved. Plaintiff then appealed to the Supreme Court.]

The general rule is that everyone is bound to bear the habitual or customary inconveniences that result from the proximity of others, and so long as this level is not surpassed, he may not complain against them. But

if the prejudice exceeds the inconveniences that such proximity habitually brings, the neighbor who causes such disturbance is held responsible for the resulting damage, being guilty of causing nuisance.

While no previous adjudications on the specific issue have been made in the Philippines, our law of nuisances is of American origin, and a review of authorities clearly indicates the rule to be that the causing or maintenance of disturbing noise or sound may constitute an actionable nuisance. *(V. Ed. Note, 23 ALR, 2d 1289).* The basic principles are laid down in *Tortorella vs. Traiser & Co., Inc.,* 90 ALR 1206:

"A noise may constitute an actionable nuisance, *Rogers vs. Elliott*, 146 Mass. 349, 15 N.E. 768, 4 Am. St. Rep. 316, *Stevens vs. Rockport Granite Co.,* 216 Mass. 486, 104 N.E. 371, Ann. Cas. 1915B, 1954, *Stodder vs. Rosen Talking Machine Co.*, 241 Mass. 245, 135 N.E. 251, 22 A. L. R. 1197, but it must be a noise which affects injuriously the health or comfort of ordinary people in the vicinity to an unreasonable extent. Injury to a particular person in a peculiar position or of specially sensitive characteristics will not render the noise an actionable nuisance, *Rogers vs. Elliott*, 146 Mass. 349, 15 N.E. 768, 4 Am. St. Rep. 316. In the conditions of present living noise seems inseparable from the conduct of many necessary occupations. Its presence is a nuisance in the popular sense in which that word is used, but in the absence of statute noise becomes actionable only when it passes the limits of reasonable adjustment to the conditions of the locality and of the needs of the maker to the needs of the listener. What those limits are cannot be fixed by any definite measure of quantity or quality. They depend upon the circumstances of the particular case. They may be affected, but are not controlled, by zoning ordinances, *Beane vs. H. J. Porter, Inc., 280 Mass. 538, 182 N. E. 823, Marshal vs. Holbrook, 276 Mass. 341, 177 N. E. 504; Strachan vs. Beacon Oil Co., 251 Mass. 479, 146 N. E. 737.* The delimitation of designated areas to use for manufacturing, industry or general business is not a license to emit every noise profitably attending the conduct of any one of them. *(Beane vs. H. J. Porter, Inc., 280 Mass. 538, 182 N. E. 823).* The test is whether rights of property of health or of comfort are so injuriously affected by the noise in question that the sufferer is subjected to a loss which goes beyond the reasonable limit imposed upon him by the condition of living, or of holding property, in a particular locality in fact devoted to uses which involve the emission of noise although ordinary care is taken to confine it within reasonably bounds; or in the vicinity of property of another owner who though creating a noise is acting with reasonable regard for the rights of those affected by it. *(Stevens vs. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371, Ann. Cas. 1915B, 1054).*

With particular reference to noise emanating from electrical machinery and appliances, the court, in *Kentucky & West Virginia Power Co. vs. Anderson*, *156 S. W. 2d 857*, after a review of authorities, ruled as follows:

> "There can be no doubt but that commercial and industrial activities which are lawful in themselves may become nuisances if they are so offensive to the senses that they render the enjoyment of life and property uncomfortable. It is no defense that skill

and care have been exercised and the most improved methods and appliances employed to prevent such result, *Wheat Culvert Company vs. Jenkins*, 246 Ky. 319, 55 S. W. 2d 4; 46 C.J. 683, 705; 20 R. C. L. 438; Annotations, 23 A. L. R. 1407; 90 A. L. R. 1207. Of course, the creation of trifling annoyance and inconvenience does not constitute an actionable nuisance, and the locality and surroundings are of importance. The fact that the cause of the complaint must be substantial has often led to expressions in the opinions that to be a nuisance the noise must be deafening or loud or excessive and unreasonable. Usually, it was shown to be of that character. The determinating factor when noise alone is the cause of complaint is not its intensity or volume. It is that the noise is of such character as to produce actual physical discomfort and annoyance to a person of ordinary sensibilities, rendering adjacent property less comfortable and valuable. If the noise does that it can well be said to be substantial and unreasonable in degree; and reasonableness is a question of fact dependent upon all the circumstances and conditions. (20 R. C. L. 445, 453; *Wheat Culvert Company vs. Jenkins, supra*). There can be no fixed standard as to what kind of noise constitutes a nuisance. It is true some witnesses in this case say they have been annoyed by the humming of these transformers, but that fact is not conclusive as to the non-existence of the cause of complaint, the test being the effect which is had upon an ordinary person who is neither sensitive nor immune to the annoyance concerning which the complaint is made. In the absence of evidence that the complainant and his family are supersensitive to distracting noises, it is to be assumed that they are persons of ordinary and normal sensibilities *Roukovina vs. Island Farm Creamery Company*, 160 Minn. 335, 200 N. W. 350, 38 A. L. R. 1502.

x x x x x x x x x

In *Wheat Culvert Company vs. Jenkins*, *supra*, we held an injunction was properly decreed to stop the noise from the operation of a metal culvert factory at night which interfered with the sleep of the occupants of an adjacent residence. It is true the clanging, riveting and hammering of metal plates produces a sound different in character from the steady hum or buzz of the electric machinery described in this case. In the Jenkins case the noise was loud, discordant and intermittent. Here it is interminable and monotonous. Therein lies the physical annoyance and disturbance. Though the noise be harmonious and slight and trivial in itself, the constant and monotonous sound of a cricket on the earth, or the drip of a leaking faucet is irritating, uncomfortable, distracting and disturbing to the average man and woman. So it is that the intolerable, steady monotony of this ceaseless sound, loud enough to interfere with ordinary conversation in the dwelling, produces a result generally deemed sufficient to constitute the cause of it an actionable nuisance. Thus, it has been held the continuous and monotonous playing of a phonograph for advertising purposes on the street even though there were various records, singing, speaking and instrumental, injuriously

affected plaintiff's employees by a gradual wear on their nervous systems, and otherwise, is a nuisance authorizing an injunction and damages. *(Frank F. Stodder, et al. vs. Rosen Talking Machine Company, 241 Mass. 245, 135 N.E. 251, 22 A. L. R. 1197)."*

The principles thus laid down make it readily apparent that inquiry must be directed at the character and intensity of the noise generated by the particular substation of the appellee. As can be anticipated, character and loudness of sound being of subjective appreciation in ordinary witnesses, not much help can be obtained from the testimonial evidence. That of plaintiff Velasco is too plainly biased and emotional to be of much value. His exaggerations are readily apparent in paragraph V of his amended complaint, signed by him as well as his counsel, wherein the noise complained of as —

> "fearful hazardous noise and clangor are produced by the said electric transformer of the MEC's substation, approximating a noise of a reactivated about-to-explode volcano, perhaps like the nerve wracking noise of the torture chamber in *Germany's Dachau or Buchenwald." (Record on Appeal, page 6).*

The estimate of the other witnesses on the point of inquiry are vague and imprecise, and fail to give a definite idea of the intensity of the sound complained of. Thus:

OSCAR SANTOS, Chief Building Inspector, Department of Engineering, Quezon City ____ "the sound (at the front door of plaintiff Velasco's house) becomes noticeable only when I tried to concentrate . . ." (T.s.n., 16 July 1956, page 50).

SERAFIN VILLARAZA, Building Inspector ____ ". . . like a high pitch note." (the trial court's description as to the imitation of noise made by witness: ". . . more of a hissing sound.) (T.s.n., 16 July 1956, pages 59-60).

CONSTANCIO SORIA, City Electrician ____ ". . . humming sound" . . . "of a running car." (T.s.n., 16 July 1956, page 87).

JOSE R. ALVAREZ, Sanitary Engineer, Quezon City Health Department ____ ". . . substation emits a continuous rumbling sound which is audible within the premises and at about a radius of 70 meters." "I stayed there from 6:00 p.m. to about 1:00 o'clock in the morning" . . . "increases with the approach of twilight." (T.s.n., 5 September 1956, pages 40-44).

NORBERTO S. AMORANTO, Quezon City Mayor ____ (for 30 minutes in the street at a distance of 12 to 15 meters from sub-station) "I felt no effect on myself." ". . . no [piercing noise]" (T.s.n., 18 September 1956, page 189).

PACIFICO AUSTRIA, architect, appellant's neighbor: ". . . like an approaching airplane . . . around five kilometers away." (T.s.n., 19 November 1956, pages 276-277).

ANGEL DEL ROSARIO, radiologist, appellant's neighbor: ". . . as if it is a running motor or a running dynamo, which disturbs the ear and the hearing of a person." (T.s.n., 4 December 1956, page 21).

ANTONIO D. PAGUIA, lawyer ____ "It may be likened to the sound emitted by the whistle of a boat at a far distance but it is very audible." (T.s.n., 19 December 1956, page 309).

RENE RODRIGUEZ, sugar planter and sugar broker, appellant's neighbor ____ "It sounds like a big motor running continuously." (T.s.n., 19 December 1956, page 347).

SIMPLICIO BELISARIO, Army captain ____ (on a visit to Velasco) "I can compare the noise to an airplane C-47 being started — the motor." [Did not notice the noise from the substation when passing by, in a car, Velasco's house] (T.s.n., 7 January 1957, pages 11-12).

MANOLO CONSTANTINO, businessman, appellant's neighbor ____ "It disturbs our concentration of mind." (T.s.n., 10 January 1957, page 11).

PEDRO PICA, businessman, appellant's neighbor: ". . . We can hear it very well [at a distance of 100 to 150 meters]. (T.s.n., 10 January 1957, page 41).

CIRENEO PUNZALAN, lawyer ____ ". . . a continuous droning, . . . like the sound of an airplane." (T.s.n., 17 January 1957, page 385).

JAIME C. ZAGUIRRE, Chief, Neuro-Psychiatry Section, V. Luna Gen. Hospital ____ ". . . comparatively the sound was really loud to bother a man sleeping." (T.s.n., 17 January 1957, page 406).

We are thus, constrained to rely on quantitative measurements shown by the record. Under instructions from the Director of Health, samplings of the sound intensity were taken by Dr. Jesus Almonte using a sound level meter and other instruments. Within the compound of the plaintiff-appellant, near the wire fence serving as property line between him and the appellee, on 27 August 1957 at 11:45 a.m., the sound level under the sampaloc tree was 46-48 decibels, while behind Velasco's kitchen, the meter registered 49-50; at the same places on 29 August 1957, at 6:00 a.m., the readings were 56-59 and 61-62 decibels, respectively; on 7 September 1957, at 9:30 a.m., the sound level under the sampaloc tree was 74-76 decibels; and on 8 September 1957 at 3:35 in the morning, the reading under the same tree was 70 decibels, while near the kitchen it was 79-80 decibels. Several measurements were also taken inside and outside the house (Exhibit "NN-7, b-f"). The ambient sound of the locality, or that sound level characteristic of it or that sound predominating minus the sound of the sub-station is from 28 to 32 decibels. (T.s.n., 26 March 1958, pages 6-7).

Mamerto Buenafe, superintendent of the appellee's electrical laboratory, also took sound level samplings. On 19 December 1958, between 7:00 to 7:30 o'clock in the evening, at the substation compound near the wire fence or property line, the readings were 55 and 54 and still near the fence close to the sampaloc tree, it was 52 decibels; outside but close to the concrete wall, the readings were 42 to 43 decibels; and near the transformers, it was 76 decibels. (Exhibit "13").

Buenafe also took samplings at the North General Hospital on 4 January 1959 between 9:05 to 9:45 in the evening. In the different rooms and wards from the first to the fourth floors, the readings varied from 45 to 67 decibels.

Technical charts submitted in evidence show the following intensity levels in decibels of some familiar sounds: average residence: 40; average office: 55; average automobile, 15 feet: 70; noisiest spot at Niagara Falls: 92 (Exhibit "11-B"); average dwelling: 35; quiet office: 40; average office: 50; conversation: 60; pneumatic rock drill: 130 (Exhibit "12"); quiet home — average living room: 40; home ventilation fan, outside sound of good home airconditioner or automobile at 50 feet: 70. (Exhibit "15-A").

Thus the impartial and objective evidence points to the sound emitted by the appellee's substation transformers being of much higher level than the ambient sound of the locality. The measurements taken by Dr. Almonte, who is not connected with either party, and is a physician to boot (unlike appellee's electrical superintendent Buenafe), appear more reliable. The conclusion must be that, contrary to the finding of the trial court, the noise continuously emitted, day and night, constitutes an actionable nuisance for which the appellant is entitled to relief, by requiring the appellee company to adopt the necessary measures to deaden or reduce the sound at the plaintiff's house, by replacing the interlink wire fence with a partition made of sound absorbent material, since the relocation of the substation is manifestly impracticable and would be prejudicial to the customers of the Electric Company who are being serviced from the substation.

Appellee company insists that as the plaintiff's own evidence (Exhibit "NN-7[c]") the intensity of the sound (as measured by Dr. Almonte) inside appellant's house is only 46 to 47 decibels at the consultation room, and 43 to 45 decibels within the treatment room, the appellant had no ground to complain. This argument is not meritorious, because the noise at the bedrooms was determined to be around 64-65 decibels, and the medical evidence is to the effect that the basic root of the appellant's ailments was his inability to sleep due to the incessant noise with consequent irritation, thus weakening his constitution and making him easy prey to pathogenic germs that could not otherwise affect a person of normal health.

In *Kentucky and West Virginia Co., Inc. vs. Anderson*, 156 SW. 857, the average of three readings along the plaintiff's fence was only 44 decibels but, because the sound from the sub-station was interminable and monotonous, the court authorized an injunction and damages. In the present case, the three readings along the property line are 52, 54 and 55 decibels. Plaintiff's case is manifestly stronger.

Appellee company argues that the plaintiff should not be heard to complain because the sound level at the North General Hospital, where silence is observed, is even higher than at his residence. This comparison lacks basis because it has not been established that the hospital is located in surroundings similar to the residential zone where the plaintiff lived or

that the sound at the hospital is similarly monotonous and ceaseless as the sound emitted by the sub-station.

Constancio Soria testified that "The way the transformers are built, the humming sound cannot be avoided." On this testimony, the company emphasizes that the sub-station was constructed for public convenience. Admitting that the sound cannot be eliminated, there is no proof that it can not be reduced. That the sub-station is needed for the Meralco to be able to serve well its customers is no reason, however, why it should be operated to the detriment and discomfort of others.

The fact that the Meralco had received no complaint although it had been operating hereabouts for the past 50 years with sub-stations similar to the one in controversy is not a valid argument. The absence of suit neither lessens the company's liability under the law nor weakens the right of others against it to demand their just due.

CHAPTER 12

PRODUCT AND SERVICE LIABILITY

1. STATUTORY BASIS

Product liability law is the law which governs the liability of manufacturers and sellers for damages resulting from defective products. Liability for defective products may be based on fraud, warranty, negligence, or strict liability. *(Coca-Cola Bottler's Philippines vs. Court of Appeals, 227 SCRA 293 [1993]).* All those theories may be used in this jurisdiction on the basis of the provisions of the Civil Code, including Articles 33, 2176 and 2187.

An important development in product liability law is the passage of the Consumer Act of the Philippines. As the title of the law indicates, it is a law that is meant to protect the consumers by providing for certain safeguards when they purchase or use consumer products. The policy statement stated in Art. 2 of the law reveals the general plan implemented in its specific provisions:

> "2. *Declaration of Basic Policy.* — It is the policy of the State to protect the interests of the consumer, promote his general welfare and to establish standards of conduct for business and industry. Towards this end, the State shall implement measures to achieve the following objectives:
>
> a) protection against hazards to health and safety;
>
> b) protection against deceptive, unfair and unconscionable sales acts and practices;
>
> c) provision of information and education to facilitate sound choice and the proper exercise of rights by the consumer;
>
> d) provision of adequate rights and means of redress; and
>
> e) involvement of consumer representatives in the formulation of social and economic policies.

It should be noted that the special law covers only consumer products and services, that is, "goods, services, and credits, debts or obligations which are primarily for personal, family, household or

agricultural purposes, which shall include but not limited to, food, drugs, cosmetics and devices." *(Article 4, par. q)*. The terms food, drugs, cosmetics and devices are, in turn, defined in Article 4 of the Consumer Act as follows:

> u) "Cosmetics" means (1) articles intended to be rubbed, poured, sprinkled or sprayed on, introduced into or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) article intended for use as a component of any such article except that such term shall not include soap.
>
> ad) "Drugs" mean (1) articles recognized in the current official United States Pharmacopoeia-National Formulary, official Homeopathic Pharmacopoeia of the United States, official National Drug Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or animals; and (4) articles intended for use as a component of any articles specified in clauses (1), (2), or (3) but do not include devices or their components, parts or accessories.
>
> The term "drug" when used in this Act shall include herbal and/or traditional drug. They are defined as articles from indigenous plant or animal origin used in folk medicine which are: (1) recognized in the Philippine National Formulary; (2) intended for use in the treatment or cure, mitigation, of disease symptoms, injury or bodily defect for use in man; (3) other than food, intended to affect the structure of any function of the body of man; (4) put into finishes, ready to use form by means of formulation, dosage or dosage directions; and (5) intended for use as a component of any of the articles specified in clauses (1), (2), (3) and (4) of this paragraph.
>
> ab) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part or accessory which is (1) recognized in the official United States Pharmacopoeia-National Formulary (USP-NF) or any supplement to them, (2) intended for use in the diagnosis of disease or other condition or in the cure, mitigation, treatment or prevention of disease, in man or other animals; or (3) intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

> ag) "Food" means any substance, whether processed, semi-processed or raw, intended for human consumption and includes chewing gum, drinks and beverages and any substance which has been used as an ingredient or a component in the manufacture, preparation or treatment of food.

Prior to the enactment of the Consumer Act, there were already laws passed by the legislature which protect the consumers and which impose liability to manufacturers and sellers. Some of the said laws include the following:

a. Act No. 3073, "An Act to Regulate the Sale of Viruses, Serums, Toxins, and Analogous Products in the Philippine Islands."

b. Act No. 3091, "An Act to Prevent the Importation, Manufacture, Sale or Transportation within the Philippine Islands of Adulterated or Misbranded Paris Green, Lead Arsenates, Lime-Sulphur Compounds, and other Insecticides and Fungicides, and Regulating Traffic therein, and for Other Purposes."

c. Act No. 3595, "An Act to Regulate the Manufacture, Importation, and Sale of Galvanized Iron, Barbed Wire, and Nails, and for Other Purposes."

d. Act No. 3596, " An Act to Prevent the Adulteration of, and Deception in the Sale of Paints and Paint Materials in the Philippine Islands."

e. Act No. 3740, "An Act to Penalize Fraudulent Advertising, Mislabeling or Misbranding of any Product, Stocks, Bonds, Etc."

f. Commonwealth Act No. 560, "An Act to Provide Security Against Fraud in the Kind of Sawn Lumber Offered for Sale."

g. Republic Act No. 428 as amended by Republic Act No. 1535, "An Act to Declare Illegal the Possession, Sale or Distribution of Fish or Other Aquatic Animals Stupefied, Disabled or Killed by Means of Dynamite or Other Explosive or Toxic Substances and Providing Penalties therefor."

h. Republic Act No. 1071, "An Act to Regulate the Sale of Veterinary Biologics and Medicinal Preparations."

i. Republic Act No. 1517, "An Act Regulating the Collection, Processing and Sale of Human Blood, and the Establishment and Operation of Blood Banks and Blood Processing Laboratories."

j. Republic Act No. 5921 as amended by E.O. No. 175 (May 22, 1987), "An Act Regulating the Practice of Pharmacy."

k. Republic Act No. 3720 as amended by E.O. No. 174 (May 22, 1987), "An Act to Ensure the Safety and Purity of Food, Drugs, and Cosmetics Being Made Available to the Public by Creating the Food and Drug Administration which shall Administer and Enforce the Laws Pertaining Thereto."

It should be noted that the above-enumerated special laws have penal provisions which also give rise to civil liability *ex delito* following the general rule that a person criminally liable is civilly liable. *(Article 100, Revised Penal Code).*

2. ALTERNATIVE THEORIES

We will examine in this Section five (5) different causes of action that may justify the award of damages for the injuries sustained because of defective products. These alternative theories that may be used to justify product liability are:

a. Fraud or Misrepresentation;

b. Breach of Warranty;

c. Negligence;

d. Civil Liability arising from Criminal Liability; and

e. Strict Liability.

A. FRAUD OR MISREPRESENTATION.

a. Civil Code.

We pointed out in Chapter 8 that liability for fraud or misrepresentation may be based on Article 33 of the Civil Code. Thus, if a seller or manufacturer misrepresented that a cosmetic product does not have any side effect, the seller is liable to the buyer who was damaged because of the side effect.

It should be noted that not all expressions of opinion are considered actionable misrepresentation if they are established to be inaccurate. The law does not exact good faith from a seller in vague commendations of his wares which are manifestly open to difference of opinion, which do not imply untrue assertions concerning matters of direct observations, and as to which it always has been understood the world over that such statements are to be distrusted. *(Deming vs. Darling, 20 N.E. 107, 108-109 [Mass. 1889]).* Under the Civil Code,

usual exaggerations in trade are not actionable misrepresentations.

b. Consumer Act.

The Consumer Act likewise prohibits fraudulent sales acts or practices. Chapter I of Title III expressly provides for protection against deceptive, unfair and unconscionable sales acts and practices. The pertinent provisions of the Act state:

> Art. 50. *Prohibition Against Deceptive Sales Acts or Practices*. — A deceptive act or practice by a seller or supplier in connection with a consumer transaction violates this Act whether it occurs before, during or after the transaction. An act or practice shall be deemed deceptive whenever the producer, manufacturer, supplier or seller, through concealment, false representation of fraudulent manipulation, induces a consumer to enter into a sales or lease transaction of any consumer product or service.
>
> Without limiting the scope of the above paragraph, the act or practice of a seller or supplier is deceptive when it represents that:
>
> a) a consumer product or service has the sponsorship, approval, performance, characteristics, ingredients, accessories, uses, or benefits it does not have;
>
> b) a consumer product or service is of a particular standard, quality, grade, style, or model when in fact it is not;
>
> c) a consumer product is new, original or unused, when in fact, it is in a deteriorated, altered, reconditioned, reclaimed or second-hand state;
>
> d) a consumer product or service is available to the consumer for a reason that is different from the fact;
>
> e) a consumer product or service has been supplied in accordance with the previous representation when in fact it is not;
>
> f) a consumer product or service can be supplied in a quantity greater than the supplier intends;
>
> g) a service, or repair of a consumer product is needed when in fact it is not;
>
> h) a specific price advantage of a consumer product exists when in fact it does not;
>
> i) the sales act or practice involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms or other rights, remedies or obligations if the indication is false; and
>
> j) the seller or supplier has a sponsorship, approval, or affili-

ation he does not have.

Art. 51. *Deceptive Sales Act or Practices By Regulation*. — The Department shall, after due notice and hearing, promulgate regulations declaring as deceptive any sales act, practice or technique which is a misrepresentation of facts other than these enumerated in Article 50.

Art. 52. *Unfair or Unconscionable Sales Act or Practice*. — An unfair or unconscionable sales act or practice by a seller or supplier in connection with a consumer transaction violates this Chapter whether it occurs before, during or after the consumer transaction. An act or practice shall be deemed unfair or unconscionable whenever the producer, manufacturer, distributor, supplier or seller, by taking advantage of the consumer's physical or mental infirmity, ignorance, illiteracy, lack of time or the general conditions of the environment or surroundings, induces the consumer to enter into a sales or lease transaction grossly inimical to the interests of the consumer or grossly one-sided in favor of the producer, manufacturer, distributor, supplier or seller.

In determining whether an act or practice is unfair and unconscionable, the following circumstances shall be considered:

a) that the producer, manufacturer, distributor, supplier or seller took advantage of the inability of the consumer to reasonably protect his interest because of his inability to understand the language of an agreement, or similar factors;

b) that when the consumer transaction was entered into, the price grossly exceeded the price at which similar products or services were readily obtainable in similar transaction by like consumers;

c) that when the consumer transaction was entered into, the consumer was unable to receive a substantial benefit from the subject of the transaction;

d) that when the consumer was entered into, the seller or supplier was aware that there was no reasonable probability or payment of the obligation in full by the consumer; and

e) that the transaction that the seller or supplier induced the consumer to enter into was excessively one-sided in favor of the seller or supplier.

Section 60 of the law expressly provides that the court may grant an injunction restraining the conduct constituting the contravention of the above-quoted provisions and/or actual damages and such other orders as it thinks fit to redress injury to the person affected by such conduct.

B. WARRANTIES.

a. Civil Code.

A warranty under the Civil Code is any affirmation of fact or any promise by the seller relating to the thing, the necessary tendency of which is to induce the buyer to purchase the same, and the buyer purchases the thing relying thereon. *(Article 1546).* An expression of opinion by the seller and affirmation of the value of the thing may likewise be a warranty if the seller made such affirmation or statement as an expert and it was relied upon by the buyer. *(ibid.).* A warranty as to the quality of the product may be express or implied. In the law on sales under the Civil Code, certain implied warranties are natural elements of the contract. These implied warranties include the warranty against hidden defects and the warranty of fitness and merchantability.

Articles 1547, 1561, 1562, 1563 to 1571 provides:

> "Art. 1561. The vendor shall be responsible for warranty against the hidden defects which the thing sold may have, should they render it unfit for the use for which it is intended, or should they diminish its fitness for such use to such an extent that, had the vendee been aware thereof, he would not have acquired it or would have given a lower price for it; but said vendor shall not be answerable for patent defects or those which may be visible, or for those which are not visible if the vendee is an expert who, by reason of his trade or profession, should have known them. (1484a)
>
> Art. 1562. In a sale of goods, there is an implied warranty or condition as to the quality or fitness of the goods, as follows:
>
> (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are acquired, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose;
>
> (2) Where the goods are brought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality. (n)
>
> Art. 1563. In the case of contract of sale of a specified article under its patent or other trade name, there is no warranty as to its fitness for any particular purpose, unless there is a stipulation

to the contrary. (n)

Art. 1564. An implied warranty or condition as to the quality or fitness for a particular purpose may be annexed by the usage of trade. (n)

Art. 1565. In the case of a contract of sale by sample, if the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. (n)

Art. 1566. The vendor is responsible to the vendee for any hidden faults or defects in the thing sold, even though he was not aware thereof.

This provision shall not apply if the contrary has been stipulated, and the vendor was not aware of the hidden faults or defects in the thing sold. (1485)

Art. 1567. In the cases of Articles 1561, 1562, 1564, 1565 and 1566, the vendee may elect between withdrawing from the contract and demanding a proportionate reduction of the price, with damages in either case. (1486a)

Art. 1568. If the thing sold should be lost in consequence of the hidden faults, and the vendor was aware of them, he shall bear the loss, and shall be obliged to return the price and refund the expenses of the contract, with damages. If he was not aware of them, he shall only return the price and interest thereon, and reimburse the expenses of the contract which the vendee might have paid. (1487a)

Art. 1569. If the thing sold had any hidden fault at the time of the sale, and should thereafter be lost by a fortuitous event or through the fault of the vendee, the latter may demand of the vendor the price which he paid, less the value which the thing had when it was lost.

If the vendor acted in bad faith, he shall pay damages to the vendee. (1488a)

Art. 1570. The preceding articles of this Subsection shall be applicable to judicial sales, except that the judgment debtor shall not be liable for damages. (1489a)

Art. 1571. Actions arising from the provisions of the preceding ten articles shall be barred after six months, from the delivery of the thing sold. (1490)

Generally, contracts have the force of law only between the parties. Hence, only the parties can enforce its provisions or elements,

including implied warranties. Article 1567 provides that the vendee may elect between withdrawing from the contract and demanding a proportionate reduction of the price, with damages in either cases. The former is called *accion redhibitoria* while the latter is called *accion quanti minoris*.

It should be noted, however, that in *Virgilio M. del Rosario, et al. vs. Court of Appeals and Metal Forming Corporation* (G.R. No. 118325, January 29, 1997), the Supreme Court imposed damages on the manufacturer who sold roofing materials without requiring privity. The petitioners were convinced to purchase the roofing materials because the manufacturer advertised through the media and brochures the alleged durability of its tiles and the sturdiness of its roofing materials installed in accordance with its particularly described method. These representations included statements that the materials are "STRUCTURALLY SAFE AND STRONG" and that the tile structure acts as a single unit against wind and storm pressure due to the strong hook action of its overlaps. The Supreme Court imposed liability on the basis of Article 1546 and rejected the argument of the manufacturer that it had no obligation to the petitioners because it was the contractor that directly purchased from them and not the petitioners. In other words, privity between the plaintiff and the defendant is not necessary before liability can be imposed for breach of warranty given to the public. The Supreme Court explained that:

> "All the quibbling about whether Engineer Puno acted as agent of MFC or of the spouses, is pointless. The matter is not a factor in determining MFC's liability for its worker's use of inferior materials and their defective installation of the 'Banawe' metal tiles in the roof of the latter's residence. Prescinding from the persuasive proof on record that at all times material and with regard to the acquisition and installation of the metal tiles or shingles, Puno was in truth acting as contractor of the Del Rosarios and on their instructions ascertainment of the definite identity of the person who actually ordered the shingles from MFC is utterly inconsequential — it must just as well have been a construction foreman, a trusted domestic."

b. Consumer Act.

The Consumer Act likewise contains provisions imposing warranty obligations on the manufacturers and sellers. Article 67 recognizes that the provisions of the Civil Code on conditions and warranties shall govern all contracts of sale with conditions and war-

ranties. Article 68 and other provisions of the Consumer Act added certain rules that govern warranties in sale of consumer products. Any covenant or stipulation contrary to the provisions are considered null and void.

(1) Formalities.

Article 68 of the Consumer Act provides that any seller or manufacturer who gives an express warranty is required to do the following:

1) set forth the terms of warranty in clear and readily understandable language and clearly identify himself as the warrantor;

2) identify the party to whom the warranty is extended;

3) state the products or parts covered;

4) state what the warrantor will do in the event of a defect, malfunction of failure to conform to the written warranty and at whose expense;

5) state what the consumer must do to avail of the rights which accrue to the warranty; and

6) stipulate the period within which, after notice of defect, malfunction or failure to conform to the warranty, the warrantor will perform any obligation under the warranty.

Other formalities required by Article 68 of the Consumer Act are as follows:

"c) *Designation of warranties*. — A written warranty shall clearly and conspicuously designate such warranty as:

1) "Full warranty" if the written warranty meets the minimum requirements set forth in paragraph (d); or

2) "Limited warranty" if the written warranty does not meet such minimum requirements.

d) *Minimum standards for warranties*. — For the warrantor of a consumer product to meet the minimum standards for warranty, he shall:

1) remedy such consumer product within a reasonable time and without charge in case of a defect, malfunction or failure to conform to such written warranty;

2) permit the consumer to elect whether to ask for a refund or replacement without charge of such product or part, as the case may be, where after reasonable number of attempts to remedy the defect or malfunc-

> tion, the product continues to have the defect or to malfunction.
>
> The warrantor will not be required to perform the above duties if he can show that the defect, malfunction or failure to conform to a written warranty was caused by damage due to unreasonable use thereof."

(2) Duration.

It is also mandated that all written warranties or guarantees issued by a manufacturer, producer, or importer shall be operative from the moment of sale. *(Article 68[b], Consumer Act).*

Nevertheless, the seller and the consumer may stipulate the period within which the express warranty shall be enforceable. If the implied warranty on merchantability accompanies an express warranty, both will be of equal duration.

Any other implied warranty shall endure not less than sixty (60) days nor more than one (1) year following the sale of new consumer products.

(3) Records and Reports.

As part of the rule regarding the enforcement of warranties, it is required that distributors and retailers keep a record of all purchases covered by a warranty or guarantee for such period of time corresponding to the lifetime of the product's respective warranties or guarantees.

Likewise, it is also required that sales report be submitted to the manufacturer, producer or importer. All sales made by distributors of products covered by this Article shall be reported to the manufacturer, producer, or importer of the product sold within thirty (30) days from date of purchase, unless otherwise agreed upon. The report shall contain, among others, the date of purchase, model of the product bought, its serial number, name and address of the buyer. The report made in accordance with this provision shall be equivalent to a warranty registration with the manufacturer, producer, or importer. Such registration is sufficient to hold the manufacturer, producer, or importer liable, in appropriate cases, under its warranty. *(Article 68[1]).*

Failure of the distributor to make the report or send them the form required by the manufacturer, producer, or importer shall relieve

the latter of its liability under the warranty and the distributor who failed to comply with its obligation to send the sales reports shall be personally liable under the warranty. The manufacturer is not, however, free from any obligation to the consumer. The law provides that the manufacturer shall be obligated to make good the warranty at the expense of the distributor. *(Art. 68[2]).*

4. Liability of Retailers.

The retailer shall be subsidiarily liable under the warranty in case of failure of both the manufacturer and distributor to honor the warranty. In such case, the retailer shall shoulder the expenses and costs necessary to honor the warranty. On the other hand, the recourse of the retailer is to proceed against the distributor or manufacturer. *(Article 68[3]).*

5. Enforcement of Warranties and Breach.

Article 68 likewise provide for the rules on the enforcement of the warranties:

> "4) *Enforcement of warranty or guarantee.* — The warranty rights can be enforced by presentment of a claim. To this end, the purchaser needs only to present to the immediate seller either the warranty card of the official receipt along with the product to be serviced or returned to the immediate seller. No other documentary requirement shall be demanded from the purchaser. If the immediate seller is the manufacturer's factory or showroom, the warranty shall immediately be honored. If the product was purchased from a distributor, the distributor shall likewise immediately honor the warranty. In the case of a retailer other than the distributor, the former shall take responsibility without cost to the buyer of presenting the warranty claim to the distributor in the consumer's behalf."

In case of breach of warranties, the following rules apply:

> "f) *Breach of warranties.* — 1) In case of breach of express warranty, the consumer may elect to have the goods repaired or its purchase price refunded by the warrantor. In case the repair of the product in whole or in part is elected, the warranty work must be made to conform to the express warranty within thirty (30) days by either the warrantor or his representative. The thirty-day period, however, may be extended by conditions which are beyond the control of the warrantor or his representative. In case the refund of the purchase price is elected, the amount directly attributable to the use of the consumer prior to the discovery of the non-conformity shall be deducted.

> 2) In case of breach of implied warranty, the consumer may retain in the goods and recover damages, or reject the goods, cancel and contract and recover from the seller so much of the purchase price as has been paid, including damages."

Aside from the foregoing rules regarding breach of warranties, Article 72 likewise enumerates certain prohibited acts, to wit: a) refusal without any valid legal cause by the total manufacturer or any person obligated under the warranty or guarantee to honor a warranty or guarantee issued; b) unreasonable delay by the local manufacturer or any person obligated under the warranty or guarantee in honoring the warranty; c) removal by any person of a product's warranty card for the purpose of evading said warranty obligation; and d) any false representation in an advertisement as to the existence of a warranty or guarantee.

6. Lack of Privity.

It is immediately noticeable that privity is not necessary in successfully pursuing an action for breach of warranty or in enforcing the same under the Consumer Act. The warranty of the manufacturer extends not only to the immediate buyer, the retailer or wholesaler, but also to the end-buyer. In addition, the duration of the warranty is longer compared to the duration thereof under the Civil Code.

C. NEGLIGENCE.

The matters that were discussed regarding liability based on delict and quasi-delict in the earlier chapters apply to liability for defective products. The liability will result if due care of an ordinarily prudent man was not exercised in manufacturing, packaging, marketing or distributing the product.

Thus, the Supreme Court ruled in *Coca-cola Bottler's Philippines, Inc. vs. Court of Appeals (supra),* that a complaint states a cause action based on quasi-delict if it makes reference to the reckless and negligent manufacture of "adulterated food items intended to be sold for public consumption." The plaintiff in the said case alleged that she was the proprietress of a canteen, an enterprise engaged in the sale of soft drinks and other goods to students of the school where the canteen was located. The plaintiff further alleged that some of the parents of students complained to her that the soft drinks sold by her contained fiber-like matter and other foreign substances or particles. When she went over her stock of soft drinks, she allegedly discovered the same fiber-like matters in the some of the bottles and a plastic

matter in an unopened bottle. She alleged that her sales plummeted as a consequence of the discovery of such substances. She alleged that as a result she was forced to close shop. The Supreme Court ruled the allegations sufficiently present a quasi-delict case and warrant an award of damages if they are supported later by evidence during the trial on the merits.

Generally, the care which must be exercised would depend on the circumstances of each case. It is important to note that in product liability law, certain standards are already imposed by special laws and the rules and regulations of proper government agencies. Certain acts or omissions are expressly prohibited by statutes thereby making violation thereof negligence *per se*. For instance, Section 11 of Republic Act No. 3720 (as amended by Executive Order No. 175) otherwise known as the Food, Drug and Cosmetic Act, specifies certain prohibited acts:

> "Sec. 11. The following acts and the causing thereof are hereby prohibited:
>
> (a) The manufacture, importation, exportation, sale, offering for sale, distribution or transfer of any food, drug, device or cosmetic that is adulterated or misbranded.
>
> (b) The adulteration or misbranding of any food, drug, device, or cosmetic.
>
> (c) The refusal to permit entry or inspection as authorized by Section twenty-seven hereof or to allow samples to be collected.
>
> (d) The giving of a guaranty or undertaking referred to in Section twelve (b) hereof which guaranty or undertaking is false, except by a person who relied upon a guarantor undertaking to the same effect signed by, and containing the name and address of, the person residing in the Philippines from whom he received in good faith the food, drug, device, or cosmetic or the giving of a guaranty or undertaking referred to in Section twelve (b) which guaranty or undertaking is false.
>
> (e) Forging, counterfeiting, simulating or falsely representing or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of this Act.
>
> (f) The using by any person to his own advantage, or revealing, other than to the Secretary or officers and employees of the Department or to the courts when relevant in any judicial proceeding under this Act, any information concerning any method or process which as a trade secret is entitled to protection.

(g) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) and result in such article being adulterated or misbranded.

(h) The use, on the labeling of any drug or in any advertising relating to such drug of any representation or suggestion that an application with respect to such drug is effective under Sections twenty-one and twenty-one-B hereof, or that such drug complies with the provisions of such sections.

(i) The use, in labeling, advertising or other sales promotion of any reference to any report or analysis furnished in compliance with Section twenty-six hereof.

(j) The manufacture, importation, exportation, sale, offering for sale, distribution, or transfer of any drug or device which is not registered with the Bureau pursuant to this Act.

(k) The manufacture, importation, exportation, sale, offering for sale, distribution, or transfer of any drug or device by any person without the license from the Bureau required under this Act.

(l) The sale or offering for sale of any drug or device beyond its expiration or expiry date.

(m) The release for sale or distribution of a batch of drugs without batch certification when required under Section twenty-two hereof."

If a person violates any of the provisions specified above, the same will be construed as negligence *per se*.

Similarly, there is negligence *per se* if the manufacturer manufactured products which do not comply with the safety standards promulgated by appropriate government agencies specified under the Consumer Act. It should be recalled that one of the ways by which the law provides protection against hazards to health and safety is by requiring the promulgation of safety and quality standards for consumer products. *(Articles 5 to 46, R.A. No. 7394)*. Article 7 provides that the standards shall consist of one or more of the following: a) requirements to performance, composition, contents, design, construction, finish, packaging of a consumer product; b) requirements as to kind, class, grade, dimensions, weights, material; c) requirements as to the methods of sampling, tests and codes used to check the quality of the products; d) requirements as to precautions in storage, transporting and packaging; e) requirements that a consumer product be marked

with or accompanied by clear and adequate safety.

D. DELICT.

The buyer or the ultimate consumer may likewise enforce the obligation of the manufacturer or the seller based on delict. The liability may be based on criminal negligence under the Revised Penal Code or violation of any special law enumerated earlier in this chapter.

There is, for instance, criminal negligence if the seller sold contaminated liquor to his customer. The seller is criminally liable under Article 365 or 366 of the Revised Penal Code as the case may be. *(United States vs. Lara, 75 Phil. 787; People vs. Alberto Fernandez, 8 ACR 172).*

With respect to violation of special laws, the liability may be imposed even in the absence of intent. The crime punished by special law generally does not require intent and it is sufficient that the offender has the intent to perpetrate the act prohibited by the special law. *(United States vs. Go Chico, 14 Phil. 128; People vs. Bayona, 61 Phil. 181).* Thus, in *United States vs. Sy Cong Bieng, et al.* (30 Phil. 577), an employee of the appellant, while in charge of the latter's store, sold coffee in the ordinary course of business. The coffee had been adulterated with an admixture of peanuts and other substances. The appellant was held liable for violation of the Pure Foods and Drugs Act (Act No. 1655) even without knowledge of the fact of adulteration.

E. STRICT LIABILITY.

a. Civil Code.

The only provision in the Civil Code which imposes strict liability for defective products is Article 2187. *(2 Sanco 714-716).*

> "Art. 2187. Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods shall be liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and the consumers. (n)"

Privity of contract is not required under Article 2187 because it expressly allows recovery although no contractual relation exists. The use of the word "shall" indicates that the liability of the manufacturer and processor is strict. Judge Sanco likewise believes that the liability under the said provision is strict liability explaining that: "That Article 2187 is included in Chapter on *Quasi-delicts* is of no moment because it does not preclude an action based on negligence for the

same act of using noxious or harmful substance in the manufacturer or processing of the foodstuffs, drinks, toilet articles or similar goods which caused the death or injury complained of, if the injured party opts to recover on that theory. And even under that theory it seems obvious that proof of negligence is likewise unnecessary because it is subsumed from the mere allegation and proof of the essential facts constituting the cause of action under this article. In this respect strict liability in tort is indistinguishable from liability for quasi-delict. The distinction lies in the kind of recoverable damages and defenses available under each cause of action which will be discussed separately." *(2 Sanco 715)*

In addition, Judge Sanco believes that the ratiocination of Justice Roger Traynor in his concurring opinion in *Escola vs. Coca-Cola Bottling Co.* and in his majority opinion in *Greenman vs. Yuba Power Products, Inc.,* applies in this jurisdiction. *(2 Sanco 715).*

In *Escola vs. Coca-Cola Bottling Co.* (150 P. 2d 436, Cal. [1944]), the plaintiff, a waitress in a restaurant, was placing into the refrigerator bottled products of the defendant that had been delivered about 36 hours earlier. As she was putting a bottle into the refrigerator, the bottle exploded in her hand causing severe injuries. The jury awarded damages in favor of the plaintiff and this award was affirmed on appeal on the ground that the negligence of the plaintiff was the cause of the injury. The appellate court sustained the award using the doctrine of *res ipsa loquitur* stating that: "The bottle was admittedly charged with gas pressure, and the charging of the bottle was within the exclusive control of the defendant. As it is a matter of common knowledge that overcharge would not ordinarily result without negligence, it follows under the doctrine of *res ipsa loquitur* that if the bottle was in fact excessively charged, an inference of defendant's negligence would arise."

Justice Trayor concurred in the result but argued that the negligence should no longer be singled out as the basis of plaintiff's right to recover in cases of similar factual background. He opined that "it should now be recognized that a manufacturer incurs an absolute liability when an article that he placed on the market, knowing that it is to be used without inspection, proves to have defect that causes injury to human being." He supported his argument with the following explanation:

> "x x x Even if there is no negligence, however, public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturers can anticipate some hazards and guard against the recur-

rence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences. The cost of the injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

The injury from a defective product does not become a matter of indifference because the defect arises from causes other than the negligence of the manufacturer, such as negligence of a submanufacturer of a component part whose defects could not be revealed by inspection, or unknown causes that even by the device or *res ipsa loquitur* cannot be classified as negligence of the manufacture. The inference of negligence may be dispelled by an affirmative showing of proper care. x x x An injured person, however, is not ordinarily in a position to refute such evidence or identity of cause of the defect, for he can hardly be familiar with the manufacturing process as the manufacturer himself is. In leaving it to the jury to decide whether the inference has been dispelled, regardless of the evidence against it, the negligence rule approaches the rule of strict liability. It is needlessly circuitous to make negligence the basis of recovery and impose what is in reality liability without negligence. If public policy demands that a manufacturer of goods responsible for their quality regardless of negligence there is no reason not to fix the responsibility openly."

On the other hand, *Greenman vs. Yuba Power Products, Inc.,* (377 P. 2d 897, 900-901, Cal. [1962]) involved a power tool (that could be used as a saw, a drill and a wood lathe) which was given to the plaintiff by his wife. While working the lathe, a piece of wood suddenly flew out of the machine and struck him in the forehead resulting in serious injury. The plaintiff's action for damages was sustained by the appellate court through Justice Traynor using the strict liability theory. The court ruled that to establish the manufacturer's liability, it was sufficient that the plaintiff proved that he was injured while using the power tool in a way it was intended to be used and as a

result of a defect in design and manufacture of which plaintiff was not aware, the tool was unsafe for its intended use. In the said case, it was established during the hearing that the power tool was defective because its screws were of insufficient strength to hold the wood in place while the lathe was being operated.

It is clear that *Greenman* could not have been the basis of Article 2187 of the New Civil Code because it was decided only in 1962. Neither could *Escola* been the source of the rule in the said provision because as pointed out earlier, the opinion of Justice Traynor that strict liability should be applied was not the majority opinion. Nevertheless, there is no reason why the reasons given by Justice Traynor cannot be used to justify strict liability under Article 2187. The view of Justice Sanco regarding this matter is still conceptually sound because of the very language of the provision indicating that the liability is strict.

Confusion is confounded however because of the interpretation that the Court of Appeals gave to Article 2187 in *Loreto Luciano De Salas vs. San Miguel Brewery* (7 CAR 2s 1, No. 3047-R, October 27, 1964), an "exploding bottle case" similar to *Escola*. Plaintiff, in the said case, had a *sari-sari* store in the district of Santo Niño, in San Fernando, Pampanga, where she sold, among other things, San Miguel Brewery beverages. In June 1953, the plaintiff was convinced by the agent-distributor of San Miguel to buy a small chiller or cooler. On September 17, 1953, at about 7:00 AM, the plaintiff received a supply of a box of beer, Pale Pilsen, from the defendant. Thereafter, she placed five or six bottles inside the cooler, standing, beside a piece of ice and some other bottles of defendant's soft drinks. At around 11:00 AM of the same morning, upon arrival of a *halo-halo* customer, she opened the cooler in order to get the piece of ice. As she opened the lid, one of the bottles of Pale Pilsen burst and some splinters of the same landed in her right eye. Her daughter tried to clean the eye as she observed that it was bleeding. Later, she went to a watchmaker who removed the fragments with tweezers. However, her condition did not improve and she had to undergo medical treatment at the University of Santo Tomas for about 17 days. The plaintiff eventually lost her sight on her right eye. Defendant was advised immediately after the incident by the husband of the plaintiff through its deputy sales supervisor in San Fernando, Mr. Alejandro Luna. Mr. Luna investigated on his own the incident and was even able to talk to the watchmaker and see the tweezers used to remove the fragments of the bottle lodged in the right eye of the plaintiff. The chief supervisor, Ricardo Austria, in turn assured plaintiff's husband that he would

report the matter to the Central Offices in Manila, so that his wife may be compensated. The plaintiff filed a case in court because no compensation was given to her by the defendant.

The trial court dismissed the plaintiff's complaint but the same was reversed by the Court of Appeals. The Court of Appeals sustained the plaintiff's submission that the plaintiff's injury was caused by the spontaneous bursting of the bottle. It ruled that such proof was enough to prove the negligence of the defendant either in its manufacture or in its preparation, as it would be inconceivable that a bottle of beer would burst spontaneously without any defect. The Court of Appeals concluded that the defendant is liable for negligence whether it be based on quasi-delict under Article 2187 of the New Civil Code using to this effect the doctrine of *res ipsa loquitur* or from the point of view of contract under Article 1566 of the New Civil Code. The Court of Appeals rejected the argument of the defendant that the injury was due to fortuitous event — the sudden change in the temperature of the cooler when the lid was opened – because it might have originated from the sudden internal pressure of the beer bottle, produced or caused by chemical changes in its composition. The same internal pressure was in turn the consequence of the way the elements were mixed in the factory. The defendant's reasoning was said to be unacceptable considering that only one bottle contained in the cooler burst. In other words, if the explosion of the bottle was caused by the sudden change in temperature more than one should have burst. The Court of Appeals quoted Justice Cardozo who said in *McPherson vs. Buick* (11 NE 1050 [1916]): "If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is a thing of danger."

What is clear therefore, is that the Court of Appeals did not consider Article 2187 of the Civil Code a strict liability provision. The Court of Appeals believed in *Loreto Luciano De Salas* case that Article 2187 is one based on negligence. The fact that the doctrine of *res ipsa loquitur* was relied upon by the Appellate Court confirms the application of the negligence theory.

It is believed that the interpretation of the Court of Appeals is not the correct approach to the liability under Article 2187. To repeat, the reasons propounded by Justice Traynor in *Escola* and *Greenman* cases can still be used to justify the interpretation that Article 2187 is a strict liability provision.

b. Consumer Act.

The problem that is encountered in justifying strict liability

under Article 2187 of the Civil Code is not present in the strict liability provisions of the Consumer Act because the language of the applicable provision is clear and unmistakable. In particular, Article 97 of the statute expressly provides for liability for defective products "independently of fault." The provision is broad enough to cover cases governed by Article 2187 of the Civil Code.

Strict liability even extends to services under Article 99 of the Consumer Act which imposes liability for defective service "independently of fault." Service under Article 99 means, "with respect to repair and service firms, services supplied in connection with a contact for construction, maintenance, repair, processing, treatment or cleaning of goods or of fixtures on land, or distribution of goods, or transportation of goods." *(Article 4[bo]).*

> Art. 97. *Liability for the Defective Products.* — Any Filipino or foreign manufacturer, producer, and any importer, shall be liable for redress, independently of fault, for damages caused to consumers by defects resulting from design, manufacture, construction, assembly and erection, formulas and handling and making up, presentation or packing of their products, as well as for the insufficient or inadequate information on the use and hazards thereof.
>
> A product is defective when it does not offer the safety rightfully expected of it, taking relevant circumstances into consideration, including but not limited to:
>
> a) presentation of product;
>
> b) use and hazards reasonably expected of it;
>
> c) the time it was put into circulation.
>
> A product is not considered defective because another better quality product has been placed in the market.
>
> The manufacturer, builder, producer or importer shall not be held liable when it evidences:
>
> a) that it did not place the product on the market;
>
> b) that although it did place the product on the market such product has no defect;
>
> c) that the consumer or a third party is solely at fault.
>
> Art. 99. *Liability for Defective Services.* — The service supplier is liable for redress, independently of fault, for damages caused to consumers by defects relating to the rendering of the services, as well as for insufficient or inadequate information on the fruition and hazards thereof.

The service is defective when it does not provide the safety the consumer may rightfully expect of it, taking the relevant circumstances into consideration, including but not limited to:

a) the manner in which it is provided;

b) the result of hazards which may reasonably be expected of it;

c) the time when it was provided.

A service is not considered defective because of the use or introduction of new techniques.

The supplier of the services shall not be held liable when it is proven:

a) that there is no defect in the service rendered;

b) that the consumer or third party is solely at fault.

Art. 106. *Prohibition in Contractual Stipulation*. — The stipulation in a contract of a clause preventing, exonerating or reducing the obligation to indemnify for damages effected, as provided for in this and in the preceding Articles, is hereby prohibited, if there is more than one person responsible for the cause of the damage, they shall be jointly liable for the redress established in the pertinent provisions of this Act. However, if the damage is caused by a component or part incorporated in the product or service, its manufacturer, builder or importer and the person who incorporated the component or part are jointly liable.

Art. 107. *Penalties*. — Any person who shall violate any provision of this Chapter or its implementing rules and regulations with respect to any consumer product which is not food, cosmetic, or hazardous substance shall upon conviction, be subject to a fine of not less than Five thousand pesos (P5,000.00) and by imprisonment of not more than one (1) year or both upon the discretion of the court.

In case of juridical persons, the penalty shall be imposed upon its president, manager or head. If the offender is an alien, he shall, after payment of fine and service of sentence, be deported without further deportation proceedings.

(1) Privity not Required.

Privity of contract is not required under Articles 97 and 99 of the Consumer Act because the responsibility of the manufacturers is owed to the consumer. Article 4(n) of the Consumer Act defines a consumer as a natural person who is a purchaser, lessee, recipient or prospective purchaser, lessor or recipient of consumer products, services or

credit. The term recipient is broad enough to cover any person who might use the product even if he was not the one who purchased the same. For example, a relative of the purchaser who used the product may be considered a recipient. If the purchaser donated the product to another person, the latter may likewise be considered a recipient of the product and is therefore a consumer as defined under the law.

(2) Persons Liable.

The strict liability under the Act is imposed on the manufacturer. A manufacturer is "any person who manufactures, assembles or processes consumer products, except that if the goods are manufactured, assembled or processed for another person who attaches his own brand name to the consumer products, the latter shall be deemed the manufacturer. In case of imported products, the manufacturer's representatives or, in his absence, the importer, shall be deemed the manufacturer." *(Article 4[as], Consumer Act).* Thus, a supermarket that sells certain products using its own trademark, is considered the manufacturer even if, in fact, it was produced by another person or entity.

Ordinarily the tradesman or seller is not liable for damages caused by defective products under the Consumer Act. He is liable only when: a) it is not possible to identify the manufacturer, builder, producer or importer; b) the product is supplied, without clear identification of the manufacturer, producer, builder or importer; and c) he does not adequately preserve perishable goods. *(Article 98, Consumer Act).* It is provided, however, that "the party making payment to the damaged party may exercise the right to recover a part of the whole of the payment made against the other responsible parties, in accordance with their part or responsibility in the cause of the damage effected." *(ibid.).*

A seller under the Act means "a person engaged in the business of selling consumer products directly to consumers. It shall include a supplier or distributor if: (1) the seller is a subsidiary or affiliate of the supplier or distributor; (2) the seller interchanges personnel or maintains common or overlapping officers or directors with the supplier or distributor; or (3) the supplier or distributor provides or exercises supervision, direction or control over the selling practices of the seller." *(Article 4[bn]).* On the other hand, a distributor and a supplier are defined as follows:

> "a) Distributor means any person to whom a consumer product is delivered or sold for purposes of distribution in com-

merce, except that such term does not include a manufacturer or retailer of such product.

b) Supplier means a person, other than a consumer, who in the course of his business, solicits, offers, advertises, or promotes the disposition or supply of a consumer product or who other than the consumer, engages in, enforces, or otherwise participates in a consumer transaction, whether or not any privity of contract actually exists between that person and the consumer, and includes the successor to, or assignee of, any right or obligation on of the supplier."

It may happen that the manufacturer was not the one who actually manufactured all the components used in the product. Usually, the manufacturer also gets components or parts from other manufacturers. In such cases, the liability of the persons involved is joint. Article 106 provides that "if the damage is caused by a component or part incorporated in the product or service, its manufacturer, builder or importer and the person who incorporated the component or part are jointly liable."

(3) Reasons why Liability is Imposed on Manufacturers.

The opinion of Justice Traynor quoted earlier explains the reason why strict liability is imposed on manufacturers. Legal writers likewise advance a number of rationales that are summarized in this wise:

"A. The consumer finds it too difficult to prove negligence against the manufacturer.

B. Strict liability provides an effective and necessary incentive to manufacturers to make their products as safe as possible.

C. *Res ipsa loquitur* is in fact applied, in some case, to impose liability upon producers who have not in fact been negligent; therefore negligence should be dispensed with.

D. Reputable manufacturers do in fact stand behind their products, replacing and repairing those which prove to be defective; and many of them issue agreements to do so. Therefore, all should be responsible when injury results from a normal use of a product.

E. The manufacturer is in a better position to protect against harm, by insuring against liability for it, and, by adding the costs of the insurance to the price of the product, to pass the loss on to the general public.

F. Strict liability can already be accomplished by a series of actions, in which the consumer first recovers from the retailer on a warranty, and liability on warranties is then carried back through the intermediate dealers to the manufacturer. The process is time-consuming, expensive, and wasteful; there should be a short-cut.

G. By placing the product on the market, the seller represents to the public that it is fit; and he intends and expects that it will be purchased and consumed in reliance upon that representation. The middleman is no more than a conduit, a mechanical device through which the thing sold reaches the consumer.

H. The costs of accidents should be placed on the party best able to determine whether there are means to prevent the accident. When those means are less expensive than the costs of such accidents, responsibility for implementing them should be placed on the party best able to do so." *(Prosser, Wade and Schwartz, Torts, 1988 Ed., p. 721).*

(4) Meaning of Defective Product.

Article 97 of the Consumer Act contemplates four (4) kinds of defects in products, *viz.:*

a. *Manufacturing Defect* — defects resulting from manufacture, construction, assembly and erection.

b. *Design Defect* — defects resulting from design and formulas.

c. *Presentation Defect* — defects resulting from handling, making up, presentation or packing of the products.

d. *Absence of Appropriate Warning* — defect resulting from the insufficient or inadequate information on the use and hazards of the products.

(4.1) Manufacturing Defect.

In general, a manufacturing or production defect is one that differs from the manufacturer's intended result or from other ostensibly identical units of the same product line. *(Barker vs. Lull Engineering Co., 573 O. 2d 443 [Cal. 1978]).* Thus, a product has manufacturing defect if it came off the assembly line in substandard condition. For example, a chainsaw, which was released and sold by a manufacturer even if it did not have a required bolt, is considered defective. Consequently, a person can enforce strict liability of the manufacturer

if he was injured because of such defect. In the case of manufacturing defect, the design itself is not defective but the product does not comply with the design.

(4.2) Design Defect.

A design defect cannot be identified by comparing the injury-producing product with the manufacturer's plans or other units. Such comparison will necessarily reflect the same design. *(ibid.).* Thus, design defect cannot be established by comparing the design of the product which caused the injury with the norm established by the manufacturer. The norm itself is defective.

However, design defect can be established by comparing it with standards established by law or by government agencies. For example, a product has design defect if it does comply with the standard prescribed by the Department of Health as mandated by the Consumer Act. Lead arsenate likewise has a defective design if it is not consistent with the formula prescribed by Section 6 of Act No. 3091. Section 29 of the law regulating the practice of pharmacy (R.A. 5921) makes it unlawful for any person person to sell adulterated drugs. A drug is deemed adulterated within the meaning of said provision if "it differs from the standard of quality or purity given in the United States Pharmacopoeia or National Formulary, both in their latest edition, or, in lieu thereof, in any standard reference for drugs and medicines given official recognition; and those which fall within the meaning as provided for in the Food, Drug, and Cosmetic Act (R.A. No. 3720)." A formula of drugs which differs from the said standard is therefore considered defective.

In cases where there are no specific standards prescribed by law or rules or where detailed formula or design cannot be provided for by law, the determination of design defect can be done using the test prescribed by law or jurisprudence. In the United States, there are two main competing tests namely the "consumers' expectation test" and the "risk-utility test."

Consumer Expectation Test.

Under the consumer expectation test, a product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. *(ibid.).* To determine whether a product contains a dangerous defect defends upon the reasonable expectation of the ordinary consumer concern-

ing the characteristics of the type of product involved. If the average consumer would reasonably anticipate the dangerous condition of the product and fully appreciate the attendant risk of injury, it would not be unreasonably dangerous and defective. This is an objective test and is not dependent upon the knowledge of the particular injured consumer *(Vincer v. Ester Williams All-Aluminum Swimming Pool Company, 69 Wis.2d 326, 230 N.W.2d 794 [1975]).*

The test recognizes that the failure of the product to perform safely may be viewed as a violation of the reasonable expectations of the consumer. *(O'Brien vs. Muskin Corp., 94 N.J. 169, 463 A.2d 298 [New Jersey, 1983]).* Under this test, where "there is no evidence, direct or circumstantial, available what sort of manufacturing flaw existed, or exactly how the design was deficient, the plaintiff may nonetheless be able to establish his right to recover, by proving that the product did not perform in keeping with the reasonable expectation of the user. When it is shown that a product failed to meet the reasonable expectations of the user the inference is that there was some sort of defect, a precise definition of which is unnecessary. If the product failed under conditions concerning which an average consumer of that product could have fairly definite expectations, then the (court) would have a basis for making an informed judgment upon the existence of a defect." *(Heaton vs. Ford Motor Company, 248 Or. 467, 435 P.2d 806 [Oregon, 1967]).*

It should be noted in this connection that the consumer expectation test has been subject to criticisms. In *Barker vs. Lull Engineering Co. (supra),* the Supreme Court of California observed that:

> "As Professor Wade has pointed out, however, the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating design defectiveness because '[I]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made' . . . Numerous California decisions have implicitly recognized this fact and have made clear, through varying linguistic formulations, that a product may be found defective in design, even if it satisfies ordinary consumer expectations, if through hindsight the jury determines that the product's design embodies 'excessive preventable danger' or, in other words, if the jury finds that the risk of danger inherent in the challenged design outweighs the benefits of such design. . . ."

The consumer expectation test is not without defenders. Professor Richard A. Epstein offers the following critique of the above-quoted opinion in *Barker*:

> "x x x But the criticism does not explain why any given manufacturer should be expected to explain how safe the product *could* have been made. Instead, the real question seems to be, did the product conform to the performance standards under which it was sold, such that the comparison of the alternatives can be made by the consumer in the marketplace instead of by the jury in the courtroom? The expectations formula, sensibly understood, worked well in the traditional negligence cases that preceded *Greenman* and in strict liability cases decided after it. It allows, indeed mandates, recovery in many cases, even if it absolutely bars the plaintiff in *Barker vs. Lull*. While the formula has a certain indefiniteness at the margin, and is always subject to abuse by courts hostile to its negative implications, it can, if fairly applied, yield an acceptable degree of predictability over the broad range of cases to which it must necessarily be applied. There seems no reason to reject it in favor of a formula which places no effective limits upon the power of courts or juries to second guess at their leisure the decisions of those who have made, marketed, purchased, and used the very products that are now subject to legal scrutiny. *(Richard A. Epstein, Modern Products Liability Law, 1980 Ed., p. 82).*

Risk-Utility Test.

The risk-utility test was set out in the 1973 article of Professor Wade. *(Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825 [1973]).* Under this test, the court is called upon to consider relevant factors including: (1) the usefulness and desirability of the product — its utility to the user and the public as a whole; (2) the safety aspects of the product — the likelihood that it will cause injury, and the probable seriousness of the injury; (3) the availability of a substitute product which would meet the same need and not be as unsafe; (4) the manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility; (5) The user's ability to avoid danger by the exercise of care in the use of the product; (6) the user's anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of existence of suitable warning or instructions; and (7) the feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

The test is embraced in the 1997 Draft of the American Law Institute's *Restatement of the Law on Torts: Product Liability (Section 2 [b]).* The Institute's formulation of the test states that a product is defective in design when the foreseeable risks of harm posed by

the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe. The test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risk of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe *(Commented to Section 2)*.

Reasonable Alternative Design.

The test prescribed in the above-cited *Restatement of the Law* mentions the requirement of a "reasonable alternative design" which is used as part of the "risk-utility" balancing test. It is important to bear in mind that the "consumer expectation" test does not preclude the requirement of a reasonable alternative design. In fact, some courts use the concept of reasonable alternative design to determine what is to be expected by the consumer *(Graham v. Sprout-Waldren & Co., 657 So.2d 868 [Ala. 1995])*.

The leading case that prescribes a requirement of proof of a reasonable alternative design is *General Motors Corporation v. Edwards (482 So. 2d 1176 [Ala., 1985])* where the court ruled that the existence of a safer, practical alternative design must be proved by showing that (a) the plaintiff's injuries would have been eliminated or in some way reduced by use of the alternative design, and that; (b) taking into consideration such factors as the intended use of the product, its styling, cost and desirability, its safety aspects, foreseeability of the particular accident, the likelihood of the injury, and the probable seriousness of the injury if that accident occurred, the obviousness of the defect, and the manufacturer's ability to eliminate the defect, the utility of the alternative design outweighed the utility of the design actually used. A sample statutory provision stating the "Reasonable Alternative Design" rule states:

> "If the design of a product or product component is in issue in a products liability action, the design shall be presumed to be reasonably safe unless, at the time the product left the control of the manufacturer, a practical and technically feasible design was available that would have prevented the harm without significantly impairing the usefulness, desirability, or marketability of the product. An alternative design is practical and feasible if the technical, medical, or scientific knowledge relating to safety of the alternative design was, at the time the product left the control of the manufacturer, available and developed for commercial use

and acceptable in the marketplace." *(Ill. Comp. Stat. Ann. Ch 736, Section 5/2-2104 [1993 & Supp. 1996]).*

Test under the Consumer Act.

The Consumer Act adopts the consumer expectation test in determining what is defective. Article 97 provides that a product is defective when it does not offer the safety rightfully expected of it, taking relevant circumstances into consideration, including but not limited to the presentation of product, the use and hazards reasonably expected of it and the time it was put into circulation. The same test is being applied in determining what is a defective service. Article 99 states that service is defective when it does not provide the safety the consumer may rightfully expect of it, taking the relevant circumstances into consideration.

The Act likewise expressly provides that the product is not defective solely by reason that a product of better quality and new techniques were introduced in the market. *(Arts. 97 and 99).*

Nevertheless, it is also possible for the "risk-utility" test to creep into the concept of what is "reasonably expected" as contemplated in Articles 97 and 99 of the Consumer Act. Although the consumer expectation test and the risk utility tests are separate tests, a few courts refer to the test for defective design as consumer expectations test, but then use risk-utility balancing to determine whether reasonable expectations are met (*Reporter's Note to 1997 Draft of Restatement of the Law on Torts: Product Liability, p. 81 citing Aller v. Rodgers Machinery Mfg. Co., Inc., 268 N.W.2d 830 [Iowa 1978; Seattle-First National Bank v. Taber, 542 P. 2d 774, 779 [Wash. 1975]; Baughn v. Honda Motor Co., 727 P.2d 655, 660 [Wash. 1986]).*

(4.3) Packaging and Presentation.

Defect which resulted because of the packaging and presentation of the product can be included under the broad concept of manufacturing defect or design defect. The defect may likewise consist of the manufacturer's failure to warn the consumer as mandated by the Consumer Act.

The defect may result because the manufacturer deviated from its self-imposed norm in packaging the product or in distributing the same. The original norm may not be defective but there was deviation therefrom. Thus, a product may become adulterated or contaminated because it was not properly packaged or stored. It may also partake the nature of a design defect because the original norm in packaging

or presenting the product may in itself be defective. For instance, the defect may result because the container used by the manufacturer may be prone to spoilage.

(4.4) Lack of Warning.

Duty to Warn.

Art. 74 of the Consumer Act expressly states as a policy that the State shall enforce compulsory labeling, and fair packaging to enable the consumer to obtain accurate information as to the nature, quality and quantity of the contents of consumer products and to facilitate his comparison of the value of such products. The obligation is primarily imposed on the manufacturer but exceptionally, the wholesaler or retailer may have such obligation if they: (a) are engaged in the packaging or labeling of such products; (b) prescribe or specify by any means the manner in which such products are packaged or labeled; or (c) having knowledge, refuse to disclose the source of the mislabeled or mispackaged products. *(Article 76)*.

Article 77 makes it part of the minimum labeling requirements for consumer products that the label state details regarding the product, including (a) whether it is flammable or inflammable; (b) directions for use, if necessary; (c) warning of toxicity; (d) wattage, voltage or amperes; or (e) process of manufacture used if necessary. Any word, statement or other information required by or under authority of Article 77 shall appear on the label or labeling with such conspicuousness as compared with other words, statements, designs or devices therein, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase or use.

The law likewise contains special requirements for the packaging of consumer products for children. Article 80 provides that the concerned department may establish standards for the special packaging of any consumer product if it finds that:

> "a) the degree or nature of the hazard to children in the availability of such product, by reason of its packaging, is such that special packaging is required to protect children from serious personal injury or serious illness resulting from handling and use of such product; and
>
> b) the special packaging to be required by such standard is technically feasible, practicable and appropriate for such product. In establishing a standard under this Article, the concerned department shall consider:

1) the reasonableness of such standard;

2) available scientific, medical and engineering data concerning special packaging and concerning accidental, ingestions, illnesses and injuries caused by consumer product;

3) the manufacturing practices of industries affected by this Article; and

4) the nature and use of consumer products."

Other specific duties under the Consumer Act relating to the duty of the manufacturer include Articles 85, 86, 87, 88, 89 and 90 *(See Appendix)*.. Needless to state, failure of the manufacturer to comply with the affirmative duties imposed by law not only exposes him to civil liability for damages but also to criminal liability. Any product which does not contain the details in the label prescribed by the statute can be considered defective products.

It should also be noted that other special laws impose duty to warn on the manufacturers and the seller. For instance, the Generic Act of 1988 (R.A. No. 6675) requires that the label of all drugs and medicines shall have the dates of manufacture and expiration. *(Sec. 7)*. Republic Act No. 5921, on the other hand, requires pharmacists to affix to every bottle, box or other package containing any dangerous or poisonous drug, another label of red paper upon which shall be printed in large letters the word "Poison" and a vignette representing a skull and bones before delivering it to the purchaser. *(Sec. 34)*.

Knowledge of the Manufacturer.

It is stated in Comment j to Section 402-A of the Restatement (Second) of Tort that the seller is required to give warning if "he has knowledge, or by application of reasonable, developed human skill and foresight should have knowledge" of the danger. This was construed as an imposition of a knowledge requirement as a limitation to be placed on a manufacturer's strict liability in tort predicated upon the failure to warn of a danger inherent in a product. It was explained that "to hold a manufacturer liable for failure to warn of a danger which it would be impossible to know based on the present state of human knowledge would make the manufacturer the virtual insurer of the product." *(Woodill vs. Parke Davis & Co., 79 Ill.2d 26, 37 Ill. Dec. 304 304, 402 N.E.2d 194 [Illinois, 1980])*.

The dissenting opinion in the above-cited *Woodill* explains, however, that knowledge of the manufacturer is not important. "In

strict liability actions, the focus is on the condition of the product and not on the conduct of the manufacturer or seller. This is the feature that distinguishes strict liability from negligence."

It is believed that the dissenting opinion is the better view and is consistent with the provisions of the Consumer Act. As already stated in another section of this chapter, violations of special law are considered *malum prohibitum* and do not require intent. It is enough that one voluntarily performed the particular prohibited act. Mere performance of the act or commission of the omission will result in criminal liability. Thus, if the manufacturer did not comply with the duty to warn prescribed in the specific provisions of the Act, the fact that he did not have knowledge of the danger is immaterial.

Moreover, it is not the manufacturer's knowledge which is material but the consumer's reasonable expectation of the product's safety. If it does not have the warning which is reasonably expected for the safety of the consumer, it is defective even if the manufacturer did not know the extent of the danger.

(5) Proof of Defect.

Proof that a defect existed is often difficult and complex in product liability cases. "Frequently the product in dispute will have been destroyed, beyond any possibility of analysis, or be so complex that a plaintiff would have a greater difficulty in determining the presence of defect than would the manufacturer. In most cases, proof of the defect must necessarily be by circumstantial evidence and inference as well as opinion of experts. No general rule can adequately apply to the wide range of such cases, each involving a different mixture of fact and inference, but fundamental to any case is that some defect must be proved." *(Friedman vs. General Motors Corp., 43 Ohio St.2d 209, 72 Ohio Ops.2d 119, 331 N.E.2d 702).*

The mere fact that an accident occurred does not make out a case that the product was defective. Neither "does the fact that it is found in a defective condition after the event, when it appears equally likely that it was caused by accident itself. The addition of other facts, tending to show that the defect existed before the accident, may make out a case, and so may expert testimony. So likewise may proof that other similar products made by the defendant met with similar misfortunes, or the elimination of other causes by satisfactory evidence. In addition, there are some accidents, as where a beverage bottle explodes or even breaks while it is being handled normally, as to which there is human experience that they do not ordinarily occur without defect. As in cases of *res ipsa loquitur*, the experience

will give rise to the inference, and it may be sufficient to sustain the plaintiff's burden of proof." *(Prosser, Strict Liability to the Consumer in California, 18 Hastings L.J. 9, 52-54, cited in Friedman vs. General Motors Corp., ibid.).*

Strictly speaking, *res ipsa loquitur* has no application to a strict liability case because determination of negligence is not material. However, the inferences that are at the core of the doctrine are applicable with equal force to strict liability cases. In other words, the fact that the product went wrong may, in proper cases, give rise to a permissible inference that it was defective and that the defect existed when it left the hands of the defendant. *(Prosser, Wade and Schwartz, Torts, 1988 Ed., p. 764, citing State Farm Mut. Auto. Ins. Co. vs. Anderson-Weber, Inc., 252 Iowa 1289, 110 N.W.2d 449 [1961]; Kroger Co. vs. Bowman, 411 S.W.2d 339 [Ky. 1967], etc.).*

(6) Defenses.

Article 97 provides that the manufacturer, builder, producer or importer shall not be held liable when it evidences:

a) that it did not place the product on the market;

b) that although it did place the product on the market such product has no defect;

c) that the consumer or a third party is solely at fault.

On the other hand, Article 99 provides that the supplier of the services shall not be held liable when it is proven:

a) that there is no defect in the service rendered;

b) that the consumer or third party is solely at fault.

The matters specified in Articles 97 and 99 are all matters of defense. The consumer is not required to prove inceptively that he was free from any fault. The law likewise states the manufacturer shall not be held liable if it evidences that it did not place the product in the market. It is believed that since the burden of proof rests on the manufacturer, the plaintiff is not required to prove that the defendant placed the product in the market so long as it can establish that the product was manufactured by the defendant. It is incumbent upon the manufacturer, for instance, to prove that the product was not defective when it left its possession and the adulteration was solely caused by the mishandling of the seller. However, if the

plaintiff can prove that the product was manufactured by the defendant, the defendant can escape liability by proving that it discovered the defects and the goods were turned over to a government agency for destruction.

Thus, the plaintiff should allege and prove that: a) the product was defective; b) the product was manufactured by the defendant; and c) the defective product was the cause in fact of his injury.

Article 97 gives the manufacturer the defense that the consumer or a third party is solely at fault. The use of the word "solely" does not mean that the manufacturer is still liable if it was also at fault. This is an incorrect reading of the law because it would then be inconsistent with the strict nature of the liability. The liability under Article 97 is independent of fault. It is believed that the defense of fault of the consumer or third party is related to the proof of causation. It is available only if the said fault is the sole cause of the injury. It should be established by the manufacturer that the defect, if any, did not in any way provide the condition which resulted in the injury. The fault of the consumer or third person in such cases can be considered foreseeable. As explained by Justice Mosk of Supreme Court of California in his dissenting opinion in *Daly vs. General Motors Corp.* (575 P. 2d 1162 [Cal. 1978]), "the defective product is comparable to a time bomb ready to explode; it maims its victims indiscriminately, the righteous and evil, the careful and the careless. Thus when a faulty design or otherwise is defective product is involved, the litigation should not be diverted to consideration of negligence of the plaintiff. The liability issues are simple: was the product or its design faulty, did the defendant inject the defective product into the stream of commerce, and did the defect cause the injury? The conduct of the ultimate consumer-victim who used the product in the contemplated or foreseeable manner is wholly irrelevant to those issues."

Under the same line of reasoning, the comparative negligence rule should likewise be inapplicable. Proof of contributory negligence will not mitigate the liability of the defendant manufacturer and is therefore irrelevant in strict product liability cases. Besides, there is no provision in the Consumer Act which allows such mitigation. Had

the legislature intended to inject a comparative negligence rule, it would have expressly provided so.

Nevertheless, it is better to not lose sight of the opinion that comparative negligence rule applies to strict liability cases. For instance, the majority opinion in *Daly vs. General Motors Corp. (supra), makes the comparative negligence rule applicable explaining that by extending and tailoring the comparative principles to the doctrine of strict products liability, we move closer to the goal of the equitable allocation of legal responsibility for personal injuries. The plaintiff will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design or dissemination of the product in question. Plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury. The cost of compensating the victim of a defective product, albeit proportionately reduced, remains on defendant manufacturer, and will, through him, be spread among society.*

CHAPTER 13

BUSINESS TORTS

The New Civil Code expressly provides that indemnification for damages shall comprehend profits that the obligee failed to obtain. *(Article 2200)*. The provision, in effect, also recognizes the existence of liability for various interference with business interests. The interference may be in the form of negligent or intentional acts or omissions. It may arise from different sources of obligation like delict, quasi-delict, or breach of contract.

This Section deals with particular business torts known as interference with contractual relations, interference with prospective advantage, unfair competition, and securities related fraud.

The development of different torts involving business had been greatly affected by prevalent economic theories. For generations, there has been a practical agreement upon the proposition that competition in trade and business is desirable, and this idea has found expression in the decisions of courts as well as in statutes. But it has led to grievous and manifold wrongs to individuals, and many courts have manifested an earnest desire to protect the individuals from the evils which result from unrestrained business competition. The problem has been to adjust matters so as to preserve the principle of competition and yet guard against its abuse to the unnecessary injury of the individual. So the principle that a man may use his own property according to his own needs and desires, while true in the abstract, is subject to many limitations in the concrete. Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are sacred as their own. The existence and well-being of society requires that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person *(Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 [Minn. 1901])*.

1. INTERFERENCE WITH CONTRACT

A. STATUTORY PROVISION AND RATIONALE.

As a general rule, only the parties to a contract are bound by the terms of the contract and only a party can file an action for breach of contract or for rescission or annulment thereof. The Civil Code expressly provides that contracts take effect only between the parties, their assigns and heirs. *(Article 1311, Civil Code)*. Consequently, only parties to the contract can file an action based thereon. Exceptions to this rule is a contract containing a stipulation in favor of a third person and contracts intended to defraud creditors. *(Articles 1312 and 1313, Civil Code)*.

It also follows that third persons cannot be sued by the contracting parties for breach of contract. A third person cannot possibly be sued for breach of contract because only parties can breach contractual provisions. However, a contracting party may sue a third person not for breach but for inducing another to commit such breach. Article 1314 of the Civil Code provides:

> "Art. 1314. Any third person who induces another to violate his contract shall be liable for damages to the other contracting party."

The tort recognized in Article 1314 is known as interference with contractual relations. Such interference is considered tortious because it violates the rights of the contracting parties to fulfill the contract and to have it fulfilled, to reap the profits resulting therefrom, and to compel the performance by the other party. *(45 Am. Jur. 2d 280-281)*. The theory is that a right derived from a contract is a property right that entitles each party to protection against all the world and any damage to said property should be compensated. *(ibid., p. 314)*.

Under the same theory, an agreement that prohibits interference with existing contracts is a contract that is not contrary to public policy. Thus, a contract is valid if it amounts simply to an agreement that those executing the contract will not induce the employees of those with whom the contract is made to leave their service. *(Rochiram Dharamdas, et al. vs. Gopaldas Haroomall, et al., G.R. Nos. 10463, 10440, October 27, 1916)*.

B. HISTORY OF THE RULE.

The development of this particular tort started in England in *Lumley vs. Gye* ([1853], 2 El. & Bl., 216). In this jurisdiction, the doctrine in *Lumley* was first adopted in 1915 in *Gilchrist vs. Cuddy* (29 Phil. Rep., 542). The Supreme Court discussed the development

of the tort of interference with contracts in one case:

> "Somewhat more than half a century ago the English Court of the Queen's Bench saw its way clear to permit an action for damages to be maintained against a stranger to a contract wrongfully interfering in its performance. The leading case on this subject is *Lumley vs. Gye* ([1853], 2 El. & Bl., 216). It there appeared that the plaintiff, as manager of a theatre, had entered into a contract with Miss Johanna Wagner, an opera singer, whereby she bound herself for a period to sing in the plaintiff's theatre and nowhere else. The defendant, knowing of the existence of this contract, and, as the declaration alleged, "maliciously intending to injure the plaintiff," enticed and procured Miss Wagner to leave the plaintiff's employment. It was held that the plaintiff was entitled to recover damages. The right which was here recognized had its origin in a rule, long familiar to the courts of the common law, to the effect that any person who entices a servant from his employment is liable in damages to the master. The master's interest in the service rendered by his employee is here considered as a distinct subject of juridical right. It being thus accepted that it is a legal wrong to break up a relation of personal service, the question now arose whether it is illegal for one person to interfere with any contract relation subsisting between others. Prior to the decision of *Lumley vs. Gye (supra)* it had been supposed that the liability here under consideration was limited to the cases of the enticement of menial servants, apprentices, and others to whom the English Statutes of Laborers were applicable. But in the case cited the majority of the judges concurred in the opinion that the principle extended to all cases of hiring. This doctrine was followed by the Court of Appeals in *Bowen vs. Hall* ([1881], 6 Q.B., Div., 333); and in *Temperton vs. Russell* ([1893], 1 Q.B., 715), it was held that the right of action for maliciously procuring a breach of contract is not confined to contracts for personal services, but extends to contracts in general. In that case the contract which the defendant had procured to be breached was a contract for the supply of building material.
>
> x x x
>
> The doctrine embodied in the cases just cited has sometimes been found useful, in the complicated relations of modern industry, as a means of restraining the activities of labor unions and industrial societies when improperly engaged in the promotion of strikes. An illustration of the application of the doctrine in question in a case of this kind is found in *South Wales Miners Federation vs. Glamorgan Coal Co.* ([1905], A. C., 239). It there appeared that certain miners employed in the plaintiff's collieries, acting under the order of the executive council of the defendant federation, violated their contract with the plaintiff by abstaining from work on certain days. The federation and council acted

without any actual malice or ill-will towards the plaintiff, and the only object of the order in question was that the price of coal might thereby be kept up, a factor which affected the miner's wage scale. It was held that no sufficient justification was shown and that the federation was liable.

In the United States, the rule established in England by *Lumley vs. Gye (supra)* and subsequent cases is commonly accepted, though in a few of the States the broad idea that a stranger to a contract can be held liable upon it is rejected, and in these jurisdictions the doctrine, if accepted at all, is limited to the situation where the contract is strictly for personal service. *(Boyson vs. Thorn, 98 Cal., 578; Chambers & Marshall vs. Baldwin, 91 Ky., 121; Bourlier vs. Macauley, 91 Ky., 135; Glencoe Land & Gravel Co. vs. Hudson Bros. Com. Co., 138 Mo., 439).*

x x x

This brings us to the decision made by this court in *Gilchrist vs. Cuddy* (29 Phil. Rep., 542). It there appeared that one Cuddy, the owner of a cinematographic film, let it under a rental contract to the plaintiff Gilchrist for a specified period of time. In violation of the terms of this agreement, Cuddy proceeded to turn over the film also under a rental contract, to the defendants Espejo and Zaldarriaga. Gilchrist thereupon restored to the Court of First Instance and procured an injunction restraining the defendants from exhibiting the film in question in their theater during the period specified in the contract of Cuddy with Gilchrist. Upon appeal to this court it was in effect held that the injunction was not improperly granted, although the defendants did not, at the time their contract was made, know the identity of the plaintiff as the person holding the prior contract but did know of the existence of a contracting favor of someone. It was also said arguendo, that the defendants would have been liable in damages under Article 1902 of the Civil Code, if the action had been brought by the plaintiff to recover damages. The force of the opinion is, we think, somewhat weakened by the criticism contained in the concurring opinion, wherein it is said that the question of breach of contract by inducement was not really involved in the case. Taking the decision upon the point which was really decided, it is authority for the proposition that one who buys something which he knows has been sold to some other person can be restrained from using that thing to the prejudice of the person having the prior and better right. *(Daywalt vs. La Corporacion de los Padres Agustinos Recoletos, 39 Phil. 587 [1919]).*

C. ELEMENTS.

The elements of the tort of interference with contractual relation are: (a) existence of a valid contract; (b) knowledge on the part of the

third person of the existence of the contract; and (c) interference of the third person without legal justification or excuse. *(So Ping Bun vs. Court of Appeals, G.R. No. 120554, September 21, 1999; Daywalt vs. La Corporacion de los Padres Agustinos Recoletos, ibid., p. 314, citing American Surety Co. vs. Schottenbauer CA Minn., 257 F 2d 6; Dunn vs. Cox, 163 A 2d 609; Snowden vs. Sorensen, 246 Minn. 526, 75 NW 2d 795).*

a. Contract.

The existence of a contract is necessary and the breach must occur because of the alleged act of interference. No tort is committed if the party had already broken the contract and offers to contract with the defendant. *(Middleton vs. Wallich's Music and Entertainment Co., 52 Ariz. App. 180, 536 P. 2d 1072 [1975]).* Neither would there be liability if the plaintiff voluntarily released the other. *(45 Am. Jur. 2d 285).*

No action can be maintained if the contract is void. Thus, there can be no action for inducing to breach an illegal contract or one that is contrary to public policy. *(ibid., p. 286).* For example, Article 2014 of the Civil provides that no action can be maintained by the winner for the collection of what he has won in a game of chance. It follows that a third person cannot be sued by the winner even if the former induced the other party not to comply with his undertaking to pay the winner.

However, there is authority for the view that an action for interference can be maintained even if the contract is unenforceable, e.g., when it does not comply with the statute of frauds. The view is that inducement, if reprehensible in an enforceable contract, is equally reprehensible in an unenforceable one. The defendant cannot cite the statute of frauds because the statute is enacted for the protection of the person charged on the contract. It is personal and not available to strangers. *(Harper, A Treatise on the Law of Torts, 1933 Ed., p. 475).*

b. Malice.

Malice means the intentional doing of a harmful act without legal or social justification or excuse. *(45 Am. Jur. 2d 281).* It is enough if the wrongdoer, having knowledge of the existence of the contract relation, in bad faith sets about to break it up. Whether his motive is to benefit himself or gratify his spite by working mischief to the other is immaterial. Malice in the sense of ill-will or spite is not essential.

(Daywalt vs. La Corporacion de los Padres Agustinos Recoletos, 39 Phil. 587 [1919]). If the persuasion be used for the indirect purpose of injuring the plaintiff or benefitting the defendant at the expense of the plaintiff, it is a malicious act which in law and fact a wrongful act. *(Harper, supra, p. 476).*

c. Procurement.

It should be observed that according to English and American authorities, no question can be made as to the liability of one who interferes with a contract through unlawful means. Thus, if performance is prevented by force, intimidation, coercion, or threats, or by false or defamatory statements, or by nuisance or riot, the person using such unlawful means is, under all the authorities, liable for the damage which ensues. *(Daywalt vs. La Corporacion de los Padres Agustinos Recoletos, 39 Phil. 587 [1919]).* A person who detains a professional singer to prevent him from pursuing his contractual commitment to perform at a certain gathering is therefore not only criminally liable but is civilly liable as well under Article 1314.

It is not enough that the defendant merely reaped the advantages of a broken contract after the contracting party had withdrawn from it on his own. *(Prosser, Handbook of the Law of Torts, 1955 Ed., p. 748).* Mere competition is not sufficient unless it is considered unfair competition or the dominant purpose is to inflict harm or injury. *(45 Am. Jr. 2d 308).*

D. LEGAL JUSTIFICATION.

In general, social policy permits a privilege or justification to intentionally invade the legally protected interests of others only if the defendant acts to promote the interests of others or himself and if the interest which he seeks to advance is superior to the interest invaded in social importance. Where protection of the actor's interest is involved, there is simply a privilege to invade equal or inferior interest, but not superior one. *(Harper, supra, p. 482, citing Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality, 39 Harv. L. Rev. 307 [1926] and Carpenter, Interference with Contractual Relations, 41 Harv. L. Rev. 728, 745 [1928]).*

The Supreme Court gave an example of justification in *Daywalt:*

> "Upon the question as to what constitutes legal justification, a good illustration was put in the leading case. If a party enters

> into contract to go for another upon a journey to a remote and unhealthful climate, and a third person, with a *bona fide* purpose of benefiting the one who is under contract to go, dissuades him from the step, no action will lie. But if the advice is not disinterested and the persuasion is used for "the indirect purpose of benefiting the defendant at the expense of the plaintiff," the intermeddler is liable if his advice is taken and the contract broken."

Competition in business likewise affords a privilege to interfere. Two elements must be present: (a) the defendant's purpose is a justifiable one and (b) the actor employs no means of fraud or deception which are regarded as unfair. *(Harper, supra, p. 493).*

E. EXTENT OF LIABILITY.

One interesting point raised by the Supreme Court in *Daywalt* is the rule regarding the extent of recovery against the defendant. The Court commented that:

> "Whatever may be the character of the liability which a stranger to a contract may incur by advising or assisting one of the parties to evade performance, there is one proposition upon which all must agree. This is, that the stranger cannot become more extensively liable in damages for the nonperformance of the contract than the party in whose behalf he intermeddles. To hold the stranger liable for damages in excess of those that could be recovered against the immediate party to the contract would lead to results at once grotesque and unjust. In the case at bar, as Teodorica Endencia was the party directly bound by the contract, it is obvious that the liability of the defendant corporation, even admitting that it has made itself co-participant in the breach of the contract, can in no event exceed hers. This leads us to consider at this point the extent of the liability of Teodorica Endencia to the plaintiff by reason of her failure to surrender the certificate of title and to place the plaintiff in possession. x x x"

In other words, the rule is that the defendant found guilty of interference with contractual relations cannot be held liable for more than the amount for which the party who was induced to break the contract can be held liable. It would seem that the rule is consistent with the provisions of Article 2202 of the New Civil Code only if the contracting party who was induced to break the contract was in bad faith. Article 2202 provides that the defendant in quasi-delict cases is liable for all the natural and probable consequences of his act or omission whether the same is foreseen or unforeseen. The same rule applies in breach of contract where the party who breached the same

was in bad faith. *(Art. 2201, New Civil Code).*

However, when there is good faith, the party who breached the contract is only liable for consequences that can be foreseen. *(Article 2201, New Civil Code).* If the rule in *Daywalt* will be strictly followed, then the defendant who maliciously interfered with another's contract will only be held liable for foreseen consequences. It is believed that the same rule is not consistent with the provisions of the New Civil Code. The rule that should be applied is that provided for under Article 2202 even if the result is that the person who breached the contract will be liable for less because of his good faith. In fact, it is possible for the contracting party to be not liable at all, as in the case where the defendant prevented him from performing his obligation through force or fraud.

CASES:

PHILIP S. YU vs. THE HONORABLE COURT OF APPEALS, et al.
G.R. No. 86683, January 21, 1993

Petitioner, the exclusive distributor of the House of Mayfair wallcovering products in the Philippines, cried foul when his former dealer of the same goods, herein private respondent, purchased the merchandise from the House of Mayfair in England through FNF Trading in West Germany and sold said merchandise in the Philippines. Both the court of origin and the appellate court rejected petitioner's thesis that private respondent was engaged in a sinister form of unfair competition within the context of Article 28 of the New Civil Code. *(pp. 23 and 64, Rollo).* Hence, the petition at bar.

There is no dispute that petitioner has had an exclusive sales agency agreement with the House of Mayfair since 1987 to promote and procure orders for Mayfair wallcovering products from customers in the Philippines. *(Annex "B," Petition; p. 30, Rollo).* Even as petitioner was such exclusive distributor, private respondent, which was then petitioner's dealer, imported the same goods via the FNF Trading which eventually sold the merchandise in the domestic market. *(TSN, September 20, 1988, p. 9; p. 117, Rollo).* In the suit for injunction which petitioner filed before the Regional Trial Court of the National Capital Judicial Region stationed at Manila, petitioner pressed the idea that he was practically by-passed and that private respondent acted in concert with the FNF Trading in misleading Mayfair into believing that the goods ordered by the trading firm were intended for shipment to Nigeria although they were actually shipped to and sold in the Philippines. *(Paragraph 5, Complaint; p. 34, Rollo).* Private respondent professed ignorance of the exclusive contract in favor of petitioner. Even then, private respondent responded by asserting that petitioner's understanding with Mayfair is binding only between the parties thereto. *(Paragraph 5, Answer; p. 50, Rollo).*

In the course of hearing the arguments for and against the issuance of the requested writ of preliminary injunction, petitioner impressed before the lower court that he is seeking to enjoin the sale and distribution by private respondent of the same goods in the market *(TSN, September 20, 1988, p. 35; p. 142, Rollo)* but the Honorable Cesar V. Alejandria, Presiding Judge of Branch 34 was unperturbed, thusly:

> "Resolving plaintiff's motion embodied in the complaint for the issuance of a writ of preliminary injunction after hearing, but without prejudging the merits of the case, and finding from the evidences adduced by the plaintiff, that the terms and conditions of the agency agreement, Exhibit "A-inj." between the plaintiff and The House of Mayfair of England for the exclusive distributorship by the plaintiff of the latter's goods, apertain to them; that there is no privity of contract between the plaintiff and the defendant; that the controversy in this case arose from a breach of contract by the FNF Trading of Germany, for having shipped goods it has purchased from The House of Mayfair to the Philippines: that as shown in Exh. "J-inj.", the House of Mayfair was demanding payment of 4,500.00 from the FNF Trading for restitution of plaintiff's alleged loss on account of the shipment of the goods in question here in the Philippines and now in the possession of the defendant; it appears to the Court that to restrain the defendant from selling the goods it has ordered from the FNF Trading of Germany, would be without legal justification.
>
> WHEREFORE, the motion for the issuance of a writ of preliminary injunction to restrain the defendant from selling the goods it has ordered from the FNF Trading of Germany is hereby DENIED." *(p. 64, Rollo).*

The indifference of the trial court towards petitioner's supplication occasioned the filing of a petition for review on *certiorari* with the Court of Appeals but Justice Ordoñez-Benitez, with whom Justices Bellosillo and Kalalo concurred, reacted in the same nonchalant fashion. According to the appellate court, petitioner was not able to demonstrate the unequivocal right which he sought to protect and that private respondent is a complete stranger *vis-a-vis* the covenant between petitioner and Mayfair. Apart from these considerations, the reviewing authority noted that petitioner could be fully compensated for the prejudice he suffered judging from the tenor of Mayfair's correspondence to FNF Trading wherein Mayfair took the cudgels for petitioner in seeking compensation for the latter's loss as a consequence of private respondent's scheme. *(p. 79, Rollo; pp. 23-29, Rollo).*

In the petition at hand, petitioner anchors his plea for redress on his perception that private respondent has distributed and continues to sell Mayfair covering products in contravention of petitioner's exclusive right conferred by the covenant with the House of Mayfair.

On March 13, 1989, a temporary restraining order was issued to last

until further notice from this Court directed against private respondent. *(p. 188, Rollo).* Notwithstanding such proscription, private respondent persisted in the distribution and sale *(p. 208; 228-229, Rollo)*, triggering petitioner's motion to cite private respondent's manager in contempt of court. *(p. 223, Rollo).* Considering that private respondent's manager, Frank Sia, admitted the acts complained of, a fine of P500.00 was imposed on him but he failed to pay the same within the five-day period provided in Our Resolution of June 21, 1989. *(p. 236, Rollo).*

Did respondent appellate court correctly agree with the lower court in disallowing the writ solicited by herein petitioner?

That the exclusive sales contract which links petitioner and the House of Mayfair is solely the concern of the privies thereto and cannot thus extend its chain as to bind private respondent herein is, We believe, beside the point. Verily, injunction is the appropriate remedy to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable. *(Gilchrist vs. Cuddy, 29 Phil. 542 [1915]; 4-A Padilla, Civil Code Annotated, 1988 Ed., p. 90).* The liability of private respondent, if any, does not emanate from the four corners of the contract for undoubtedly, Unisia Merchandising Co., Inc. is not a party thereto but its accountability is "an independent act generative of civil liability." *(Daywalt vs. Corporacion de PP. Agustinos Recoletos, 39 Phil. 587 [1919]; 4 Paras, Civil Code of the Philippines Annotated, 1981 10th Ed., p. 439; 4 Tolentino, Commentaries and Jurisprudence on the Civil Code, 1986 Ed., p. 439).* These observations, however, do not in the least convey the message that We have placed the cart ahead of the horse, so to speak, by pronouncing private respondent's liability at this stage in view of the pendency of the main suit for injunction below. We are simply rectifying certain misperceptions entertained by the appellate court as regards the feasibility of requesting a preliminary injunction to enjoin a stranger to an agreement.

To Our mind, the right to perform an exclusive distributorship agreement and to reap the profits resulting from such performance are proprietary rights which a party may protect *(30 Am. Jur. Section 19, pp. 71-72; Jurado, Comments and Jurisprudence on Obligations and Contracts, 1983 8th Rev. Ed., p. 336),* which may otherwise not be diminished, nay, rendered illusory by the expedient act of utilizing or interposing a person or firm to obtain goods from the supplier to defeat the very purpose for which the exclusive distributorship was conceptualized, at the expense of the sole authorized distributor. *(43 C.J.S. 597).*

Another circumstance which respondent court overlooked was petitioner's suggestion, which was not disputed by herein private respondent in its comment, that the House of Mayfair in England was duped into believing that the goods ordered through the FNF Trading were to be shipped to Nigeria only, but the goods were actually sent to and sold in the Philippines. A ploy of this character is akin to the scenario of a third person who induces a party to renege on or violate his undertaking under a contract, thereby

entitling the other contracting party to relief therefrom. *(Article 1314, New Civil Code).* The breach caused by private respondent was even aggravated by the consequent diversion of trade from the business of petitioner to that of private respondent caused by the latter's species of unfair competition as demonstrated no less by the sales effected inspite of this Court's restraining order. This brings Us to the irreparable mischief which respondent court misappreciated when it refused to grant the relief simply because of the observation that petitioner can be fully compensated for the damage. A contrario, the injury is irreparable where it is continuous and repeated since from its constant and frequent recurrence, no fair and reasonable redress can be had therefor by petitioner insofar as his goodwill and business reputation as sole distributor are concerned. Withal, to expect petitioner to file a complaint for every sale effected by private respondent will certainly court multiplicity of suits. *(3 Francisco, Revised Rules of Court, 1985 Edition, p. 261).*

GILCHRIST vs. CUDDY
(29 Phil. Rep., 542)

[C.S. Gilchrist, the plaintiff, proprietor of the Eagle Theater of Iloilo, contracted with E. A. Cuddy, one of the defendants, of Manila, for a film entitled "Zigomar or Eelskin, 3d series," to be exhibited in his theater in Iloilo during the week beginning May 26, 1913. Later, the defendants Espejo and Zaldarriaga, who were also operating a theater in Iloilo, representing Pathe Freres, also obtained from Cuddy a contract for the exhibition of the film aforesaid in their theater in Iloilo during the same week. Gilchrist commenced action seeking that the court issue a preliminary injunction against the defendants Espejo and Zaldarriaga prohibiting them from receiving, exhibiting, or using said film in Iloilo during the last week of May, 1913, or at any other time prior to the delivery to the plaintiff. Gilchrist was able to procure an injunction.]

x x x

The right on the part of Gilchrist to enter into a contract with Cuddy for the lease of the film must be fully recognized and admitted by all. That Cuddy was liable in an action for damages for the breach of that contract, there can be no doubt. Were the appellants likewise liable for interfering with the contract between Gilchrist and Cuddy, they not knowing at the time the identity of one of the contracting parties? The appellants claim that they had a right to do what they did. The ground upon which the appellants base this contention is, that there was no valid and binding contract between Cuddy and Gilchrist and that, therefore, they had a right to compete with Gilchrist for the lease of the film, the right to compete being a justification for their acts. If there had been no contract between Cuddy and Gilchrist this defense would be tenable, but the mere right to compete could not justify the appellants in intentionally inducing Cuddy to take away the appellee's contractual rights.

Chief Justice Wells in *Walker vs. Cronin* (107 Mass., 555), said: "Eve-

ryone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with."

In *Read vs. Friendly Society of Operative Stonemasons* ([1902] 2 K. B., 88), Darling, *J*., said: "I think the plaintiff has a cause of action against the defendants, unless the court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference; . . . for it is not a justification that 'they acted *bona fide* in the best interests of the society of masons,' *i.e.,* in their own interests. Nor is it enough that 'they were not actuated by improper motives. I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or *bona fide*, or in the best interests of himself, or even that he acted as an altruist, seeking only the good of another and careless of his own advantage." *(Quoted with approval in Beekman vs. Marsters, 195 Mass., 205).*

It is said that the ground on which the liability of a third party for interfering with a contract between others rests, is that the interference was malicious. The contrary view, however, is taken by the Supreme Court of the United States in the case of *Angle vs. Railway Co.* (151 U. S., 1). The only motive for interference by the third party in that case was the desire to make a profit to the injury of one of the parties of the contract. There was no malice in the case beyond the desire to make an unlawful gain to the detriment of one of the contracting parties.

In the case at bar the only motive for the interference with the Gilchrist-Cuddy contract on the part of the appellants was a desire to make a profit by exhibiting the film in their theater. There was no malice beyond this desire; but this fact does not relieve them of the legal liability for interfering with that contract and causing its breach. It is, therefore, clear, under the above authorities, that they were liable to Gilchrist for the damages caused by their acts, unless they are relieved from such liability by reason of the fact that they did not know at the time the identity of the original lessee (Gilchrist) of the film.

The liability of the appellants arises from unlawful acts and not from contractual obligations, as they were under no such obligations to induce Cuddy to violate his contract with Gilchrist. So that if the action of Gilchrist had been one for damages, it would be governed by chapter 2, title 16 book 4 of the Civil Code. Article 1902 of that code provides that a person who, by act or omission, causes damage to another when there is fault or negligence, shall be obliged to repair the damage so done. There is nothing in this article which requires as a condition precedent to the liability of a tort feasor that he must know the identity of a person to whom he causes damage. In fact, the

chapter wherein this article is found clearly shows that no such knowledge is required in order that the injured party may recover for the damage suffered.

But the fact that the appellants' interference with the Gilchrist contract was actionable did not of itself entitle Gilchrist to sue out an injunction against them. The allowance of this remedy must be justified under Section 164 of the Code of Civil Procedure, which specifies the circumstances under which an injunction may issue. Upon the general doctrine of injunction we said in *Devesa vs. Arbes* (13 Phil. Rep., 273):

"An injunction is a 'special remedy' adopted in that code (Act No. 190) from American practice, and originally borrowed from English legal procedure, which was there issued by the authority and under the seal of a court of equity, and limited, as in other cases where equitable relief is sought, to cases where there is no 'plain, adequate, and complete remedy at law,' which 'will not be granted while the rights between the parties are undetermined, except in extraordinary cases where material and irreparable injury will be done,' which cannot be compensated in damages, and where there will be no adequate remedy, and which will not, as a rule, be granted, to take property out of the possession of one party and put it into that of another whose title has not been established by law."

We subsequently affirmed the doctrine of the Devesa case in *Palafox vs. Madamba* (19 Phil. Rep., 444), and we take this occasion of again affirming it, believing, as we do, that the indiscriminate use of injunctions should be discouraged.

Does the fact that the appellants did not know at the time the identity of the original lessee of the film militate against Gilchrist's right to a preliminary injunction, although the appellants incurred civil liability for damages for such interference? In the examination of the adjudicated cases, where in injunctions have been issued to restrain wrongful interference with contracts by strangers to such contracts, we have been unable to find any case where this precise question was involved, as in all of those cases which we have examined, the identity of both of the contracting parties was known to the tortfeasors. We might say, however, that this fact does not seem to have been a controlling feature in those cases. There is nothing in section 164 of the Code of Civil Procedure which indicates, even remotely, that before an injunction may issue restraining the wrongful interference with contracts by strangers, the strangers must know the identity of both parties. It would seem that this is not essential, as injunctions frequently issue against municipal corporations, public service corporations, public officers, and others to restrain the commission of acts which would tend to injuriously affect the rights of persons whose identity the respondents could not possibly have known beforehand. This court has held that in a proper case injunction will issue at the instance of a private citizen to restrain *ultra vires* acts of public officials. *(Severino vs. Governor General, 16 Phil. Rep., 366).* So we proceed to the determination of the main question of whether or not the preliminary injunction ought to have been issued in this case.

As a rule, injunctions are denied to those who have an adequate remedy at law. Where the choice is between the ordinary and the extraordinary processes of law, and the former are sufficient, the rule will not permit the use of the latter. *(In re Debs, 158 U. S., 564)*. If the injury is irreparable, the ordinary process is inadequate. In *Wahle vs. Reinbach* (76 Ill., 322), the Supreme Court of Illinois approved a definition of the term "irreparable injury" in the following language: "By 'irreparable injury' is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury or great damage, but that species of injury, whether great or small, that ought not to be submitted to on the one hand or inflicted on the other; and, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law." *(Quoted with approval in Nashville R. R. Co. vs. McConnell, 82 Fed., 65).*

The case at bar is somewhat novel, as the only contract which was broken was that between Cuddy and Gilchrist, and the profits of the appellee depended upon the patronage of the public, for which it is conceded the appellants were at liberty to compete by all fair and legitimate means. As remarked in the case of the "ticket scalpers" *(82 Fed., 65)*, the novelty of the facts does not deter the application of equitable principles. This court takes judicial notice of the general character of a cinematograph or motion-picture theater. It is a quite modern form of the play house, wherein, by means of an apparatus known as a cinematograph or cinematograph, a series of views representing closely successive phases of a moving object, are exhibited in rapid sequence, giving a picture which, owing to the persistence of vision, appears to the observer to be in continuous motion. *(The Encyclopedia Britannica, vol. 6, p. 374).* The subjects which have lent themselves to the art of the photographer in this manner have increased enormously in recent years, as well as have the places where such exhibitions are given. The attendance, and, consequently, the receipts, at one of these cinematograph or motion-picture theaters depends in no small degree upon the excellence of the photographs, and it is quite common for the proprietor of the theater to secure an especially attractive exhibit as his "feature film" and advertise it as such in order to attract the Public. This feature film is depended upon to secure a larger attendance than if its place on the program were filled by other films of mediocre quality. It is evident that the failure to exhibit the feature film will reduce the receipts of the theater.

Hence, Gilchrist was facing the immediate prospect of diminished profits by reason of the fact that the appellants had induced Cuddy to rent to them the film Gilchrist had counted upon as his feature film. It is quite apparent that to estimate with any degree of accuracy the damages which Gilchrist would likely suffer from such an event would be quite difficult if not impossible. If he allowed the appellants to exhibit the film in Iloilo, it would be useless for him to exhibit it again, as the desire of the public to witness the production would have been already satisfied. In this extremity, the appellee applied for and was granted, as we have indicated, a mandatory injunction against Cuddy requiring him to deliver the Zigomar to Gilchrist,

and a preliminary injunction against the appellants restraining them from exhibiting that film in their theater during the week he (Gilchrist) had a right to exhibit it. These injunctions saved the plaintiff harmless from damages due to the unwarranted interference of the defendants, as well as the difficult task which would have been set for the court of estimating them in case the appellants had been allowed to carry out their illegal plans. As to whether or not the mandatory injunction should have been issued, we are not, as we have said, called upon to determine. So far as the preliminary injunction issued against the appellants is concerned, which prohibited them from exhibiting the Zigomar during the week which Gilchrist desired to exhibit it, we are of the opinion that the circumstances justified the issuance of that injunction in the discretion of the court.

We are not lacking in authority to support our conclusion that the court was justified in issuing the preliminary injunction against the appellants. Upon the precise question as to whether injunction will issue to restrain wrongful interference with contracts by strangers to such contracts, it may be said that courts in the United States have usually granted such relief where the profits of the injured person are derived from his contractual relations with a large and indefinite number of individuals, thus reducing him to the necessity of proving in an action against the tort-feasor that the latter was responsible in each case for the broken contract, or else obliging him to institute individual suits against each contracting party and so exposing him to a multiplicity of suits, *Sperry & Hutchinson Co. vs. Mechanics' Clothing Co.* (128 Fed., 800); *Sperry & Hutchin son Co. vs. Louis Weber & Co.* (161 Fed., 219); *Sperry & Hutchinson Co. vs. Pommer* (199 Fed., 309); were all cases wherein the respondents were inducing retail merchants to break their contracts with the company for the sale of the latters' trading stamps. Injunction issued in each case restraining the respondents from interfering with such contracts.

In the case of the *Nashville R. R. Co. vs. McConnell* (82 Fed., 65), the court, among other things, said: "One who wrongfully interferes in a contract between others, and, for the purpose of gain to himself induces one of the parties to break it, is liable to the party injured thereby; and his continued interference may be ground for an injunction where the injuries resulting will be irreparable."

In *Hamby & Toomer vs. Georgia Iron & Coal. Co.* (127 Ga., 792), it appears that the respondents were interfering in a contract for prison labor, and the result would be, if they were successful, the shutting down of the petitioners plant for an indefinite time. The court held that although there was no contention that the respondents were insolvent, the trial court did not abuse its discretion in granting a preliminary injunction against the respondents.

In *Beekman vs. Marsters* (195 Mass., 205), the plaintiff had obtained from the Jamestown Hotel Corporation, conducting a hotel within the grounds of the Jamestown Exposition, a contract whereby he was made their exclusive agent for the New England States to solicit patronage for the hotel. The defendant induced the hotel corporation to break their contract with the

plaintiff in order to allow him to act also as their agent in the New England States. The court held that an action for damages would not have afforded the plaintiff adequate relief, and that an injunction was proper compelling the defendant to desist from further interference with the plaintiff's exclusive contract with the hotel company.

In *Citizens' Light, Heat & Power Co. vs. Montgomery Light & Water Power Co*. (171 Fed., 553), the court, while admitting that there are some authorities to the contrary, held that the current authority in the United States and England is that:

> "The violation of a legal right committed knowingly is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law, if there be no sufficient justification for the interference. *(Quinn vs. Leatham, supra, 510; Angle vs. Chicago, etc., Ry. Co., 151 U. S., 1; 14 Sup. Ct., 240; 38 L. Ed., 55; Martens vs. Reilly, 109 Wis., 464, 84 N.W., 840; Rice vs. Manley, 66 N. Y., 82; 23 Am. Rep., 30; Bitterman vs. L. & N. R. R. Co., 207 U. S., 205; 28 Sup. Ct., 91; 52 L. Ed., 171; Beekman vs. Marsters, 195 Mass., 205; 80 N.E., 817; 11 L. R. A. [N. S.], 201; 122 Am. St. Rep., 232; South Wales Miners' Fed. vs. Glamorgan Coal Co., Appeal Cases, 1905, p. 239)." (See also Nims on Unfair Business Competition, pp. 351-371).*

In 3 Elliott on Contracts, section 2511, it is said: "Injunction is the proper remedy to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable. And where there is a malicious interference with lawful and valid contracts a permanent injunction will ordinarily issue without proof of express malice. So, an injunction may be issued where the complainant and the defendant were business rivals and the defendant had induced the customers of the complainant to break their contracts with him by agreeing to indemnify them against liability for damages. So, an employee who breaks his contract of employment may be enjoined from inducing other employees to break their contracts and enter into new contracts with a new employer of the servant who first broke his contract. But the remedy by injunction cannot be used to restrain a legitimate competition, though such competition would involve the violation of a contract. Nor will equity ordinarily enjoin employees who have quit the service of their employer from attempting by proper argument to persuade others from taking their places so long as they do not resort to force or intimidation or obstruct the public thoroughfares."

Beekman vs. Marsters, supra, is practically on all fours with the case at bar in that there was only one contract in question and the profits of the injured person depended upon the patronage of the public. *Hamby & Toomer vs. Georgia Iron & Coal Co., supra*, is also similar to the case at bar in that there was only one contract, the interference of which was stopped by injunction.

DAYWALT vs. LA CORPORACION

DE LOS PADRES AGUSTINOS RECOLETOS, et al.
G.R. No. 13505, February 4, 1919

In the year 1902, Teodorica Endencia, an unmarried woman, resident in the Province of Mindoro, executed a contract whereby she obligated herself to convey to Geo W. Daywalt, a tract of land situated in the barrio of Mangarin, municipality of Bulalacao, now San Jose, in said province. It was agreed that a deed should be executed as soon as the title to the land should be perfected by proceedings in the Court of Land Registration and a Torrens certificate should be procured therefor in the name of Teodorica Endencia. A decree recognizing the right of Teodorica as owner was entered in said court in August 1906, but the Torrens certificate was not issued until later. The parties, however, met immediately upon the entering of this decree and made a new contract with a view to carrying their original agreement into effect. This new contract was executed in the form of a deed of conveyance and bears date of August 16, 1906. The stipulated price was fixed at P4,000, and the area of the land enclosed in the boundaries defined in the contract was stated to be 452 hectares and a fraction.

The second contract was not immediately carried into effect for the reason that the Torrens certificate was not yet obtainable and in fact said certificate was not issued until the period of performance contemplated in the contract had expired. Accordingly, upon October 3, 1908, the parties entered into still another agreement, superseding the old, by which Teodorica Endencia agreed, upon receiving the Torrens title to the land in question, to deliver the same to the Hongkong and Shanghai Bank in Manila, to be forwarded to the Crocker National Bank in San Francisco, where it was to be delivered to the plaintiff upon payment of a balance of P3,100.

The Torrens certificate was in time issued to Teodorica Endencia, but in the course of the proceedings relative to the registration of the land, it was found by official survey that the area of the tract inclosed in the boundaries stated in the contract was about 1,248 hectares instead of 452 hectares as stated in the contract. In view of this development Teodorica Endencia became reluctant to transfer the whole tract to the purchaser, asserting that she never intended to sell so large an amount of land and that she had been misinformed as to its area.

This attitude of hers led to litigation in which Daywalt finally succeeded, upon appeal to the Supreme Court, in obtaining a decree for specific performance; and Teodorica Endencia was ordered to convey the entire tract of land to Daywalt pursuant to the contract of October 3, 1908, which contract was declared to be in full force and effect. This decree appears to have become finally effective in the early part of the year 1914.

The defendant, La Corporacion de los Padres Recoletos, is a religious corporation, with its domicile in the city of Manila. Said corporation was formerly the owner of a large tract of land, known as the San Jose Estate, on the island of Mindoro, which was sold to the Government of the Philippine Islands in the year 1909. The same corporation was at this time also the owner of another estate on the same island immediately adjacent to the

land which Teoderica Endencia had sold to Geo W. Daywalt; and for many years the Recoletos Fathers had maintained large herds of cattle on the farms referred to. Their representative, charged with the management of these farms, was father Isidoro Sanz, himself a member of the order. Father Sanz had long been well acquainted with Teodorica Endencia and exerted over her an influence and ascendency due to his religious character as well as to the personal friendship which existed between them. Teodorica appears to be a woman of little personal force, easily subject to influence, and upon all the important matters of business was accustomed to seek, and was given, the advice of Father Sanz and other members of his order with whom she came in contact.

Father Sanz was fully aware of the existence of the contract of 1902 by which Teodorica Endencia agreed to sell her land to the plaintiff as well as of the later important developments connected with the history of that contract and the contract substituted successively for it; and in particular Father Sanz, as well as other members of the defendant corporation, knew of the existence of the contract of October 3, 1908, which, as we have already seen, finally fixed the rights of the parties to the property in question. When the Torrens certificate was finally issued in 1909 in favor of Teodorica Endencia, she delivered it for safekeeping to the defendant corporation, and it was then taken to Manila where it remained in the custody and under the control of P. Juan Labarga the procurador and chief official of the defendant corporation, until the delivery thereof to the plaintiff was made compulsory by reason of the decree of the Supreme Court in 1914.

When the defendant corporation sold the San Jose Estate, it was necessary to bring the cattle off of that property; and, in the first half of 1909, some 2,368 head were removed to the estate of the corporation immediately adjacent to the property which the plaintiff had purchased from Teodorica Endencia. As Teodorica still retained possession of said property Father Sanz entered into an arrangement with her whereby large numbers of cattle belonging to the defendant corporation were pastured upon said land during a period extending from June 1, 1909, to May 1, 1914.

Under the first cause stated in the complaint in the present action the plaintiff seeks to recover from the defendant corporation the sum of P24,000, as damages for the use and occupation of the land in question by reason of the pasturing of cattle thereon during the period stated. The trial court came to the conclusion that the defendant corporation was liable for damages by reason of the use and occupation of the premises in the manner stated; and fixed the amount to be recovered at P2,497. The plaintiff appealed and has assigned error to this part of the judgment of the court below, insisting that damages should have been awarded in a much larger sum and at least to the full extent of P24,000, the amount claimed in the complaint.

As the defendant did not appeal, the propriety of allowing damages for the use and occupation of the land to the extent of P2,497, the amount awarded, is not now in question; and the only thing here to be considered, in connection with this branch of the case, is whether the damages allowed

under this head should be increased. The trial court lightly ignored the fact that the defendant corporation had paid Teodorica Endencia for use and occupation of the same land during the period in question at the rate of P425 per annum, inasmuch as the final decree of this court in the action for specific performance is conclusive against her right, and as the defendant corporation had notice of the rights of the plaintiff under his contract of purchase, it can not be permitted that the corporation should escape liability in this action by proving payment of rent to a person other than the true owner.

With reference to the rate at which compensation should be estimated the trial court came to the following conclusion:

> "As to the rate of the compensation, the plaintiff contends that the defendant corporation maintained at least one thousand head of cattle on the land and that the pasturage was of the value of forty centavos per head monthly, or P4,800 annually, for the whole tract. The court can not accept this view. It is rather improbable that 1,248 hectares of wild Mindoro land would furnish sufficient pasturage for one thousand head of cattle during the entire year, and, considering the locality, the rate of forty centavos per head monthly seems too high. The evidence shows that after having recovered possession of the land the plaintiff rented it to the defendant corporation for fifty centavos per hectare annually, the tenant to pay the taxes on the land, and this appears to be a reasonable rent. There is no reason to suppose that the land was worth more for grazing purposes during the period from 1909 to 1913, than it was at the later period. Upon this basis, the plaintiff is entitled to damages in the sum of P2,497, and is under no obligation to reimburse the defendants for the land taxes paid by either of them during the period the land was occupied by the defendant corporation. It may be mentioned in this connection that the Lontok tract adjoining the land in question and containing over three thousand hectares appears to have been leased for only P1,000 a year, plus the taxes."

From this, it will be seen that the trial court estimated the rental value of the land for grazing purposes at 50 centavos per hectare per annum, and roughly adopted the period of four years as the time for which compensation at that rate should be made. As the court had already found that the defendant was liable for these damages from June 1, 1909, to May 1, 1914, or a period of four years and eleven months, there seems some ground for the contention made in the appellant's first assignment of error that the court's computation was erroneous, even accepting the rule upon which the damages were assessed, as it is manifest that at the rate of 50 centavos per hectare per annum, the damages for four years and eleven months would be P3,090.

Notwithstanding this circumstance, we are of the opinion that the damages assessed are sufficient to compensate the plaintiff for the use and occupation of the land during the whole time it was used. There is evidence in the record strongly tending to show that the wrongful use of the land by the defendant was not continuous throughout the year but was confined

mostly to the season when the forage obtainable on the land of the defendant corporation was not sufficient to maintain its cattle, for which reason it became necessary to allow them to go over to pasture on the land in question; and it is not clear that the whole of the land was used for pasturage at any time. Considerations of this character probably led the trial court to adopt four years as roughly being the period during which compensation should be allowed. But whether this was advertently done or not, we see no sufficient reason, in the uncertainty of the record with reference to the number of the cattle grazed and the period when the land was used, for substituting our guess for the estimate made by the trial court.

In the second cause of action stated in the complaint the plaintiff seeks to recover from the defendant corporation the sum of P500,000, as damages, on the ground that said corporation, for its own selfish purposes, unlawfully induced Teodorica Endencia to refrain from the performance of her contract for the sale of the land in question and to withhold delivery to the plaintiff of the Torrens title, and further, maliciously and without reasonable cause, maintained her in her defense to the action of specific performance which was finally decided in favor of the plaintiff in this court. The cause of action here stated is based on a liability derived from the wrongful interference of the defendant in the performance of the contract between the plaintiff and Teodorica Endencia; and the large damages laid in the complaint were, according to the proof submitted by the plaintiff, incurred as a result of a combination of circumstances of the following nature: In 1911, it appears, the plaintiff, as the owner of the land which he had bought from Teodorica Endencia entered into a contract (Exhibit C) with S.B. Wakefield, of San Francisco, for the sale and disposal of said lands to a sugar growing and milling enterprise, the successful launching of which depended on the ability of Daywalt to get possession of the land and the Torrens certificate of title. In order to accomplish this end, the plaintiff returned to the Philippine Islands, communicated his arrangement to the defendant, and made repeated efforts to secure the registered title for delivery in compliance with said agreement with Wakefield. Teodorica Endencia seems to have yielded her consent to the consummation of her contract, but the Torrens title was then in the possession of Padre Juan Labarga in Manila, who refused to deliver the document. Teodorica also was in the end prevailed upon to stand out against the performance of her contract with the plaintiff with the result that the plaintiff was kept out of possession until the Wakefield project for the establishment of a large sugar growing and milling enterprise fell through. In the light of what has happened in recent years in the sugar industry, we feel justified in saying that the project above referred to, if carried into effect, must inevitably have proved a great success.

The determination of the issue presented in this second cause of action requires a consideration of two points. The first is whether a person who is not a party to a contract for the sale of land makes himself liable for damages to the vendee, beyond the value of the use and occupation, by colluding with the vendor and maintaining him in the effort to resist an action for specific performance. The second is whether the damages which the plaintiff seeks to recover under this head are too remote and speculative to be the subject

of recovery.

As preliminary to a consideration of the first of these questions, we deem it well to dispose of the contention that the members of the defendant corporation, in advising and prompting Teodorica Endencia not to comply with the contract of sale, were actuated by improper and malicious motives. The trial court found that this contention was not sustained, observing that while it was true that the circumstances pointed to an entire sympathy on the part of the defendant corporation with the efforts of Teodorica Endencia to defeat the plaintiff's claim to the land, the fact that its officials may have advised her not to carry the contract into effect would not constitute actionable interference with such contract. It may be added that when one considers the hardship that the ultimate performance of that contract entailed on the vendor, and the doubt in which the issue was involved — to the extent that the decision of the Court of the First Instance was unfavorable to the plaintiff and the Supreme Court itself was divided — the attitude of the defendant corporation, as exhibited in the conduct of its procurador, Juan Labarga, and other members of the order of the Recollect Fathers, is not difficult to understand. To our mind a fair conclusion on this feature of the case is that father Juan Labarga and his associates believed in good faith that the contract could not be enforced and that Teodorica would be wronged if it should be carried into effect. Any advice or assistance which they may have given was, therefore, prompted by no mean or improper motive. It is not, in our opinion, to be denied that Teodorica would have surrendered the documents of title and given possession of the land but for the influence and promptings of members of the defendant corporation. But we do not credit the idea that they were in any degree influenced to the giving of such advice by the desire to secure to themselves the paltry privilege of grazing their cattle upon the land in question to the prejudice of the just rights of the plaintiff.

The attorney for the plaintiff maintains that, by interfering in the performance of the contract in question and obstructing the plaintiff in his efforts to secure the certificate of title to the land, the defendant corporation made itself a co-participant with Teodorica Endencia in the breach of said contract; and inasmuch as father Juan Labarga, at the time of said unlawful intervention between the contracting parties, was fully aware of the existence of the contract (Exhibit C) which the plaintiff had made with S.B. Wakefield, Francisco, it is insisted that the defendant corporation is liable for the loss consequent upon the failure of the project outlined in said contract.

[The court went on to discuss the tort of interference with contractual relations quoted above.]

x x x

Translated into terms applicable to the case at bar, the decision in *Gilchrist vs. Cuddy* (29 Phil. Rep., 542), indicates that the defendant corporation, having notice of the sale of the land in question to Daywalt, might have been enjoined by the latter from using the property for grazing its cattle thereon. That the defendant corporation is also liable in this action for the damage

resulting to the plaintiff from the wrongful use and occupation of the property has also been already determined. But it will be observed that in order to sustain this liability it is not necessary to resort to any subtle exegesis relative to the liability of a stranger to a contract for unlawful interference in the performance thereof. It is enough that defendant used the property with notice that the plaintiff had a prior and better right.

Article 1902 of the Civil Code declares that any person who by an act or omission, characterized by fault or negligence, causes damage to another shall be liable for the damage so done. Ignoring so much of this article as relates to liability for negligence, we take the rule to be that a person is liable for damage done to another by any culpable act and by "culpable act" we mean any act which is blameworthy when judged by accepted legal standards. The idea thus expressed is undoubtedly broad enough to include any rational conception of liability for the tortious acts likely to be developed in any society. Thus, considered, it cannot be said that the doctrine of *Lumley vs. Gye (supra)* and related cases is repugnant to the principles of the civil law.

Nevertheless, it must be admitted that the codes and jurisprudence of the civil law furnish a somewhat uncongenial field in which to propagate the idea that a stranger to a contract may be sued for the breach thereof. Article 1257 of the Civil Code declares that contracts are binding only between the parties and their privies. In conformity with this it has been held that a stranger to a contract has no right of action for the nonfulfillment of the contract except in the case especially contemplated in the second paragraph of the same article. *(Uy Tam and Uy Yet vs. Leonard, 30 Phil. Rep., 471).* As observed by this court in *Manila Railroad Co. vs. Compania Transatlantica*, G.R. No. 11318 (38 Phil. Rep., 875), a contract, when effectually entered into between certain parties, determines not only the character and extent of the liability of the contracting parties but also the person or entity by whom the obligation is exigible. The same idea should apparently be applicable with respect to the person against whom the obligation of the contract may be enforced; for it is evident that there must be a certain mutuality in the obligation, and if the stranger to a contract is not permitted to sue to enforce it, he cannot consistently be held liable upon it.

If the two antagonistic ideas which we have just brought into juxtaposition are capable of reconciliation, the process must be accomplished by distinguishing clearly between the right of action arising from the improper interference with the contract by a stranger thereto, considered as an independent act generative of civil liability, and the right of action *ex contractu* against a party to the contract resulting from the breach thereof. However, we do not propose here to pursue the matter further, inasmuch as, for reasons presently to be stated, we are of the opinion that neither the doctrine of *Lumley vs. Gye (supra)* nor the application made of it by this court in *Gilchrist vs. Cuddy* (29 Phil. Rep., 542), affords any basis for the recovery of the damages which the plaintiff is supposed to have suffered by reason of his inability to comply with the terms of the Wakefield contract.

Whatever may be the character of the liability which a stranger to

a contract may incur by advising or assisting one of the parties to evade performance, there is one proposition upon which all must agree. This is, that the stranger cannot become more extensively liable in damages for the nonperformance of the contract than the party in whose behalf he intermeddles. To hold the stranger liable for damages in excess of those that could be recovered against the immediate party to the contract would lead to results at once grotesque and unjust. In the case at bar, as Teodorica Endencia was the party directly bound by the contract, it is obvious that the liability of the defendant corporation, even admitting that it has made itself co-participant in the breach of the contract, can in no event exceed hers. This leads us to consider at this point the extent of the liability of Teodorica Endencia to the plaintiff by reason of her failure to surrender the certificate of title and to place the plaintiff in possession.

It should in the first place be noted that the liability of Teodorica Endencia for damages resulting from the breach of her contract with Daywalt was a proper subject for adjudication in the action for specific performance which Daywalt instituted against her in 1909 and which was litigated by him to a successful conclusion in this court, but without obtaining any special adjudication with reference to damages. Indemnification for damages resulting from the breach of a contract is a right inseparably annexed to every action for the fulfillment of the obligation *(Art. 1124, Civil Code);* and it is clear that if damages are not sought or recovered in the action to enforce performance they cannot be recovered in an independent action. As to Teodorica Endencia, therefore, it should be considered that the right of action to recover damages for the breach of the contract in question was exhausted in the prior suit. However, her attorneys have not seen fit to interpose the defense of *res judicata* in her behalf; and as the defendant corporation was not a party to that action, and such defense could not in any event be of any avail to it, we proceed to consider the question of the liability of Teodorica Endencia for damages without reference to this point.

The most that can be said with reference to the conduct of Teodorica Endencia is that she refused to carry out a contract for the sale of certain land and resisted to the last an action for specific performance in court. The result was that the plaintiff was prevented during a period of several years from exerting that control over the property which he was entitled to exert and was meanwhile unable to dispose of the property advantageously. Now, what is the measure of damages for the wrongful detention of real property by the vendor after the time has come for him to place the purchaser in possession?

The damages ordinarily and normally recoverable against a vendor for failure to deliver land which he has contracted to deliver is the value of the use and occupation of the land for the time during which it is wrongfully withheld. And of course, where the purchaser has not paid the purchase money, a deduction may be made in respect to the interest on the money which constitutes the purchase price. Substantially, the same rule holds with respect to the liability of a landlord who fails to put his tenant in possession pursuant to a contract of lease. The measure of damages is the value of the

leasehold interest, or use and occupation, less the stipulated rent, where this has not been paid. The rule that the measure of damages for the wrongful detention of land is normally to be found in the value of use and occupation is, we believe, one of the things that may be considered certain in the law *(39 Cyc., 1630; 24 Cyc., 1052; Sedgewick on Damages, Ninth ed., Sec. 185)* — almost as well settled, indeed, as the rule that the measure of damages for the wrongful detention of money is to be found in the interest.

We recognize the possibility that more extensive damages may be recovered where, at the time of the creation of the contractual obligation, the vendor, or lessor, is aware of the use to which the purchaser or lessee desires to put the property which is the subject of the contract, and the contract is made with the eyes of the vendor or lessor open to the possibility of the damage which may result to the other party from his own failure to give possession. The case before us is not of this character, inasmuch as at the time when the rights of the parties under the contract were determined, nothing was known to any of them about the San Francisco capitalist who would be willing to back the project portrayed in Exhibit C.

The extent of the liability for the breach of a contract must be determined in the light of the situation in existence at the time the contract is made; and the damages ordinarily recoverable are in all events limited to such as might be reasonably foreseen in the light of the facts then known to the contracting parties. Where the purchaser desires to protect himself, in the contingency of the failure of the vendor promptly to give possession, from the possibility of incurring other damages than such as are incident to the normal value of the use and occupation, he should cause to be inserted in the contract a clause providing for stipulated amount to be paid upon failure of the vendor to give possession; and no case has been called to our attention where, in the absence of such a stipulation, damages have been held to be recoverable by the purchaser in excess of the normal value of use and occupation. On the contrary, the most fundamental conceptions of the law relative to the assessment of damages are inconsistent with such idea.

The principles governing this branch of the law were profoundly considered in the case of *Hadley vs. Baxendale* (9 Exch., 341), decided in the English Court of Exchequer in 1854; and a few words relative to the principles governing the recovery of damages, as expounded in that decision, will here be found instructive. The decision in that case is considered a leading authority in the jurisprudence of the common law. The plaintiffs in that case were proprietors of a mill in Gloucester, which was propelled by steam, and which was engaged in grinding and supplying meal and flour to customers. The shaft of the engine got broken, and it became necessary that the broken shaft be sent to an engineer or foundry man at Greenwich, to serve as a model for casting or manufacturing another that would fit into the machinery. The broken shaft could be delivered at Greenwich on the second day after its receipt by the carrier. It was delivered to the defendants, who were common carriers engaged in that business between these points, and who had told plaintiffs it would be delivered at Greenwich on the second day after its delivery to them, if delivered at a given hour. The carriers were informed that

the mill was stopped, but were not informed of the special purpose for which the broken shaft was desired to be forwarded. They were not told the mill would remain idle until the new shaft would be returned, or that the new shaft could not be manufactured at Greenwich until the broken one arrived to serve as a model. There was delay beyond the two days in delivering the broken shaft at Greenwich, and a corresponding delay in starting the mill. No explanation of the delay was offered by the carriers. The suit was brought to recover damages for the lost profits of the mill, caused by the delay in delivering the broken shaft. It was held that the plaintiff could not recover.

The discussion contained in the opinion of the court in that case leads to the conclusion that the damages recoverable in case of the breach of a contract are two sorts, namely: (1) the ordinary, natural, and in a sense necessary damage; and (2) special damages.

Ordinary damages is found in all breaches of contract where there are no special circumstances to distinguish the case specially from other contracts. The consideration paid for an unperformed promise is an instance of this sort of damage. In all such cases the damages recoverable are such as naturally and generally would result from such a breach, "according to the usual course of things." In cases involving only ordinary damage no discussion is ever indulged as to whether that damage was contemplated or not. This is conclusively presumed from the immediateness and inevitableness of the damage, and the recovery of such damage follows as a necessary legal consequence of the breach. Ordinary damage is assumed as a matter of law to be within the contemplation of the parties.

Special damage, on the other hand, is such as follows less directly from the breach than ordinary damage. It is only found in case where some external condition, apart from the actual terms to the contract exists or intervenes, as it were, to give a turn to affairs and to increase damage in a way that the promisor, without actual notice of that external condition, could not reasonably be expected to foresee. Concerning this sort of damage, *Hadley vs. Baxendale,* (1854) *(supra)* lays down the definite and just rule that before such damage can be recovered the plaintiff must show that the particular condition which made the damage a possible and likely consequence of the breach was known to the defendant at the time the contract was made.

The statement that special damages may be recovered where the likelihood of such damages flowing from the breach of the contract is contemplated and foreseen by the parties needs to be supplemented by a proposition which, though not enunciated in *Hadley vs. Baxendale*, is yet clearly to be drawn from subsequent cases. This is that where the damage which a plaintiff seeks to recover as special damage is so far speculative as to be in contemplation of law remote, notification of the special conditions which make that damage possible cannot render the defendant liable therefor. To bring damages which would ordinarily be treated as remote within the category of recoverable special damages, it is necessary that the condition should be made the subject of contract in such sense as to become an express or implied term of the engagement. *Horne vs. Midland R. Co.* (L R., 8 C.P., 131) is a case where

the damage which was sought to be recovered as special damage was really remote, and some of the judges rightly placed the disallowance of the damage on the ground that to make such damage recoverable, it must so far have been within the contemplation of the parties as to form at least an implied term of the contract. But others proceeded on the idea that the notice given to the defendant was not sufficiently full and definite. The result was the same in either view. The facts in that case were as follows: The plaintiffs, shoe manufacturers at K, were under contract to supply by a certain day shoes to a firm in London for the French government. They delivered the shoes to a carrier in sufficient time for the goods to reach London at the time stipulated in the contract and informed the railroad agent that the shoes would be thrown back upon their hands if they did not reach the destination in time. The defendants negligently failed to forward the good in due season. The sale was therefore lost, and the market having fallen, the plaintiffs had to sell at a loss.

In the preceding discussion, we have considered the plaintiff's right chiefly as against Teodorica Endencia; and what has been said suffices in our opinion to demonstrate that the damages laid under the second cause of action in the complaint could not be recovered from her, first, because the damages in question are special damages which were not within contemplation of the parties when the contract was made, and secondly, because said damages are too remote to be the subject of recovery. This conclusion is also necessarily fatal to the right of the plaintiff to recover such damages from the defendant corporation, for, as already suggested, by advising Teodorica not to perform the contract, said corporation could in no event render itself more extensively liable than the principal in the contract.

SO PING BUN vs. COURT OF APPEALS, et al.
G.R. No. 120554, September 21, 1999

In 1963, Tek Hua Trading Co., through its managing partner, So Pek Giok, entered into lease agreements with lessor Dee C. Chuan & Sons, Inc. (DCCSI). Subjects of four (4) lease contracts were premises located at Nos. 930, 930-Int., 924-B and 924-C, Soler Street, Binondo, Manila. Tek Hua used the areas to store its textiles. The contracts each had a one-year term. They provided that should the lessee continue to occupy the premises after the term, the lease shall be on a month-to-month basis.

When the contracts expired, the parties did not renew the contracts, but Tek Hua continued to occupy the premises. In 1976, Tek Hua Trading Co. was dissolved. Later, original members of Tek Hua Trading Co. including Manuel C. Tiong, formed Tek Hua Enterprising Corp., herein respondent corporation.

So Pek Giok, managing partner of Tek Hua Trading, died in 1986. So Pek Giok's granson, petitioner So Ping Bun, occupied the warehouse for his own textile business, Trendsetter Marketing.

On August 1, 1989, lessor DCCSI sent letters addressed to Tek Hua

Enterprises, informing the latter of the 25% increase in rent effective September 1, 1989. The rent increase was later on reduced to 20% effective January 1, 1990, upon other lessees' demand. Again on December 1, 1990, the lessor implemented a 30% rent increase. Enclosed in these letters were new lease contracts for signing. DCCSI warned that failure of the lessee to accomplish the contracts shall be deemed as lack of interest on the lessee's part, and agreement to the termination of the lease. Private respondents did not answer these letters. Still, the lease contracts were not rescinded.

On March 1, 1991, private respondent Tiong sent a letter to petitioner, which reads as follows:

March 1, 1991

"Mr. So Ping Bun
930 Soler Street
Binondo, Manila

Dear Mr. So,

Due to my closed *(sic)* business associate *(sic)* for three decades with your grandfather Mr. So Pek Giok and late father, Mr. So Chong Bon, I allowed you temporarily to use the warehouse of Tek Hua Enterprising Corp. for several years to generate your personal business.

Since I decided to go back into textile business, I need a warehouse immediately for my stocks. Therefore, please be advised to vacate all your stocks in Tek Hua Enterprising Corp. Warehouse. You are hereby given 14 days to vacate the premises unless you have good reasons that you have the right to stay. Otherwise, I will be constrained to take measure to protect my interest.

Please give this urgent matter your preferential attention to avoid inconvenience on your part.

Very truly yours,

(Sgd) Manuel C. Tiong
MANUEL C. TIONG
President"

Petitioner refused to vacate. On March 4, 1992, petitioner requested formal contracts of lease with DCCSI in favor of Trendsetter Marketing. So Ping Bun claimed that after the death of his grandfather, So Pek Giok, he had been occupying the premises for his textile business and religiously paid rent. DCCSI acceded to petitioner's request. The lease contracts in favor of Trendsetter were executed.

[A suit for injunction was filed for the nullification of the lease contracts between DCCSI and the petitioner and for damages. Judgment was rendered in favor of the plaintiffs and damages were awarded finding the petitioner guilty of tortious interference of contract.]

x x x

Damage is the loss, hurt, or harm which results from injury, and damages are the recompense or compensation awarded for the damage suffered. One becomes liable in an action for damages for a nontrespassory invasion of another's interest in the private use and enjoyment of asset if (a) the other has property rights and privileges with respect to the use or enjoyment interfered with, (b) the invasion is substantial, (c) the defendant's conduct is a legal cause of the invasion, and (d) the invasion is either intentional and unreasonable or unintentional and actionable under general negligence rules.

The elements of tort interference are: (1) existence of a valid contract; (2) knowledge on the part of the third person of the existence of contract; and (3) interference of the third person is without legal justification or excuse.

A duty which the law of tort is concerned with is respect for the property of others, and a cause of action *ex delicto* may be predicated upon an unlawful interference by one person of the enjoyment by the other of his private property. This may pertain to a situation where a third person induces a party to renege on or violate his undertaking under a contract. In the case before us, petitioner's Trendsetter Marketing asked DCCSI to execute lease contracts in its favor, and as a result petitioner deprived respondent corporation of the latter's property right. Clearly, and as correctly viewed by the appellate court, the three elements of tort interference above-mentioned are present in the instant case.

Authorities debate on whether interference may be justified where the defendants acts for the sole purpose of furthering his own financial of economic interest. One view is that, as a general rule, justification for interfering with the business relations of another exists where the actor's motive is to benefit himself. Such justification does not exist where his sole motive is to cause harm to the other. Added to this, some authorities believe that it is not necessary that the interferer's interest outweigh that of the party whose rights are invaded, and that an individual acts under an economic interest that is substantial, not merely *de minimis*, such that wrongful and malicious motives are negatived, for he acts in self-protection. Moreover, justification for protecting one's financial position should not be made to depend in a comparison of his economic interest in the subject matter with that of others. It is sufficient if the impetus of his conduct lies in a proper business interest rather than in wrongful motives.

As early as *Gilchrist vs. Cuddy,* we held that where there was no malice in the interference of a contract, and the impulse behind one's conduct lies in a proper business interest rather than in wrongful motives, a party cannot be a malicious interferer. Where the alleged interferer is financially

interested, and such interest motivates his conduct, it cannot be said that he is an officious or malicious intermeddler.

In the instant case, it is clear that petitioner So Ping Bun prevailed upon DCCSI to lease the warehouse to his enterprise at the expense of respondent corporation. Though petitioner took interest in the property of respondent corporation and benefited from it, nothing on record imputes deliberate wrongful motives or malice on him.

Section 1314 of the Civil Code categorically provides also that, "Any third person who induces another to violate his contract shall be liable for damages to the other contracting party." Petitioner argues that damage is an essential element of tort interference, and since the trial court and the appellate court rule that private respondents were not entitled to actual, moral or exemplary damages, it follows that he ought to be absolved of any liability, including attorney's fees.

It is true that the lower courts did not award damages, but this was only because the extent of damage was not quantifiable. We had similar situation in *Gilchrist,* where it was difficult or impossible to determine the extent damage and there was nothing on record to serve as basis thereof. In that case we refrained from awarding damages. We believe the same conclusion applies in this case.

While we do not encourage tort interferers seeking their economic interest to intrude into existing contracts at the expense of others, however, we find that the conduct herein complained of did not transcend the limits forbidding an obligatory award for damages in the absence of any malice. The business desire is there to make some gain to the detriment of the contracting parties. Lack of malice, however, precludes damages. But it does not relieve petitioner of the legal liability for entering into contracts and causing breach of existing ones. The respondent appellate court correctly confirmed the permanent injunction and nullification of the lease contracts between DCCSI and Trendsetter Marketing, without awarding damages. The injunction saved the respondents from further damage or injury caused by petitioner's interference.

2. INTERFERENCE WITH PROSPECTIVE ADVANTAGE

If there is no contract yet and the defendant is only being sued for inducing another not to enter into a contract with the plaintiff, the tort committed is appropriately called interference with prospective advantage. Thus, if the defendant, with ill will, induced an employer not to hire Mr. X, Mr. X may hold the defendant liable for interfering with a prospective advantage.

One of the leading cases in American jurisprudence is *Tuttle vs. Buck* (107 Minn. 145, 119 N.W. 946 [1909], cited in Prosser, Wade & Schwartz, p. 1106). Defendant in said case was a wealthy banker and

a man of considerable influence in the community. He maliciously established a barber shop and employed his influence to attract the customers of the plaintiff's barber shop. The defendant's sole purpose in establishing his shop was to ruin the plaintiff. Having successfully ruined the plaintiff, the defendant was sued by the former. The Court sustained the plaintiff stating that:

> "When a man starts an opposition place of business, not for the sake of profit himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort. In such a case he would not be exercising his legal right, or doing an act which can be judged separately from the motive which actuated him. To call such conduct competition is a perversion of terms. It is simply the application of force without legal justification, which in its moral quality may be no better than highway robbery."

3. UNFAIR COMPETITION

Article 27 of the Civil Code provides that unfair competition in agricultural, commercial or industrial enterprises, or in labor through the use of force, intimidation, deceit, machination or any other unjust, oppressive or highhanded method shall give rise to a right of action by the person who thereby suffers damage. The Code Commission explained that the provision is necessary in a system of free enterprise. "Democracy becomes a veritable mockery if any person or group of persons by any unjust or highhanded method may deprive others of a fair chance to engage in business or earn a living." *(Report of the Code Commission, p. 31).*

The Constitution and the Revised Penal Code prohibit combinations in restraint of trade or unfair competition. Thus, Section 2 of Article XIV of the Constitution provides: "The State shall regulate or prohibit private monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed."

Article 186 of the Revised Penal Code also provides:

> "Art. 186. *Monopolies and combinations in restraint of trade.* — The penalty of *prision correccional* in its minimum period or a fine ranging from two hundred to six thousand pesos, or both, shall be imposed upon:
>
> 1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the

form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market.

2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize said merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other artifice to restrain free competition in the market.

3. Any person who, being a manufacturer, producer, or processor of any merchandise or object of commerce or an importer of any merchandise or object of commerce from any foreign country, either as principal or agent, wholesale or retailer, shall combine, conspire or agree in any manner with any person likewise engaged in the manufacture, production, processing, assembling or importation of such merchandise or object of commerce or with any other persons not so similarly engaged for the purpose of making transactions prejudicial to lawful commerce, or of increasing the market price in any part of the Philippines, or any such merchandise or object of commerce manufactured, produced, processed, assembled in or imported into the Philippines, or of any article in the manufacture of which such manufactured, produced, processed, or imported merchandise or object of commerce is used."

A. PASSING OFF AND DISPARAGEMENT OF PRODUCTS.

The Intellectual Property Code (Republic Act No. 8293) gives a definition of the term unfair competition. Section 168 of the law provides:

SEC. 168. *Unfair Competition, Rights, Regulation and Remedies*. — 168.1 A person who has identified in the mind of the public the goods he manufactures or deals in, his business or services from those of others, whether or not a registered mark is employed, has a property right in the goodwill of the said goods, business or services so identified, which will be protected in the same manner as other property rights.

168.2. Any person who shall employ deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him or in which he deals, or his business, or services for those of the one having established such goodwill, or who shall commit any acts calculated to produce said result, shall be guilty of unfair competition, and shall be subject to an action therefor.

> 168.3. In particular, and without in any way limiting the scope of protection against unfair competition, the following shall be deemed guilty of unfair competition:
>
> (a) Any person, who is selling his goods and gives them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves or in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer, other than the actual manufacturer or dealer, or who otherwise clothes the goods with such appearance as shall deceive the public and defraud another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purposes.
>
> (b) Any person who by any artifice, or device, or who employs any other means calculated to induce the false belief that such person is offering the services of another who has identified such services in the mind of the public; or
>
> (c) Any person who shall make any false statement in the course of trade or who shall commit any other act contrary to good faith of a nature calculated to discredit the goods, business or services of another.

Sections 168.2 and 168.3[a] and [b] specifies the different situations constitutive of the unfair competition known as "passing off" of one's product as that of another. Section 168.3[2], on the other hand, contemplates the tort of disparagement of products. *(par. c)*.

It should be pointed out in this connection that the concept of unfair competition under the Civil Code is much broader than what is contemplated under the Intellectual Property Code. Unfair competition defined in the Intellectual Property Code is only one of the torts falling within the purview of Article 27 of the Civil Code.

B. INTERFERENCE.

Unfair competition includes cases involving the tort of interference with contractual relations and interference with prospective advantage.

Thus, a businessman who maliciously interferes with the contract of his competitor with the latter's clients in order to get them as his own may be guilty of interference with contractual relations. If, on the other hand, the businessman, through force, intimidation

or any other means prevents the customers from entering into a contract with the competitor, the same may amount to interference with prospective advantage. Both cases are examples of unfair competition.

C. MISAPPROPRIATION.

Unfair competition is likewise present if the defendant committed fraudulent misappropriation against a competition. Thus, in *International News Service vs. Associated Press* (248 U.S. 215 [1918]), the defendant International News Service was held to have been guilty of unfair competition when it appropriated news taken from bulletins issued by complainant Associated Press. The parties were competitors in the gathering and distribution of news and its publication for profit in newspapers in the United States. The Court explained that news of current events are not copyrightable and may be regarded as common property. However, competitors are "under a duty to conduct its own business so as not unnecessarily or unfairly injure that of the other."

The Court further explained that when defendant admitted that it took news items from plaintiff's bulletin boards and transmitted the same for commercial use, the defendant admitted that it took materials that has been acquired "by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit if reaped, in order to divert a material portion of the profit from those who have earned it to those who have not."

Justice Holmes concurred with the majority explaining that: "When an uncopyrighted combination of words is published there is no general right to forbid other people from repeating them — in other words there is no property in the combination or in the thoughts or facts that the words express. Property, a creation of law, does not arise from value, although exchangeable — a matter of fact. Many exchangeable values may be destroyed intentionally without compensation. Property depends upon exclusion by law from interference, and a person is not excluded from using any combination of words merely because someone has used it before, even if it took labor and genius to make it. If a given person is to be prohibited from making the use

of words that his neighbors are free to make some other ground must be found. One such ground is vaguely expressed in the phrase unfair trade. This means that the words are repeated by a competitor in business in such a way as to convey a misrepresentation that materially injures the person who first used them, by appropriating credit of some kind which the first user has earned. The ordinary case is a representation by device, appearance, or other indirection that the defendant's goods come from the plaintiff. But the only reason why it is actionable to make such a representation is that it tends to give the defendant an advantage in his competition with the plaintiff and that it is thought undesirable that an advantage should be gained that way. Apart from that the defendant may use such unpatented devices and uncopyrighted combinations of words as he likes. The ordinary case, I say, is palming off the defendant's product as the plaintiff's but the same evil may follow from the opposite falsehood."

D. MONOPOLIES AND PREDATORY PRICING.

Defendants can be held liable for unfair competition if they were involved in predatory pricing, *i.e.*, a practice of selling below costs in the short run in the hope of obtaining monopoly gains later, after driving the competition from the market. *(Epstein, supra, p. 1361; see also Mogul Steamship Co. vs. McGregor, Gow, & Co., 23 Q.B.D. 598 [1889], affirmed [1892] A.C. 25).* Such practice is also a form of monopoly in restraint of trade contemplated under the Constitution and the Revised Penal Code. The reason why monopolies and combinations in restraint of trade are prohibited was explained in *Gokongwei vs. The Securities and Exchange Commission (G.R. No. L-45911, April 11, 1979; See also Garcia v. Corona, 321 SCRA 218 [1999])*:

> "There are other legislation in this jurisdiction, which prohibit monopolies and combinations in restraint of trade. Basically, these anti-trust laws or laws against monopolies or combinations in restraint of trade are aimed at raising levels of competition by improving the consumers' effectiveness as the final arbiter in free markets. These laws are designed to preserve free and unfettered competition as the rule of trade. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices and the highest quality . . ." they operate to forestall concentration of economic power. The law against monopolies and combinations in restraint of trade is aimed at contracts and combinations that, by reason of the inherent nature of the contemplated acts, prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade.

> The terms "monopoly," "combination in restraint of trade" and "unfair competition" appear to have a well defined meaning in other jurisdictions. A "monopoly" embraces any combination the tendency of which is to prevent competition in the broad and general sense, or to control prices to the detriment of the public. In short, it is the concentration of business in the hands of a few. The material consideration in determining its existence is not that prices are raised and competition actually excluded, but that power exists to raise prices or exclude competition when desired. Further, it must be considered that the idea of monopoly is now understood to include a condition produced by the mere act of individuals. Its dominant thought is the notion of exclusiveness or unity, or the suppression of competition by the unification of interest or management, or it may be thru agreement and concert of action. It is, in brief, unified tactics with regard to prices."

Whenever competition was suppressed because of a monopoly, the competition that was so suppressed can file an action for damages under Articles 19, 20, 21 and 27 of the Civil Code.

CASE:

SHELL COMPANY OF THE PHILIPPINES, LTD. vs. INSULAR PETROLEUM REFINING CO., LTD., et al.
G.R. No. L-19441, June 30, 1964

Petitioner, Shell Co. of the Phil., Ltd. (Shell for short), is a corporation engaged in the sale of petroleum products, including lubricating oil. The packages and containers of its goods bear its trademark, labeled or stenciled thereon. Defendant Insular Petroleum Refining Co. Ltd. (Insular for short), is a registered limited partnership, whose principal business is collecting used lubricating oil which, thru a scientific process, is refined and marketed to the public at a price much lower than that of new lubricating oil. From the used oil, respondent produces two types of lubricating oil: one, a straight mineral oil classified as second grade or low-grade oil; and another, a first-grade or high grade oil. The essential difference between the two types lies in the fact that the high-grade oil contains an additive element which is not found in the other type. In marketing these two types of oil, respondent, as a practice, utilizes for the high grade oil containers, painted black on the sides yellow on top and on the bottom with its trade-name stenciled thereon, with a special sealing device at its opening which cannot be removed unless the oil is used. In selling its low grade oil, respondent uses miscellaneous containers, which its general manager Donald Mead describes, "generally, we used miscellaneous containers which we have on hand, several drums, may be all drums, with marks on them, we have several used drums may be belonging to the U.S. Army or other drums may be belonging to the Caltex, or the Stanvac; we have

some that belonged to the Union, miscellaneous drums of other companies, but they are used drums . . . And some of those miscellaneous containers are the Shell containers . . . but before filing the empty drums we obliterate the markings of the drums, whether it is army type drums or whether it is a Union brand or whether it is a Valvoline or Caltex or Shell or Standard Vacuum drum". In one transaction, however, which was consummated with Conrado Uichangco, a dealer of petitioner's gasoline and lubricating oil, the low-grade oil that was sold to said operator was contained in a drum with the petitioner's mark or brand "Shell" still stenciled without having been erased. The circumstances leading to the consummation of this isolated transaction, have been summed up by the Court of Appeals as follows:

"This single transaction between plaintiff and defendant was effected, according to Conrado Uichangco, an operator of a Shell service station at the corner of San Andres and Tuason Privado Streets, Manila, and who has been losing during the first eight and ten months of operation of his station, although he had money to back up his losses, when a certain F. Tecson Lozano, an agent of the defendant, repaired at his station and 'tried to convince me that Insoil is a good oil.' As a matter of fact, he tried to show me a chemical analysis of Insoil which he claimed was very close to the analysis of Shell oil; and he also told me that he could sell this kind of oil (Insoil) to me at a much cheaper price so that I could make a bigger margin of profit.

Q. What did you reply?

A. I told Mr. F. Tecson Lozano that if his intention was to sell me Insoil for me to pass as any of the Shell oils, I was not agreeable because I did not want to cheat my customers . . .

Q. You ordered a Shell drum from Mr. Lozano on your own volition or on orders of the Shell management?

A. Well, this is the story as to how I happened to order that one drum of Insoil oil that was inside that Shell drum. When Mr. Lozano was insistent that I buy Insoil package in a Shell drum I called up Mr. Crespo and I asked him in effect why we have to kill ourselves when there is a man here who came to my station and told me that he has oil that approximates the analysis of Shell oil which he could sell to me at a very much cheaper price and Mr. Crespo told me 'that is not true,' and then he further added, 'can you order one drum of that oil for me. Charge it against me.' I told him 'Yes, I will.' So I ordered that one drum of Insoil from Mr. F. Tecson Lozano.

Q. Do you know whether that one drum of oil was ever sold by you or by the Shell company to the public?

A. It was never re-sold to the public. I re-sold it to the Shell Company of the Philippines.

Q. You mean you bought it on your own name and you sold it to the Shell company at a profit?

A. I sold it to the Shell Company because it was an order of Mr. Crespo.

I did not profit anything from it. I just charged them in invoice price . . .

Q. My question to you is: He never made any misrepresentation to you that he was selling you any oil other than Insoil Motor oil, straight mineral SAE No. 30?

A. That is what he told me . . .

Q. And it is also a fact that you stated in the Fiscal's Office and in the Court of First Instance during the trial that there was no seal whatsoever appearing in the opening of the drum; is that correct?

A. There was no seal by the Insoil or by the Shell Company."

The evidence of the above transaction was an Invoice issued by the defendant's agent, describing the goods sold as "Insoil Motor oil (straight mineral) SAE 30 — 1 drum — P76.00 — (seller's drum)."

The incident between petitioner's operator and respondent's agent brought about the presentation with the Manila CFI, a case for damages on the allegation of unfair competition and a Criminal Case No. 42020 under the Revised Penal Code (Art. 189) against Ronald Mead, Manager, Pedro Kayanan and F. Tecson Lozano. In the criminal case, the accused therein were acquitted, the Court having found that the element of deceit was absent.

In the civil case, petitioner herein invoked two causes of action: (1) that respondent in selling its low-grade oil in Shell containers, without erasing the marks or brands labeled or stencilled thereon, intended to mislead the buying public to the prejudice of petitioner and the general public; and (2) defendant had attempted to persuade shell dealers to purchase its low-grade oil and to pass the same to the public as Shell oil, by reason of which petitioner had suffered damages in the form of decrease in sales, estimated at least P10,000.00. A prayer for double the actual damages was made, pursuant to section 23 of Republic Act 166, P5,000.00 for attorney's fees, P1,000.00 for legal expenses and P25,000.00 for exemplary damages. A writ of preliminary injunction was requested to enjoin respondent herein to cease and desist from using for the sale of any of its products and more particularly for the sale of its low-grade lubricating oil, Shell containers with Shell markings still on them. The motion to dissolve the injunction granted, was denied by the court *a quo*.

Respondent Insular answering the complaint, after the usual admissions and denials, alleged that it "has never attempted to pass off its products as that of another nor to persuade anyone to do the same," and that the action is barred by the decision in the criminal case No. 42020. A counterclaim for P81,000.00 for actual, moral and exemplary damages, P4,000.00 for attorney's fees and P5,000 for legal expenses was interposed by respondent.

After trial, the CFI found for Shell and ordered respondent to pay P20,000.00 for actual damages. P5.000.00 for attorney's fees, P1,000.00 for legal expenses and P10,000.00 by way of exemplary damages and the costs.

In reversing the above judgment, the Court of Appeals, disquisitioned:

> "On the question of whether or not, as a matter of fact, the defendant is guilty of unfair competition in the conduct of its trade or business in the marketing of its low-grade oil, particularly in the single transaction between defendant's agent and plaintiff's dealer, as hereinabove narrated, we deem it wise to preface the discussion by citing certain passages in the decision of the Supreme Court in the case of *Alhambra Cigar, etc. vs. Mojica, 27 Phil. Rep. 266*, thus:
>
> 'No inflexible rule can be laid down as to what will constitute unfair competition. Each case is, in a measure, a law unto itself. Unfair competition is always a question of fact. The question to be determined in every case is whether or not, as a matter of fact, the name or mark used by the defendant has previously come to indicate and designate plaintiff's goods, or, to state it in another way, whether defendant, as a matter of fact, is, by his conduct, passing off defendant's goods as plaintiff's goods or his business as plaintiff's business. The universal test question is whether the public is likely to be deceived . . . Nothing less than conduct tending to pass off one man's goods or business as that of another will constitute unfair competition. Actual or probable deception and confusion on the part of the customers by reason of defendant's practices must always appear."

Encompassing the facts of the case to the foregoing ruling in the *Alhambra* case, it clearly appears that defendant's practices in marketing its low-grade oil did not cause actual or probable deception and confusion on the part of the general public, because, as shown from the established facts, with the exception of that single transaction regarding the one drum of oil sold by the defendant's agent to the plaintiff's dealer, as aforesaid, before marketing to the public its low-grade oil in containers the brands or marks of the different companies stenciled on the containers are totally obliterated and erased. The defendant did not pass off or attempt to pass off upon the public its goods as the goods of another. There is neither express nor implied representation to that effect. The practices do not show a conduct to the end and probable effect of which is to deceive the public, or pass of its goods as those of another. Proof of this may be clearly deduced from the fact that, with the exception of the sale of one drum of low-grade oil by defendant's agent to Uichangco, no other companies whose drums or containers have been used by the defendant in its business have filed any complaint to protect against the practices of the defendant . . ."

Now we shall dwell on the transaction between defendant's agent and plaintiff's dealer, Uichangco, to determine whether or not, as a matter of fact, the defendant is guilty of unfair competition. There is evidence showing that the use of the defendant of the drum or container with the Shell brand stenciled thereon was with the knowledge and consent of Uichangco. There is also the categorical testimony of Uichangco that defendant's agent did not make any representation that said agent was selling any oil other than Insoil

motor oil. The sales invoice states that Insoil Oil was sold. True, that a drum with the brand Shell remaining unerased was used by the defendant. But, Uichangco was apprised beforehand that a Shell drum would be used, and in fact the instruction of Crespo to Uichangco could mean — to buy Insoil oil contained in a Shell drum. The buyer could not have been deceived or confused that he was not buying Insoil oil. There is reason to believe that the transaction was consummated in pursuance of a plan of Mr. Crespo to obtain evidence for the filing of a case. The oil was never sold to the public, because the plaintiff never intended or contemplated doing so."

x x x

In the petition, Shell claims three (3) errors allegedly committed by the Court of Appeals, all of which pose the singular issue of whether respondent in the isolated transaction, stated elsewhere in this opinion, committed an act of unfair competition and should be held liable.

The complaint was predicated on Section 29 of Rep. Act No. 166, defining unfair competition, to wit:

> "Any person who shall employ deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him or in which he deals . . . for those of the one having established such goodwill, or who shall commit any act calculated to produce said result, shall be guilty of unfair competition, and shall be subject to an action therefor."

From the above definition and authorities interpretative of the same, it is seen that to hold a defendant guilty of unfair competition, no less than satisfactory and convincing evidence is essential, showing that the defendant has passed off or attempted to pass off his own goods as those of another and that the customer was deceived with respect to the origin of the goods. In other words, the inherent element of unfair competition is fraud or deceit. *(I Nim's The Law of Unfair Competition and Trademarks, 4th ed., pp. 52-53, and cases cited therein; U.S. vs. Kyburz, 28 Phil. 475, citing Paul on Trademarks, sec. 209; I Callman's, The Law of Unfair Competition and Trademarks 329; Roger's New Directions in the Law of Unfair Competition, [1940] N.Y.L. Rev. 317, 320; Alhambra Cigar, etc. vs. Mojica, 29 Phil. 266, refer to passage quoted in the decision of C.A., supra).*

As no inflexible rule can be laid down as to what will constitute unfair competition; as each case is, in a measure, a law unto itself and as unfair competition is always a question of fact, the determination of whether unfair competition was committed in the case at bar, must have to depend upon the facts as found by the Court of Appeals, to the definitiveness of which we are bound. *(I Moran's Rules of Court, 1957 Ed., p. 699 and cases cited therein).* ". . . The Supreme Court can not examine the question of whether or not the Court of Appeals was right when that tribunal concluded from the uncontroverted evidence that there had been no deceit." *(De Luna, et al. vs. Linatoc, 74 Phil. 15).* And the facts of the case at bar, are, as found and exposed by

the Court of Appeals in the portion of its decision above-quoted.

Not just because a manufacturer used a container still bearing a competitor's markings in the sale of one's products, irrespective of to whom and how the sale is made, can there be a conclusion that the buying public has been misled or will be misled, and, therefore, unfair competition is born. The single transaction at bar will not render defendant's act an unfair competition, much in the same way that the appearance of one swallow does not make a season summer.

It was found by the Court of Appeals that in all transactions of the low-grade Insoil, except the present one, all the marks and brands on the containers used were erased or obliterated. The drum in question did not reach the buying public. It was merely a Shell dealer or an operator of a Shell Station who purchased the drum not to be resold to the public, but to be sold to the petitioner company, with a view of obtaining evidence against someone who might have been committing unfair business practices, for the dealer had found that his income was dwindling in his gasoline station. Uichangco, the Shell dealer, testified that Lozano (respondent's agent) did not at all make any representation that he (Lozano) was selling any oil other than Insoil motor oil, a fact which finds corroboration in the receipt issued for the sale of the drum. Uichangco was apprised beforehand that Lozano would sell Insoil oil in a Shell drum. There was no evidence that defendants or its agents attempted to persuade Uichangco or any Shell dealer, for that matter, to purchase its low-grade oil and to pass the same to the public as Shell oil. It was shown that Shell and other oil companies, deliver oil to oil dealers or gasoline stations in drums, these dealers transfer the contents of the drums to retailing dispensers known as "tall boys," from which the oil is retailed to the public by liters.

This Court is not unaware of the decisions cited by petitioner to bolster its contention. We find those cases, however, not applicable to the one at bar. Those cases were predicated on facts and circumstances different from those of the present. In one case, the trade name of plaintiff was stamped on the goods of defendant and they were being passed as those of the plaintiff. This circumstance does not obtain here. From these cases, one feature common to all comes out in bold relief and that is, the competing product involving the offending bottles, wrappers, packages or marks reached the hands of the ultimate consumer, so bottled, wrapped, packaged or marked. In other words, it is the form in which the wares or products come to the ultimate consumer that was significant; for, as has been well said, the law of unfair competition does not protect purchasers against falsehood which the tradesmen may tell; the falsehood must be told by the article itself in order to make the law of unfair competition applicable.

Petitioner contends that there had been a marked decrease in the volume of sales of low-grade oil of the company, for which reason it argues that the sale of respondent's low-grade oil in Shell containers was the cause. We are reluctant to share the logic of the argument. We are more inclined to believe that several factors contributed to the decrease of such sales. But let

us assume, for purposes of argument, that the presence of respondent's low-grade oil in the market contributed to such decrease. May such eventuality make respondent liable for unfair competition? There is no prohibition for respondent to sell its goods, even in places where the goods of petitioner had long been sold or extensively advertised. Respondent should not be blamed if some of petitioner's dealers buy Insoil oil, as long as respondent does not deceive said dealers. If petitioner's dealers pass off Insoil oil as Shell oil, that is their responsibility. If there was any such effort to deceive the public, the dealers to whom the defendant (respondent) sold its products and not the latter, were legally responsible for such deception. The passing of said oil, therefore, as product of Shell was not performed by the respondent or its agent, but petitioner's dealers, which act respondent had no control whatsoever. And this could easily be done, for, as respondents' counsel put it —

> "The point we would like to drive home is that if a Shell dealer wants to fool the public by passing off INSOIL as SHELL oil he could do this by the simple expedient of placing the INSOIL oil or any other oil for that matter in the 'tall boys' and dispense it to the public as SHELL oil. Whatever container INSOIL uses would be of no moment . . . absence of a clear showing that INSOIL and the SHELL dealer connived or conspired, we respectfully maintain that the responsibility of INSOIL ceases from the moment its oil, if ever it has ever been done, is transferred by a shell dealer to a SHELL 'tall boy.'"

And the existence of connivance or conspiracy, between dealer Uichangco and Agent Lozano has not in the least been insinuated.

Petitioner submits the adoption in the case at bar of the "service station is package theory" — that the service stations of oil companies are packages in themselves, such that all products emanating therefrom are expected to be those of the company whose marks the station bear, that when a motorist drives to a Shell station, he does so with the intention of buying shell products and that he is naturally guided by the marking of the station itself. Hence, it constitutes a deceit on the buying public, to sell to said motorists any other kind of products without apprising them beforehand that they are not Shell products. (Third assignment of error). In view, however, of the findings and conclusions reached, there seem to be no need of discussing the merits and demerits of the theory, or whether the same is applicable or not, to the present case.

4. SECURITIES RELATED TORTS

A person who, contrary to law, caused damage to another is liable for damage under Article 21 of the Civil Code. Thus, implicit from any violation of the provisions of the Securities Regulation Code (Republic Act No. 8799) is the liability for damages caused by such violation. In addition, civil liability arising from delict likewise fol-

lows such violation because Section 73 of the law imposes criminal liability on any person who violates any of the provisions thereof or the rules and regulations promulgated by the Securities and Exchange Commission or any person who, in the registration statement makes untrue statement of or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading.

A. FRAUD.

Of particular interest are the anti-fraud provisions of the Securities Regulations Code. Section 26 of the Code specifies certain fraudulent transactions:

> Sec. 26. *Fraudulent transactions.* — (a) It shall be unlawful for any person, directly or indirectly, in connection with the purchase or sale of any securities —
>
> 26.1 Employ any device, scheme, or artifice to defraud;
>
> 26.2 Obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or
>
> 2.6.3 Engage in any act, transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Section 58 of the same law provides that any person who engages in any such fraudulent act or transaction shall be liable for the damages sustained by any person as a result of such transaction.

In common law, the tort of deceit was used to justify award of damages in transactions involving securities. As already discussed in an earlier chapter, deceit in common law is a tort covered by Article 33 of the Civil Code. The anti-fraud provisions in the Code are broader in scope and are not limited to circumstances that would give rise to a common law action for deceit. *(Loss, Fundamentals of Securities Regulation, 1988 Ed., p. 716).* "The antifraud provisions are part of the statutory scheme that resulted from a finding that securities are 'intricate merchandize' and a congressional determination that the public interest demanded legislation that would recognize the gross inequality of bargaining power between the professional securities firm and the average investor. 'The essential objective of securities legislation is to protect those who do not know market conditions from

the overrechings of those who do.'" *(ibid., citing Charles Hughes & Co., Inc. v. SEC, 139 F. 2d 434, 437 [2nd Cir. 1943])*.

Just like the tort of deceit, however, there is no hard and fast rule on what constitutes fraud. Thus, the first paragraph of Section 26 merely prohibits persons from employing "any device, scheme, or artifice to defraud" without giving a definition of fraud or deceit. The reason why there is no such definition according to one Court is that if there is such a definition "a certain class of gentlemen of the 'J. Rufus Wallingford' type — 'they toil not neither do they spin' — would lie awake nights endeavoring to conceive some devious and shadowy way of evading the law. It is more advisable to deal with each case as it arises." *(ibid., citing State vs. Whitaker, 118 Ore. 656, 661, 247 Pac. 1077, 1079 [1926])*.

B. MISSTATEMENTS.

No securities, except those classified as exempt or unless sold in any exempt transaction, can be sold or offered for sale or distribution to the public within the Philippines unless such securities shall have been registered with Securities and Exchange Commission. *(Section 8, R.A. No. 8799)*. Under the prior law, the Revised Securities Act *(B.P. Blg. 178)*, certain facts and documents that should be included in the registration statement were specified. *(Section 8)*. The present law does not contain an enumeration of all the documents mentioned in the previous law. Section 12 of R.A. No. 8799 only provides that the sworn registration statement must be in such form and containing such information and documents as the Commission shall prescribe. It is provided however that "the information required for the registration of any kind, and all securities, shall include, among others, the effect of the securities issue on ownership, on the mix of ownership, especially foreign and local ownership." It is also expressly provided that the registration statement shall include a prospectus required or permitted to be delivered under Sub-sections 8.2, 8.3 and 8.4 of the Code.

Sections 56 and 57 provide for civil liabilities for damages on account of false statements in the registration statement and the materials and documents attached thereto.

a. False Registration Statement.

(1) The Plaintiff.

Sub-section 56.1 of the Securities Regulation Code gives a right "to any person acquiring a security, the registration statement of

which or any part thereof contains on its effectivity an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make such statements not misleading, and who suffers damage, to sue for damages." He is not entitled to damages if "at the time of such acquisition he knew of such untrue statement or omission."

It is noticeable that the liability arises only if the false statement or material omission is contained in the registration statement "on its effectivity." Thus, "no matter whether the plaintiff purchased a day or a year after the effective date of the particular part of the registration statement complained of, materiality is reckoned as of that one date." *(Loss, supra, p. 901).*

There is also a limitation with respect to matters stated in an income statement. Section 56.2 provides however that — "if the person who acquired the security did so after the issuer has made generally available to its security holders an income statement covering a period of at least twelve (12) months beginning from the effectivity date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon the registration statement and not knowing of such income statement, but such reliance may be established without proof of the reading of the registration statement by such person."

(2) The Defendants.

Section 56 of the Code likewise specifies the possible defendants in an action for damages under the said provision. The persons specified under the law are the following: (a) the issuer and every person who signed the registration statement; (b) Every person who was a director of, or any other person performing similar functions, or a partner in, the issuer at the time of the filing of the registration statement or any part, supplement or amendment thereof with respect to which his liability is asserted; (c) Every person who is named in the registration statement as being or about to become a director of, or a person performing similar functions, or a partner in, the issuer and whose written consent thereto is filed with the registration statement; (d) Every auditor or auditing firm named therein as having certified any financial statements used in connection with the registration statement or prospectus; (e) Every person who, with his written consent, which shall be filed with the registration statement, has been named as having prepared or certified any part of the registration statement, or as having prepared or certified a report or valuation which is used in connection with the registration statement, with respect to the statement, report, or valuation, which purports to

have been prepared or certified by him; (f) Every selling shareholder who contributed to and certified as to the accuracy of a portion of the registration statement, with respect to the portion of the registration statement which purports to have been contributed by him; and (g) Every underwriter with respect to such security.

(3) Defenses.

The defendants are free from liability if they can prove that at the time of acquisition, the plaintiff knew of the untrue statement or omission. The plaintiff cannot be said to have relied on the untrue statement if he was aware of the falsity thereof. This a form of assumption of risk because the plaintiff made the investment knowing the danger thereof on account of the false statements.

(4) Damages.

(4.1) Nature and Extent.

The suit authorized under Sections 56, as well as Sections 57 to 61, may be filed before the Regional Trial Court. *(Section 63, R.A. No. 8799).* The said court may award damages in the amount not exceeding triple the amount of the transactions plus actual damages.

Exemplary damages may also be awarded in cases of bad faith, fraud, malevolence or wantonness in the violation of the Code or the rules and regulations promulgated thereunder. Courts are authorized to award attorney's fees not exceeding thirty percent (30%) of the award.

(4.2) Joint and Several Liability.

If two or more persons are made liable as defendants, they shall be jointly and severally liable for the payment of damages. However, any person who becomes liable for the payment of such damages may recover contribution from any other person who, if sued separately, would have been liable to make the same payment, unless the former was guilty of fraudulent representation and the latter was not.

Nevertheless, all persons held liable shall contribute equally to the total liability adjudged herein. In no case shall the principal stockholders, directors and other officers of the issuer or persons occupying similar positions therein, recover their contribution to the liability from the issuer. However, the right of the issuer to recover from the guilty parties the amount it has contributed shall not be prejudiced.

b. Prospectus and the like.

The civil liabilities for the false statements in the prospectus, communications and reports are defined in Section 57 of the Code which states:

> SEC. 57. *Civil liabilities arising in connection with prospectuses, communications and reports.* — 57.1.Any person who:
>
> a) offers to sell or sells a security in violation of Chapter III, or
>
> b) offers to sell or sells a security, whether or not exempted by the provisions of this Code, by the use of any means or instruments of transportation or communication, by means of a prospectus or other written oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission) and who shall fail in the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security,
>
> c) Any person who shall make or cause to be made any statement in any report, or document filed pursuant to this Code or any rule or regulation thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person who, not knowing that such statement was false or misleading, and relying upon such statements, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading.

c. Statute of Limitation.

The action for damages may likewise be dismissed due to extinctive prescription. The prescriptive period for the action is specified in Section 62.

SEC. 62. *Limitation of actions.* — 62.1 No action shall be maintained to enforce any liability created under Section 56 or 57 of this Code unless brought within two (2) years after the discovery of the untrue statement or the omission, or, if the action is to enforce a liability created under Subsection 57.1, unless brought within two years after the violation upon which it

is based. In no event shall any such action be brought to enforce a liability created under Section 56 or Subsection 57.1 (a) more than five (5) years after the security was *bona fide offered to the public, or under Subsection 57.1 (b) more than five (5) years after the sale.*

62.2. No action shall be maintained to enforce any liability created under any provision of this Code unless brought within two (2) years after the discovery of the facts constituting the cause of action and within five (5) years after such cause of action accrued.

BUSINESS TORTS

CHAPTER 14

DAMAGES

The Code Commission included a Title on Damages in the draft of the New Civil Code to see to it that whenever a right is transgressed, every manner of loss or injury is compensated for in some way or another. The Commission further explained that:

> "The subject of 'Damages' is introduced in the Project. The present Code has but few general principles on the measure of damages. Moreover, practically the only damages in the present Code are compensatory ones and those agreed upon in a penal clause. Moral damages are not expressly recognized in the present Civil Code, although in one instance — injury to reputation — such damages have been allowed by the Supreme Court of Spain, and some Spanish jurists believe that moral damages are allowable. The Supreme Court of the Philippines has awarded moral damages in a few cases.
>
> The measure of damages is of far-reaching importance in every legal system. Upon it depends the just compensation for every wrong or breach of contract.
>
> The Commission has, therefore, deemed it advisable to include in the Project a Title on 'Damages' which embodies some principles of the American Law on the subject. The American courts have developed abundant rules and principles upon the adjudication of damages."

The Civil Code expressly provides that "the provisions of this Title (on Damages) shall be respectively applicable to all obligations mentioned in Article 1157" *(Article 2195, Civil Code),* that is, obligations arising from delict, quasi-delict, contract, and quasi-contract.

Article 2196 of the Civil Code states that the rules under the Title on Damages are without prejudice to special provisions on damages formulated elsewhere in the Code. Compensation for workmen and other employees in case of death, injury or illness is regulated by special laws. Rules governing damages laid down in other laws

shall be observed insofar as they are not in conflict with this Code.

On the other hand, Article 2198 provides that the principles of general law on damages are adopted insofar as they are not inconsistent with the New Civil Code.

1. DEFINITION AND CONCEPT

"Damage" has been defined by Escriche as "the detriment, injury, or loss which are occasioned by reason of fault of another in the property or person." *(Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, vol. 2, p. 597).* Of whatsoever nature the damage be, and from whatsoever cause it may proceed, the person who has done the injury ought to repair it by an indemnity proportionate to his fault and to the loss caused thereby. *(1 Cushing, Domat's Civil Law, p. 741, cited in Simona Manzanares vs. Rafael Moreta, G.R. No. 12306, October 22, 1918).*

The Supreme Court defined the word "damages" in one case as the pecuniary compensation, recompense, or satisfaction for an injury sustained, or as otherwise expressed, the pecuniary consequences which the law imposes for the breach of some duty or violation of some rights. *(People vs. Ballesteros, 285 SCRA 438, 448 [1998]).*

A complaint for damages is a personal action and may be commenced and tried where the defendant or any of the defendant resides or may be found, or where the plaintiff or any of the plaintiffs resides at the election of the plaintiff. *(Baritua vs. Court of Appeals, 267 SCRA 331 [1997]).*

In actions for damages, courts should award an amount to the winning party and not its equivalent in property. The damages that should be awarded should be the money value of such damages. In one case, the plaintiffs were ordered "jointly and solidarily liable to defendants the quantity of one hundred (100) cavans of *palay* every year from 1972." The Supreme Court deleted such award explaining that one hundred (100) cavans of *palay* as a form of damages cannot be sustained because *palay* is not legal currency in the Philippines *(Heirs of Simeon Borlado v. Court of Damages, 363 SCRA 753, 757).*

2. DAMNUM ABSQUE INJURIA

Almost all conduct may, under certain circumstances, be considered tortious. In all theses cases, the presence of damage caused to the defendant is required. It does not mean however that a person is always liable in each and every case that there is damage. In some

cases, there is no liability even if there is damage because there was no injury — *Damnum Absque Injuria. (Custodio vs. Court of Appeals, 253 SCRA 483 [1996]; Philippine Racing Club vs. Bonifacio, 109 Phil. 233; Auyong Hiyan vs. Court of Tax Appeals, 59 SCRA 110; Farolan vs. Solma, March 13, 1991).* Where the case is one of *damnum absque injuria,* the conjunction of damages and wrong is absent there can be no actionable wrong if either one or the other is wanting. Thus, if the damage resulted because a person exercised his legal rights (like the filing of a Complaint in good faith) it is *damnum absque injura.*

In the above-cited *Custodio* case which is reproduced hereunder, Justice Florenz D. Regalado explained the difference between damage and injury. He explained that mere damage without injury does not result in liability. The explanation in *Custodio* was reiterated in a fairly recent case in this wise:

> "x x x However, there is a material distinction between between damages and injury. Injury is the legal invasion of a legal right; damage is the loss, hurt, or harm which results from the injury; and damages are the recompense or compensation awarded for the damage suffered. Thus, there can be damage without injury in those instances in which the loss or harm was not the result of a violation of a legal duty. In such cases, the consequences must be borne by the injured person alone, the law affords no remedy for damages resulting from an act which does not amount to a legal injury or wrong. These situations are often called *damnum absque injuria.*
>
> In other words, in order that a plaintiff may maintain an action for the injuries of which he complains, he must establish that such injuries resulted from a breach of duty which the defendant owed to the plaintiff — a concurrence of injury to the plaintiff and legal responsibility by the person causing it. The underlying basis for the award of tort damages is the premise that an individual was injured in contemplation of law. Thus, there must first be a breach before damages may be awarded; and the breach of such duty should be the proximate cause of the injury." *(BPI Express Card Corporation vs. Court of Appeals, 296 SCRA 260, 272-273).*

The rule was applied in *Farolan vs. Salmac Marketing Corporation* (G.R. No. 83589, March 13, 1991). In the said case, the Commissioner of Customs withheld the release of certain importation because of an erroneous interpretation of law. The Supreme Court explained that the damage that resulted because of such act was in the nature of *damnum absque injuria.* The Court believed that it is its duty to see to it that public officers are not hampered in the performance of their duties or in making decisions for fear of personal liability for

damages due to honest mistakes.

Related to such rule is the maxim *qui jure suo utitur nullum damnum facit* — one who exercises a right does no injury. This maxim is often applied to cases where the Court rejects claims for damages of the winning defendant in a case. The Court often reiterates the rule that the adverse result of an action does not *per se* make the action wrongful and subject the actor to payment of damages. *(Saba vs. Court of Appeals, 189 SCRA 50 [1990]).*

CASE:

SPOUSES CRISTINO AND BRIGIDA CUSTODIO, et al.
vs. COURT OF APPEALS, et al.
253 SCRA 483

On August 26, 1982, Civil Case No. 47466 for the grant of an easement of right of way was filed by Pacifico Mabasa against Cristino Custodio, Brigida R. Custodio, Rosalina R. Morato, Lito Santos and Maria Cristina C. Santos before the Regional Trial Court of Pasig and assigned to Branch 22 thereof.

The generative facts of the case, as synthesized by the trial court and adopted by the Court of Appeals, are as follows:

Perusing the record, this Court finds that the original plaintiff Pacifico Mabasa died during the pendency of this case and was substituted by Ofelia Mabasa, his surviving spouse [and children].

The plaintiff owns a parcel of land with a two-door apartment erected thereon situated at Interior P. Burgos St., Palingon, Tipas, Tagig, Metro Manila. The plaintiff was able to acquire said property through a contract of sale with spouses Mamerto Rayos and Teodora Quintero as vendors last September 1981. Said property may be described to be surrounded by other immovables pertaining to defendants herein. Taking P. Burgos Street as the point of reference, on the left side, going to plaintiff's property, the row of houses will be as follows: That of defendants Cristino and Brigido Custodio, then that of Lito and Maria Cristina Santos and then that of Ofelia Mabasa. On the right side (is) that of defendant Rosalina Morato and then a Septic Tank (Exhibit "D"). As an access to P. Burgos Street from plaintiff's property, there are two possible passageways. The first passageway is approximately one meter wide and is about 20 meters distant from Mabasa's residence to P. Burgos Street. Such path is passing in between the previously mentioned row of houses. The second passageway is about 3 meters in width and length from plaintiff Mabasa's residence to P. Burgos Street; it is about 26 meters. In passing thru said passageway, a less than a meter wide path through the septic tank and with 5-6 meters in length has to be traversed.

When said property was purchased by Mabasa, there were tenants

occupying the premises and who were acknowledged by plaintiff Mabasa as tenants. However, sometime in February, 1982, one of said tenants vacated the apartment and when plaintiff Mabasa went to see the premises, he saw that there had been built an adobe fence in the first passagewav making it narrower in width. Said adobe fence was first constructed by defendants Santoses along their property which is also along the first passageway. Defendant Morato constructed her adobe fence and even extended said fence in such a way that the entire passageway was enclosed (Exhibit "I-Santoses and Custodios, Exh. "D" for plaintiff, Exhs. "1-C," "1-D" and "1-E"). And it was then that the remaining tenants of said apartment vacated the area. Defendant Ma. Cristina Santos testified that she constructed said fence because there was an incident when her daughter was dragged by a bicycle pedalled by a son of one of the tenants in said apartment along the first passageway. She also mentioned some other inconveniences of having (at) the front of her house a pathway such as when some of the tenants were drunk and would bang their doors and windows. Some of their footwear were even lost. . . . (Underscoring in original text; corrections in parentheses supplied)

[Judgment was rendered by the trial court ordering the defendants to give the plaintiff permanent access and to pay damages. The said decision was affirmed by the Court of Appeals.]

x x x

However, with respect to the second issue, we agree with petitioners that the Court of Appeals erred in awarding damages in favor of private respondents. The award of damages has no substantial legal basis. A reading of the decision of the Court of Appeals will show that the award of damages was based solely on the fact that the original plaintiff, Pacifico Mabasa, incurred losses in the form of unrealized rentals when the tenants vacated the leased premises by reason of the closure of the passageway.

However, the mere fact that the plaintiff suffered losses does not give rise to a right to recover damages. To warrant the recovery of damages, there must be both a right of action for a legal wrong inflicted by the defendant, and damage resulting to the plaintiff therefrom. Wrong without damage, or damage without wrong, does not constitute a cause of action, since damages are merely part of the remedy allowed for the injury caused by a breach or wrong.

There is a material distinction between damages and injury. Injury is the illegal invasion of a legal right; damage is the loss, hurt, or harm which results from the injury, and damages are the recompense or compensation awarded for the damage suffered. Thus, there can be damage without injury in those instances in which the loss or harm was not the result of a violation of a legal duty. These situations are often called *damnum absque injuria*.

In order that a plaintiff may maintain an action for the injuries of which he complains, he must establish that such injuries resulted from a breach of

duty which the defendant owed to the plaintiff — a concurrence of injury to the plaintiff and legal responsibility by the person causing it. The underlying basis for the award of tort damages is the premise that an individual was injured in contemplation of law. Thus, there must first be the breach of some duty and the imposition of liability for that breach before damages may be awarded, it is not sufficient to state that there should be tort liability merely because the plaintiff suffered some pain and suffering.

Many accidents occur and many injuries are inflicted by acts or omissions which cause damage or loss to another but which violate no legal duty to such other person, and consequently create no cause of action in his favor. In such cases, the consequences must be borne by the injured person alone. The law affords no remedy for damages resulting from an act which does not amount to a legal injury or wrong.

In other words, in order that the law will give redress for an act causing damage, that act must be not only hurtful, but wrongful. There must be *damnum et injuria*. If, as may happen in many cases, a person sustains actual damage, that is, harm or loss to his person or property, without sustaining any legal injury, that is, an act or omission which the law does not deem an injury, the damage is regarded as *damnum absque injuria*.

In the case at bar, although there was damage, there was no legal injury. Contrary to the claim of private respondents, petitioners could not be said to have violated the principle of abuse of right. In order that the principle of abuse of right provided in Article 21 of the Civil Code can be applied, it is essential that the following requisites concur: (1) The defendant should have acted in a manner that is contrary to morals, good customs or public policy; (2) The acts should be willful; and (3) There was damage or injury to the plaintiff. The act of petitioners in constructing a fence within their lot is a valid exercise of their right as owners, hence not contrary to morals, good customs or public policy. The law recognizes in the owner the right to enjoy and dispose of a thing, without other limitations than those established by law. It is within the right of petitioners, as owners, to enclose and fence their property. Article 430 of the Civil Code provides that "(e)very owner may enclose or fence his land or tenements by means of walls, ditches, live or dead hedges, or by any other means without detriment to servitudes constituted thereon."

At the time of the construction of the fence, the lot was not subject to any servitudes. There was no easement of way existing in favor of private respondents, either by law or by contract. The fact that private respondents had no existing right over the said passageway is confirmed by the very decision of the trial court granting a compulsory right of way in their favor after payment of just compensation. It was only that decision which gave private respondents the right to use the said passageway after payment of the compensation and imposed a corresponding duty on petitioners not to interfere in the exercise of said right.

Hence, prior to said decision, petitioners had an absolute right over their

property and their act of fencing and enclosing the same was an act which they may lawfully perform in the employment and exercise of said right. To repeat, whatever injury or damage may have been sustained by private respondents by reason of the rightful use of the said land by petitioners is *damnum absque injuria*.

A person has a right to the natural use and enjoyment of his own property, according to his pleasure, for all the purposes to which such property is usually applied. As a general rule, therefore, there is no cause of action for acts done by one person upon his own property in a lawful and proper manner, although such acts incidentally cause damage or an unavoidable loss to another, as such damage or loss is *damnum absque injuria*. When the owner of property makes use thereof in the general and ordinary manner in which the property is used, such as fencing or enclosing the same as in this case, nobody can complain of having been injured, because the inconvenience arising from said use can be considered as a mere consequence of community life.

The proper exercise of a lawful right cannot constitute a legal wrong for which an action will lie, although the act may result in damage to another, for no legal right has been invaded. One may use any lawful means to accomplish a lawful purpose and though the means adopted may cause damage to another, no cause of action arises in the latter's favor. Any injury or damage occasioned thereby is *damnum absque injuria*. The courts can give no redress for hardship to an individual resulting from action reasonably calculated to achieve a lawful end by lawful means.

3. KINDS OF DAMAGES

The word "damages" involve any and all manifestations of life: physical or material, moral or psychological, mental or spiritual, financial, economic, social, political and religious. *(Castro vs. Acro Taxicab Co., 82 Phil. 359, 381).* It is in recognition of these different facets of damages that the Civil Code identified and defined all the different kinds of damages that may be awarded in this jurisdiction. Thus, Article 2197 of the Civil Code provides:

> Art. 2197. Damages may be:
>
> (1) Actual or compensatory;
>
> (2) Moral;
>
> (3) Nominal;
>
> (4) Temperate or moderate;
>
> (5) Liquidated; or
>
> (6) Exemplary or corrective.

Proof of pecuniary loss is necessary to successfully recover actual damages from the defendant. "No proof of pecuniary loss is necessary in order that moral, nominal, temperate, liquidated or exemplary damages, may be adjudicated. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case." *(Article 2216, Civil Code).*

A. ACTUAL OR COMPENSATORY DAMAGES.

Article 2199 of the Civil Code provides that "except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages." The Supreme Court described this type of damage in *Algarra vs. Sandejas (supra, at p. 32):*

> "The purpose of the law in awarding actual damages is to repair the wrong that has been done, to compensate for the injury inflicted, and not to impose a penalty. Actual damages are not dependent on nor graded by the intent with which the wrongful act is done." (*Field vs. Munster*, 11 Tex. Civ. Appl., 341, 32 S. W., 417). "The words 'actual damages' shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever." (Gen. Stat. Minn., 1894, sec. 5418). "Actual damages are compensatory only." (*Lord*, *Owen & Co. vs. Wood*, 120 Iowa, 303, 94 N. W., 842.) " 'Compensatory damages' as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. They proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another." (*Reid vs. Terwilliger*, 116 N. Y., 530; 22 N. E., 1091). "'Compensatory damages' are such as are awarded to compensate the injured party for injury caused by the wrong, and must be only such as make just and fair compensation, and are due when the wrong is established, whether it was committed maliciously — that is, with evil intention — or not." *(Wimer vs. Allbaugh, 78 Iowa, 79; 42 N.W., 587; 16 Am. St. Rep., 422).*

a. Kinds.

Indemnification for damages shall comprehend not only the value of the loss suffered, but also that of the profits which the obligee failed to obtain. *(Article 2200, Civil Code).* This principle proceeds from a sense of natural justice and is designed to repair the wrong that has been done. Indemnification is meant to compensate for the injury inflicted and not to impose a penalty. *(PNOC Shipping and Transport*

Corp. vs. Honorable Court of Appeals, 297 SCRA 402 [1998]).

Actual or compensatory damages under the prevailing law may be classified into two. One is the loss of what a person already possesses *(daño emergente)*, and the other is the failure to receive as a benefit that would have pertained to him *(lucro cesante). (ibid.; see also Integrated Packing Corporation v. Court of Appeals, 333 SCRA 170 [2000]).* The latter type of damage includes those mentioned in Article 2205 of the Civil Code which states:

> "Art. 2205. Damages may be recovered:
>
> (1) For loss or impairment of earning capacity in cases of temporary or permanent personal injury;
>
> (2) For injury to the plaintiff's business standing or commercial credit."

b. Extent and Measure of Damages.

The Civil Code expressly provides for the rule regarding the limit of liability in cases involving quasi-delicts. (See Chapter 5). The extent of recovery is likewise expressly provided for in case of contractual breach. Thus, Articles 2201 and 2202 provide:

> "Art. 2201. In contracts and quasi-contracts, the damages for which the obligor who acted in good faith is liable shall be those that are the natural and probable consequences of the breach of the obligation, and which the parties have foreseen or could have reasonably foreseen at the time the obligation was constituted.
>
> In case of fraud, bad faith, malice or wanton attitude, the obligor shall be responsible for all damages which may be reasonably attributed to the non-performance of the obligation. (1107a)
>
> Art. 2202. In crimes and quasi-delicts, the defendant shall be liable for all damages which are the natural and probable consequences of the act or omission complained of. It is not necessary that such damages have been foreseen or could have reasonably been foreseen by the defendant."

It should be emphasized that the rule in crimes and quasi-delicts is the same as the rule in breach of contracts and quasi-contracts where the breach was accompanied by fraud, bad faith, malice or wanton attitude on the part of the obligor.

The basic principle for the measure of damages in tort is that there should be *restitutio in integrum*. The amount to be awarded to

the plaintiff should be that sum of money which will put the party who has been injured or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation. *(Winfield and Jolowich, p. 757)*. The primary object of an award in civil action, and the fundamental principle or theory on which it is based, is just compensation, indemnity or reparation for the loss or injury sustained by the injured party so that he may be made whole or restored as nearly as possible prior to the injury. *(25 C.J.S. 626)*.

Consequently, the damages is measured on plaintiff's loss and not on defendant's gain. *(25 C.J.S. 628)*. By way of exception, damages is measured by the benefit that has accrued to the defendant in certain cases. The theory is that the benefits derived by the defendant pertain to or could have been received by the plaintiff because only the plaintiff is supposed to profit from the activity involved. For instance, the Intellectual Property Code allows recovery of the amount that was earned by the defendant who infringed the right of the owner of the mark. *(Section 156, R.A. No. 8293)*.

c. Certainty.

A party is entitled to adequate compensation only for such pecuniary loss actually suffered and duly proved. It is a basic rule that to recover damages, the amount of loss must not only be capable of proof but must actually be proven with a reasonable degree of certainty, premised upon competent proof or best evidence obtainable of the actual amount thereof. The claimant is duty-bound to point out specific facts that afford a basis for measuring whatever compensatory damages are borne. *(PNOC Shipping and Transport Corporation vs. Court of Appeals, supra; Bernardo vs. Court of Appeals, 275 SCRA 413 [1997]; Kierulf vs. Court of Appeals, 269 SCRA 433 [1997]; Development Bank of the Philippines vs. Court of Appeals, 249 SCRA 331 [1995]; Lufthansa German Airlines vs. Court of Appeals, 243 SCRA 600 [1995])*.

A court cannot rely on speculations, conjectures, or guesswork as to the fact and amount of damages. It cannot also rely on hearsay or uncorroborated testimony, the truth of which is suspect. *(Development Bank of the Philippines vs. Court of Appeals, G.R. No. 118367, January 5, 1998; Bargaza vs. Court of Appeals, 268 SCRA 105 [1997]; People vs. Gutierrez, 258 SCRA 70 [1996]; Baliwag Transit, Inc. vs. Court of Appeals, 256 SCRA 746 [1996]; Gatchalian vs. Delim, 203 SCRA 126 [1991]; Guilatco vs. City of Dagupan, 171 SCRA 382 [1989]; Raagas vs. Traya, 22 SCRA 839 [1968]; Executive Secretary vs. Court of Appeals, 162 SCRA 51 [1988])*.

The burden of proof is on the party who would be defeated if no evidence would be presented on either side. He must establish his case by a preponderance of evidence which means that evidence, as a whole, adduced by one side is superior to that of the other. In other words, damages cannot be presumed and courts, in giving an award, must point out specific facts that could afford a basis for measuring whatever compensatory or actual damages are borne. *(PNOC Shipping and Transport Corporation vs. Court of Appeals, supra; Fuentes, Jr. vs. Court of Appeals, 323 Phil. 508 [1996]; Summa Insurance Corp. vs. Court of Appeals, 323 Phil. 214, 227 [1996]; Del Mundo vs. Court of Appeals, 310 Phil. 367 [1995]; Sales vs. Court of Appeals, 192 SCRA 526 [1990])*.

It should be emphasized however that uncertainty as to the precise amount is not necessarily fatal. *(Talisay-Silay Milling, Inc. vs. Associacion de Agricultores de Talisay-Silay, Inc., 247 SCRA 361 [1996])*. Mere difficulty in the assessment of damages is not sufficient reason for refusing them where the right to them has been established. *(Ball vs. Pardy CT.J. Construction Co., 63 ALR 139, 108 Conn. 549, 143 A 855)*.

d. Damage to Property.

Where goods were destroyed by the wrongful act of the defendant, the plaintiff is entitled to their value at the time of destruction. Normally, the award is the sum of money which plaintiff would have to pay in the market for identical or essentially similar good, plus in proper cases, damages for the loss of use during the period before replacement. In case of profit-earning chattels, what has to be assessed is the value of the chattel to its owner as a going concern at the time and place of the loss. *(PNOC Shipping and Transport Corporation vs. Court of Appeals, supra)*.

For instance, the loss of a ship would require payment of its assessed value at the time and place of the loss. In determining such value, regard must be made to existing and pending engagements. Thus:

> " x x x If the market value of the ship reflects the fact that it is in any case virtually certain of profitable employment, then nothing can be added to that value in respect of charters actually lost, for to do so would be *pro tanto* to compensate the plaintiff twice over. On the other hand, if the ship is valued without reference to its actual future engagements and only in the light of its profit-earning potentiality, then it may be necessary to add to the value thus assessed the anticipated profit on a charter or other engagement which it was unable to fulfill. What the court

> has to ascertain in each case is the 'capitalized value of the vessel as a profit-earning machine not in the abstract but in view of the actual circumstances,' without, of course, taking into account considerations which were too remote at the time of the loss." *(ibid., citing Clerk & Lindsell on Torts, 17th Ed., pp. 1489-1490).*

With respect to real property, the measure of damage for a permanent injury is ordinarily the difference between the reasonable market value of the property immediately before and after the injury. *(Reed vs. Mercer County Fiscal Ct., 54 ALR 1275, 220 Ky. 646, 295 SW 995).* In case of total loss, the value of the real property at the time and place of the loss must also be assessed and such assessed value is the measure of the damage due to the plaintiff.

Where the plaintiff was merely deprived of his possession, said plaintiff is entitled to the value of use of the premises. *(Daywalt vs. La Corporacion de los Padres Agustinos Recoletos, 39 Phil. 587; Ching vs. Court of Appeals, 181 SCRA 9 [1990]).* Thus, the rental value should be assessed against the plaintiff for trespass or illegal occupation of a house. *(Saldivar vs. Municipality of Talisay, 18 Phil. 362).* This rule is equally applicable in cases involving deprivation of possession of personal property. *(Luzon Concrete Products vs. Court of Appeals, 135 SCRA 455; Kairuz vs. Pacio, 108 Phil. 1097).*

The plaintiff is also entitled to damages equivalent to rentals even if the trespass is intermittent. Thus, in *Daywalt vs. La Corporacion de los Padres Agustinos Recoletos* proper rent was awarded to the plaintiff who sought to recover damages for the use and occupation of the land in question by reason of the pasturing of cattle thereon. It was established that wrongful use of the land by the defendant was not continuous throughout the year but was confined mostly to the season when the forage obtainable on the land of the defendant was not sufficient to maintain the cattle.

e. Personal Injury and Death.

If the plaintiff is asking for damages for his own injury or for the death of his relative, said plaintiff is entitled to the amount of medical expenses as well as other reasonable expenses that he incurred to treat his or his relative's injuries. Courts may also award monthly payments to the person who was injured to answer for his future medical expenses. Thus, in *Rogelio E. Ramos, et al. vs. Court of Appeals, et al.* (G.R. No. 124354, December 29, 1999) the Court sustained the award of monthly compensation of P8,000.00 to answer for the medical expenses that will be incurred by a comatose victim of the negligent act of the defendants. The Court even awarded temper-

ate damages to compensate for the increase in cost of such medical expenses through time.

In proper cases, the award of damages may likewise include the amount spent for the plastic surgery of the plaintiff or any procedure to restore the part of the body that was affected. *(Gatchalian vs. Delim, 203 SCRA 126; Spouses Renato Ong vs. Court of Appeals, G.R. No. 117103, January 21, 1999).*

In case of death, the plaintiff is entitled to the amount that he spent during the wake and funeral of the deceased. However, it has been ruled that expenses after the burial are not compensable. The heirs are not entitled to an award of damages for the expenses incurred relating to the 9th day, 40th day and 1st year death anniversaries *(Victory Liner, Inc. v. Heirs of Andres Malecdan, No. 154278, December 27, 2002; People v. Mangahas, 311 SCRA 384 [1999]).*

The damages that may be awarded for death caused by a crime or quasi-delict include the following:

> "Art. 2206. The amount of damages for death caused by a crime or quasi-delict shall be at least three thousand pesos, even though there may have been mitigating circumstances. In addition:
>
> (1) The defendant shall be liable for the loss of the earning capacity of the deceased, and the indemnity shall be paid to the heirs of the latter; such indemnity shall in every case be assessed and awarded by the court, unless the deceased on account of permanent physical disability not caused by the defendant, had no earning capacity at the time of his death;
>
> (2) If the deceased was obliged to give support according to the provisions of Article 291, the recipient who is not an heir called to the decedent's inheritance by the law of testate or intestate succession, may demand support from the person causing the death, for a period not exceeding five years, the exact duration to be fixed by the court;
>
> (3) The spouse, legitimate and illegitimate descendants and ascendants of the deceased may demand moral damages for mental anguish by reason of the death of the deceased."

Justice Malcolm discussed the historical background, as well as philosophical background, of the rule regarding payment of damages for wrongful death in his concurring opinion in *Mansanares vs. Moreta* (38 Phil. 823).

CASE:

MANZANARES vs. MORETA
38 PHIL. 823

The facts are few and simple. A male child, 8 or 9 years of age, was killed through the negligence of the defendant in driving his automobile. The mother of the dead boy is a widow, a poor washerwoman. She brings action against the defendant to recover damages for her loss in the amount of P5,000. Without there having been tendered any special proof of the amount of damages suffered, the trial court found the defendant responsible and condemned him to pay to plaintiff the sum of P1,000. The decision of this Court handed down by Justice Torres, affirms the judgment of the Court of First Instance. If necessary, the decision of the Supreme Court of Louisiana in the case of *Burvant vs. Wolfe* ([1910], 126 La., 787), could be cited as corroborative authority.

The principles of law which measure the pecuniary responsibility of the defendant, not discussed in the main opinion, are more difficult. Since the time of Grotius and even before, lawyers and publicists have speculated as to whether the loss of a human life should be compensated in money, and if so, as to the amount which should be allowed.

At Common Law, no civil action lies for damages caused by the death of a human being by the wrongful or negligent act of another. The maxim is *actio personalis moritur cum persona. (Mobile Life Ins. Co. vs. Brame, [1878], 95 U. S., 754; Baker vs. Bolton, 1 Campb., 493).* Two different modes of reasoning have arrived at this result. The first and older theory was the merger of the private right in the public wrong. *(The E. B. Ward, Jr. [1883], 16 Fed., 255).* The second and younger theory was that the death of a human being cannot be complained of as a civil injury. Under the latter doctrine, it has been repeatedly held that a civil action by a parent for the death of a minor child cannot be maintained. *(Kramer vs. San Francisco Market Street R. Co., [1864], 25 Cal., 434; Jackson vs. Pittsburg, C. C. & St. L. R. Co. [1894], 140 Ind., 241; Wilson vs. Bumstead [1881], 12 Neb., 1; Sullivan vs. Union P. R. Co. [1880], 2 Fed., 447; Osborn vs. Gillett [1873], L. R. 8 Exch., 88; Weems vs. Mathieson, 4 Macq. H. L. Cas. 215; Gulf, C. & S. F. Ry. Co. vs. Beall [1897], 91 Tex., 310. See 41 L. R. A., 807, Note).*

By the Civil Law, particularly as existing in Spain, France, Porto Rico, and Louisiana, the true principle is somewhat beclouded. Thus, in Louisiana, a State favored by French and Spanish antecedents, the exact question of whether an action for damages caused by the homicide of a human being can be maintained, was presented by able counsel for the opinion of distinguished jurists. And it was held in a decision, later expressly affirmed, that, under the Civil Law, the action could not be maintained by the surviving wife or children. *(Hubgh vs. New Orleans & Carrollton R. R. Co. [1851], 6 La. Ann., 495; Hermann vs. New Orleans & Carrollton R. R. Co. [1856], 11 La. Ann.,*

5; 24 Pothier Pandectes, p. 279; law 13; 7 Partida, title 15, law 3).

The same question has arisen in Porto Rico. It has there been held that by the Civil Law in force in Porto Rico a civil action lies for negligence resulting in death. *(Borrero vs. Cia. Anonyma de la Luz Electriea de Ponce [1903], 1 Porto Rico Fed., 144; Diaz vs. San Juan Light & Transit Co. [1911], 17 Porto Rico, 64).* The right to sue for death from negligence of a defendant, by persons entitled to support by the deceased has not been changed by the new Civil Code of Porto Rico. *(Torres vs. Ponce Railway & Light Co. [1903], 1 Porto Rico Fed., 476).*

In Spain, from which both the civil law of Porto Rico and the Philippines were derived, it has been decided that such an action could be maintained. *(Decision of the Supreme Court of Spain of December 14, 1894).* In France, the highest court has interpreted the Code Napoleon as sanctioning actions by those damaged by the death of another against persons by whose fault the death happened. *(Chavoix vs. Enfants Duport [1853], 1 Journal du Palais 614; Rollond's case, 19 Sirey, 269).*

That even in those jurisdictions in which the Common Law has force, the observance of the principle has been resisted, is disclosed by the action of Hawaii in holding that there can be a recovery for death by wrongful act. *(The Schooner Robert Lewers Co. vs. Kekauoha [1902], 114 Fed., 849).* That the impropriety of the judge-made rule was early disclosed, is shown by the numerous statutes, beginning with Lord Campbell's Act, which were enacted to cover the deficiency by permitting of a right of action to recover damages for death caused by wrongful act. Even in Louisiana, a State partially governed by the Civil Law, because of a statute, an action will now lie for pecuniary and other damages caused by death. *(McCubbin vs. Hastings [1875], 27 La. Ann., 713).* And finally, that eminent authorities recognize liability in case of death by negligence is disclosed by the mere mention of such names as Grotius, Puffendorif, and Domat. For instance, Grotius in his Rights of War and Peace said:

> *"Exemplo hæc sint. Homicida injustus, tenetur solvere impensas, si qæu factæ sunt in medicos, et iis quos occisus alere exofficio solebat, puta parentibus, uxoribus liberis dare tantum, quantum illa spes alimentorum, ratione habita ætatis occissi, valebat — sicuti Hercules legitur Iphiti a se occissi leberis mulctam pependissi, quo facilius expiaretur. Michael Ephesius ad quintum Nicomachiorum Aristotilis; Alla kai o Phoneuthies elabe tropon tina — O gare e gune e oi paides, e oi suggenies tou phoneuthentos elabe tropon tina ekeino dedotai. Sed et qui occisus est accipit aliquo modo. Quae enim uxor ejus et liberi et cognati accipiunt, ipse quodammodo accipit. Loquimur de homicida injusto id est, qui non habuit jus id faciendi unde mors sequitur. Quare si quis jus haburit sed in caritatem peccavirit ut qui fugere noluit, non tenebitur.*
>
> *"Vitae autem in libero homine aestimatio non fit, secus in servo qui vendi potuit." [11 La. Ann., 5].*

"The following may be for example: Any man slaying another,

unjustly, is bound to discharge the expenses, if any are contracted, for physicians, and to give to those whom the slain was in duty accustomed to maintain — such as parents, wives, children — as much as that hope of maintenance — regard being had to the age of the deceased — was worth: thus, Hercules is said to have made reparation (paid a fine) to the children of Iphitus, slain by him, in order that expiation might more easily be made.

"Michael, the Ephesian, says upon the 5th of the Nicomachii of Aristotle: 'but also the person slain receives, in some sort, for what the wife or children or relations of the person slain receive is, in some sort given him.' We are speaking of an unjust manslayer: that is, one who had not the right of doing that from whence death follows. "Wherefore, if any one may have had the right; but has sinned against charity, as when one (being assaulted) has been unwilling to flee, he shall not be bound. But of life, in case of a free man, no valuation is made, otherwise, in case of a slave who can be sold."

Both because of the civil origin of the applicable law in the Philippines, because we are not fettered by the harsh common law rule on the subject, because it is the modern and more equitable principle, and because reason and natural justice are eloquent advocates, we hold that an action for damages can be maintained in this jurisdiction for the death of a person by wrongful act. It can be admitted, since objection has not been made, that the primary right of action is in the parent.

The second phase of our enquiry, pertaining to the amount of compensation for the loss of a human life, must now be settled.

"Damage" has been defined by Escriche as "the detriment, injury, or loss which are occasioned by reason of fault of another in the property or person." *(Escriche, Diccionario Razonado de Legislacion y Jurisprudencia, vol. 2, p. 597).* Of whatsoever nature the damage be, and from whatsoever cause it may proceed, the person who has done the injury ought to repair it by an indemnity proportionate to his fault and to the loss caused thereby. *(1 Cushing, Domat's Civil Law, p. 741). Damnum*. (*daño* or a loss) must be shown to sustain an action for damages.

Philippine law as found in the well known Article 1902 of the Civil Code, derived from Partida VII, Title V, is to this effect. In order to give rise to the obligation imposed by this article of the Civil Code, the coincidence of two distinct requisites is necessary, *viz*.: (1) That there exist an injury or damage not originating in acts or omissions of the prejudiced person himself, and its existence be duly proven by the person demanding indemnification therefore; (2) that said injury or damage be caused by the fault or negligence of a person other than the sufferer. *(12 Manresa, Comentarios al Codigo Civil, p. 604).*

Those seeking to recoup damages must ordinarily establish their pecuniary loss by satisfactory proof. *(Decisions of the Supreme Court of Spain, December 14, 1894; November 13 and 26, 1895; December 7, 1896; September 30, 1898, and December 16, 1903; Sanz vs. Lavin [1906], 6 Phil., 299; To*

Guioc-Co vs. Del Rosario [1907], 8 Phil., 546; Diaz vs. San Juan Light & Transit Co. [1911], 17 Porto Rico, 64). The customary elements of damages must be shown. But in certain cases, the law presumes a loss because of the impossibility of exact proof and computation in respect to the amount of the loss sustained. In other words, the loss can be proved either by evidence or by presumption. For instance, where the relation of husband and wife or parent and child exist, provided the child is shown to be a minor, the law presumes a pecuniary loss to the survivor from the fact of death, and it is not necessary to submit proof as to such loss. *(Chicago vs. Scholten [1874], 75 Ill., 468; Rockford, etc. R. Co. vs. Delaney [1876], 82 Ill., 198; Chicago vs. Hesing [1876], 83 Ill., 204; Delaware, etc. R. Co. vs. Jones [1889], 128 Pa. St. 308; Atrops vs. Costello [1894], 8 Wash., 149; Mason vs. Southern R. Co. [1900], 58 S. C., 70; McKechney vs. Redmond, 94 Ill. App., 470; Joliet vs. Weston, 22 Ill. App., 225; Kelly vs. Twenty-third St. R. Co., 14 N. Y. St., 699; Dunhene vs. Ohio L. Ins. etc. Co., 1 Disn., 257; Diaz vs. San Juan Light & Transit Co., supra).*

In one of the cited cases *(City of Chicago vs. Hesing),* on an action to recover damages resulting to the parents, laboring people, by the death of their child four years old through negligence on the part of the City of Chicago, the court said:

> "Only pecuniary damages can be recovered in such actions as this. Nothing can be given as solace or for bereavement suffered. Under instructions declaring the true rule for estimating the damages, the jury found for plaintiff, in the sum of $800, but one of the errors assigned is, the amount found is excessive. As a matter of law, we cannot so declare, and as a matter of fact, how can we know the amount is in excess of the pecuniary damages sustained? When proof is made of the age and relationship of the deceased to next of kin, the jury may estimate the pecuniary damages from the facts proven, in connection with their own knowledge and experiences in relation to matters of common observation. It is not indispensable there should be proof of actual services of pecuniary value rendered to next of kin, nor that any witness should express an opinion as to the value of services that may have been or might be rendered. Where the deceased was a minor, and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation, under the statute, may be given."

The discretion of a jury, where there is a jury, or of the trial court, where the court possesses such faculty, in fixing the amount of damages, will not be interfered with by the appellate court unless this discretion has been palpably abused. Since in the very nature of things, the value of a human life cannot be exactly estimated in money, and since the elements which go to make up any value are personal to each case, much must depend on the good sense and sound judgment of the jury or judge. The rule has been applied to the death of minor children where there was nothing to show passion, prejudice, or ignorance on the part of the jury. *(See 13 Cyc., 375-377).*

The right of action for death and the presumption in favor of compensation being admitted, the difficulty of estimating in money the worth of a life should not keep a court from judicially compensating the injured party as nearly as may be possible for the wrong. True, man is incapable of measuring exactly in the delicate scales of justice the value of a human life. True, the feelings of a mother on seeing her little son torn and mangled — expiring — dead — could never be assuaged with money. True, all the treasure in nature's vaults could not begin to compensate a parent for the loss of a beloved child. Nevertheless, within the bounds of human powers, the negligent should make reparation for the loss.

Attempts at approximation in money for death have been made. Many American statutes have arbitrarily limited the amounts that could be recovered to five thousand dollars or ten thousand dollars. The federal Courts have intimated that these statutory limits should only be taken as a guide to the permissible amount of damages. *(Cheatham vs. Red River Line [1893], 56 Fed., 248; The Oceanic [1894], 61 Fed., 338; Farmers' L. & T. Co. vs. Toledo A. A. & N. M. Ry. Co. [1895], 67 Fed., 73).* In Louisiana, $2,500, $3,000, $4,000, and $6,000 were allowed in the respective cases for the death of a child. In Porto Rico, $1,000 and $1,500 has been allowed for such a loss. In the Philippines, the rule has been in criminal cases to allow as a matter of course P1,000 as indemnity to the heirs of the deceased.

The foregoing is believed to be a fair statement of the pertinent general principles. Before closing, notice should be taken of the leading decisions of the supreme court of Spain and the supreme court of Porto Rico. The first is the decision of the Supreme Court of Spain of December 14, 1894.

Eulogio Santa Maria died in Madrid in 1891, in consequence of a fall from the wall of the racket known as "Jai-Alai," which he was climbing for the purpose of placing the customary flags to announce the opening of the game. The facts were investigated through criminal proceedings which were discontinued, and then the widow of the deceased, in her own behalf and on behalf of her infant daughter, Teodora, instituted a civil action in the proper court, alleging that "the cause of the fatal accident resided in the fault and omission of the owners of the racket, because, as they knew and saw, neither the place for the raising of the flags nor the road that had to be gone over to reach it were in a condition to insure safety;" that at his death her husband had left two children, one named Anastasio, of 14 years, had by his first marriage, and another named Teodora, of 3 years had by his second marriage with the plaintiff; that the damages caused and for which the defendants should be held responsible were of a two-fold character — that is, one having reference to affection and the other to the loss of the modest pay which, capitalized at 5 percent and added to the sum demandable for the first mentioned consideration, amounted to 21,425 pesetas. The defendants alleged that the death of the plaintiff's husband could not be ascribed to any fault, omission, or negligence on their part, etc., and prayed that the complaint be dismissed. After hearing the case the court rendered judgment condemning the defendants to pay the sum of 5,000 pesetas to the heirs of the deceased as indemnification for the latter's death. An appeal from said judgment hav-

ing been taken by the plaintiff, the defendants joined in said appeal and the "Audiencia territorial," in deciding the case, adjudged the defendants to pay the plaintiff in her own right and as representative of her daughter, Teodora, 5,000 pesetas, as indemnification for the death of her husband, affirming in these terms, the judgment appealed from, and reserving to the other child of the deceased, who was not a party in this case, his right likewise to demand indemnification. The defendants then took an appeal for annulment of judgment to the supreme court, alleging that various laws had been violated and, among other particulars, that the judgment did not state the amount at which the court valued the life of Santa Maria, nor was anything allowed the plaintiffs on the score of affection or for damages, nor was the principle mentioned upon which the court had acted to fix the sum of 5,000 pesetas.

The Supreme Court of Spain affirmed the judgment appealed from in its opinion of December 14, 1894, the grounds whereof are the following:

> "As to the ground the court had for concluding, in view of the evidence, that the death of the unfortunate Eulogio Santa Maria was due to the omission on the part of the appellants, owners, and managers of the racket (ball game) known as 'Jai-Alai,' of such precautions as were called for to forestall the dangers attending the placing and removal of the streamers, which the deceased had been doing with their knowledge and consent, and for their benefit, we find that said court has correctly applied Articles 1093, 1902, and 1903, and that it has not violated Articles 1101, 1103, and 1104 of the Civil Code, because, according to the first-mentioned article, obligations arising from acts or omissions, in which faults or negligence, not punished by law, occur, are subject to the provisions of said Articles 1902 and 1903, and, according to the latter, indemnification for the damage done lies whenever the act or omission has been the cause of the damage and all the diligence of a good father of a family has not been observed, either when the act or omission is personal with the party, or when it has reference to persons for whom he should be responsible; and because the provisions of Articles 1101, 1103, and 1104 are of a general character and applicable to all kinds of obligations and do not come in conflict with the special provisions of Articles 1902 and 1903;
>
> "The indemnification corresponding to the damage caused by a guilty act or omission, not constituting a crime, should be declared, as are all indemnifications, in every suit, in accordance with the particular damage caused to the claimants, and as in the judgment this has been done with respect to Juana Alonzo Celada and her daughter, the only plaintiffs, by fixing the sum due them, said judgment does not violate Article 1902 of the code, and much less does it violate Article 360 of the Law of Civil Procedure;
>
> ""The amount of the indemnification adjudged is based on the evidence taken and on the facts admitted by both parties in

their pleadings at the trial, wherefore there has been no violation of Article 1211, through lack of proof, as alleged."

As has heretofore been intimated, the Civil Law in Porto Rico, derived from the same source as that of the Philippines, can well be looked to for persuasive authority. Thus, as disclosed by the facts in the decision coming from the pen of Justice Del Toro, one Diaz brought a suit against the San Juan Light & Transit Co. to recover the sum of $6,000 as damages. The district court of San Juan rendered judgment declaring that the facts and the law were in favor of the plaintiff and against the defendant, and decreeing that the former should obtain from the latter the sum of $3,000 as damages. The supreme court of Porto Rico said the issue was, that inasmuch as plaintiff has failed to produce any evidence of the amount of damage sustained, judgment should not be rendered in this form. After setting forth the decision of the supreme court of Spain of December 14, 1894, hereinbefore described, and other authorities, the court said:

"Applying the foregoing principles and those contained in Section 1804 of the Revised Civil Code to the specific case under consideration, we find that in the complaint it is alleged that the complainant sustained damages which he estimates at $6,000, and that the immediate and natural cause of said damages was the careless act of one of the employees of the defendant, who was in its service and while in the discharge of his duties.

"The evidence taken does not show that the complainant failed to earn, as a result of the injuries received, a stated sum of money, or that he had to pay the physician who attended him another stated sum, etc.; but it does show that the complainant, a man of 51 years of age, who worked as a farmer and hawked about his products, supporting himself and his family with his labor, while stepping out of one of the electric cars of the defendant, at Stop 7 of the San Juan-Rio Piedras line, fell to the ground owing to the carelessness and inattention of the motorman in starting the car before it, was time; that he received a severe blow which rendered him unconscious for some moments, fractured his lower jaw, and caused abrasions on his legs and other parts of his body; that he remained at the hospital, having his injuries nursed, for more or less one month, and that, on being examined at the trial — that is, one year and five months after his fall — he presented on the right side of his face, as a consequence of the fracture, 'a contraction which means a paralysis,' and could 'speak, but hardly masticate, and only with difficulty could open and close his mouth.' It does not appear from the evidence that the complainant has been disabled, but it does appear that at the time the evidence was taken he was suffering from nervous illness, according to the opinion of Dr. Stahl, one of the experts who testified at the trial.

"Under these circumstances the judge, in accordance with

the law and jurisprudence, had to estimate for himself the damage caused and determine the amount of indemnification which the defendant should pay the complainant. And in so doing, the court did not commit the errors attributed to it by the appellant.

"The question in the present case is not one of punitive or exemplary damages, but of compensation for damages sustained. In order to allow such compensation it is not necessary that the complainant should prove his loss in terms of dollars and cents, it being sufficient, in cases of this nature to prove that the plaintiff, through the fault or negligence of the defendant and not through his own fault and negligence, had sustained a real damage, consisting of physical pains, loss of work, confinement in a hospital, mental suffering, etc.

"The indemnification in this case was fixed by the lower court at $2,000, and although it could perhaps have been calculated at less, we do not find that it is immoderately inadequate, and this being so we should not alter it." *(Diaz vs. San Juan Light & Transit Co., supra).*

In another case, that of *Gonzalez vs. The San Juan Light & Transit Co.* ([1911], 17 Porto Rico, 115) recovery for damages was not permitted. In the latter case, it was said:

"This is an appeal from the first section of the district court of San Juan seeking to reverse a judgment therein rendered on December 1, 1909, in favor of the defendant. This suit was initiated in the district court of San Juan through a complaint presented by Ramona Gonzalez Soto, alleging therein that the defendant company, the San Juan Light and Transit Co., had negligently caused the death of Juan Cordova Soto, son of the plaintiff, in the ward of Santurce, between stops 21 and 22, on the trolley line of defendant, about December 2, 1904, the father of the deceased not appearing also as a complainant on account of his death having occurred after that of his son but previous to the filing of the complaint.

"We have stated said first ground alleged for reversal in the form in which it has been expressed by counsel for the defendant; but possibly it might also have been set forth more clearly as follows: 'Even supposing that the plaintiff had shown that the death of her son had been caused through the negligence of the defendant company, could damages be awarded her without showing by proof their existence and the amount there-of ?'

"Our Civil Code now in force, in Section 1803, reads as follows:

" 'A person who by an act or omission causes damage to another, when there is fault or negligence, shall be obliged to

repair the damage so done.'

"So that the claim of the plaintiff herein is sustained by this precept of the law which establishes her right to be indemnified by the defendant for the damage caused her on account of the death of her son, if said death was brought about by any act or omission of said company, through its fault or negligence.

"This is our substantive law in the matter of damages and it is in accordance with its provisions, as interpreted by the ruling jurisprudence, that courts should decide questions submitted to them for decision, and therefore the plaintiff is entitled, in cases where there may exist fault or negligence on the part of the defendant company, to recover from the defendant company the damages that may have been actually caused to her, whatever they may be."

x x x x x x x x x

"As may be seen, this jurisprudence (of Spain) is in accordance with the legal precept of the code that only those damages actually caused may be awarded, and, therefore, to enable the court to decide what damages have been caused, it is necessary to prove the real existence of the damages and the corresponding facts from which the court can deduce the amount thereof.

"Of course, the plaintiff makes a claim only for herself for pecuniary loss sustained by her on account of the death of her son, and the boy himself does not make any claim because he did not live to do so; hence the mother would never have been entitled to any other damages than those arising out of the loss of the services of her son, and never to those damages which he himself might have been entitled to claim had he not died, or arising from the injuries that he himself might have suffered on account of the accident. The damages which would give the plaintiff in this case a right to recovery against the defendant are only the loss of support, or contributions thereto, which the son was accustomed to make to his mother from his earnings and of which she may have been deprived by his death. But does the evidence introduced by the plaintiff support her claim to recover such damages? We are of the opinion that it does not, because she has not proven that her son was really earning the amount alleged in the complaint, nor any other sum whatever, nor how much money he was earning by his work either in Arecibo or in San Juan during the days immediately preceding his death or at any time. And we are of the opinion that this is a necessary requisite, because, as the Civil Code declares that recovery may be had for the damage caused, the damages accruing to the plaintiff must be shown so that the trial judge may have data on which to base his decision.

> "In this action no evidence whatever has been produced in this respect. The only fact proven in regard to this point is that Juan Cordova Soto was killed by a collision with the trolley car; that he was earning something when he was previously in Arecibo. It is not shown what occupation he had, nor how much money he earned while he was there nor while he was in San Juan, nor is it shown that his mother derived any benefit from his wages; and from this evidence the court cannot consider as proven the amount of the damages, nor even their existence. It has not been shown that the death of her son caused any material or pecuniary damages to his mother, the plaintiff herein, nor the amount thereof.
>
> "Therefore, an essential requisite for a judgment against the defendant company is lacking, and even supposing that she had an action for damages through negligence of the company in the death of the boy, we could not find a judgment against the defendant company, for lack of evidence in regard to the existence of the pecuniary damages sustained and facts from which to infer the amount thereof. Therefore, the defendant's motion for a judgment in its favor on this first ground was properly sustained."

As will be readily perceived, having dug out the applicable authorities, and having set them before us, our task still is far from complete. On the one hand, the obvious conclusion would be that, inasmuch as plaintiff has failed to prove her pecuniary loss, she cannot recover, or, for the same reason, to return the case to the lower court for further evidence. This is the obvious way. To one trained in the Common Law, and inculcated with all the doctrines of the American law of damages, it is the logical way. Is it the just and natural way?

The first reply would be that the civil law authorities are, like the common law cases, against recovery without proof of loss. If necessary, however, the three decisions just described, could be differentiated from the present facts. The decision of the supreme court of Spain, it is to be remembered, involved an action for the death of a man of mature years. The first decision of the supreme court of Porto Rico recognizes the principle of presumptive recovery. The second decision of the supreme court of Porto Rico concerned an action for the death of a son of sufficient age to have an earning capacity. None of these is our case. Here present is the case of a young child whose death is caused by wrongful act, leaving a poor mother to be the loser.

To answer in a different way, let us make a comparison. The facts before us, and the facts before the supreme court of Illinois in analogous cases, are substantially identical. We have proof of the age of the deceased, proof of the name of the next of kin, and proof that the mother is a laboring woman. Under both the Common Law and the Civil Law, plaintiff's damage, broadly speaking, is for the loss of the services of the deceased, or for support by the deceased. Plaintiff having shown that the deceased was her son and that he

was 8 or 9 years of age at the time of death, it was neither necessary nor possible to prove loss of services or support, or to prove special damage as if the object of the loss had been a horse or other animal. No doubt the damage could be greatly enhanced by showing the personal characteristics of the deceased. Outside of this, however, the pecuniary loss may be estimated from the facts at hand with reference to the general knowledge which all possess.

To force the plaintiff to prove her loss exactly would be to ask the impossible — would be in effect to return to the old common law rule which prohibits a recovery Physical and gross criteria, as the hewing of wood and carrying of water, are indeed no standards at all. Even if the case was to be reopened, the plaintiff could with extreme difficulty present any better evidence than that now before us. As we have the basis of satisfactory facts from which to infer the amount of damage, as the law presumes a pecuniary loss because of the death, and as the trial judge has made an intelligent computation, we should rest here, with knowledge that, within the ken of human wisdom, justice has been done.

On a careful consideration of the entire field of the law on the subject of damages, we come to the conclusion that the amount, in the nature of an indemnity allowed by the trial court, is neither excessive nor immoderately inadequate, and should stand.

(1) Fixed Damages.

The law also requires payment of the amount of P3,000.00 to the heirs of the deceased. The fixed amount of three thousand pesos (P3,000) is in addition to any damage that may have resulted because the act or omission of the defendant including medical expenses and loss of earning capacity. It should be noted, however that the Supreme Court had repeatedly increased the amount of indemnity from three thousand pesos (P3,000.00) in order to reflect the current value of currency and prevailing inflation. The current amount of fixed damages as increased by the Court is P50,000.00. *(Gregorio Pestano et al. v. Spouses Paz, G.R. No. 139875, December 4, 2000, 346 SCRA 870).*

(2) Loss of Earning Capacity.

Formula.

The formula for the computation of the awarded damages for loss of earning capacity was laid down in the landmark case of *Villa Rey Transit vs. Court of Appeals. (31 SCRA 511 [1963]; reiterated in People vs. Daniel, 136 SCRA 92; Dangwa Trans. Co., Inc. vs. CA, 202 SCRA 574; Davila vs. Phil. Airlines, 49 SCRA 497 [1973]; Monson vs. Intermediate Appellate Court, 169 SCRA 76 [1989]; People vs. Suitos, 220 SCRA 420, 430 [1993]; People vs. Teehankee, Jr., 249 SCRA 54; Baliwag Transit, Inc. vs. Court of Appeals, 262 SCRA 230 [1996];*

People vs. Cordero, 263 SCRA 122, 141 [1996]; People vs. Aringue, 283 SCRA 291, 306 [1997]). The Supreme Court observed in the said case that the important variables taken into account in determining the compensable amount of lost earnings are: (1) the number of years for which the victim would otherwise have lived (life expectancy); and (2) the rate of loss sustained by the heirs of the deceased (net income). The following formula should therefore be used:

Net Earning Capacity = Life Expectancy x [Gross Annual Income less Necessary Living Expenses]

The first factor, *i.e.*, life expectancy is computed by applying the formula *(2/3 x [80 — age at death])* adopted in the American Expectancy Table of Mortality or the Actuarial Combined Experience Table of Mortality.

For example, in a case *(People v. Galvez, 355 SCRA 266 [2001] See also Pleyto v. Lomboy, No. 14737, June 16, 2004)* where it was established that the deceased was 21 years old at the time of his death and was working as a construction worker five days a week earning P150.00 per day, the Supreme Court computed the victim's lost earning capacity as follows:

2/3 x [80-21 (age of the victim at time of death)] = 39.33

P150 (daily wage) x 261 (number of working days in a year) = P39,150.00 (gross annual salary)

P39,150.00 x .50 (allocation for living expenses) = P19,575.00 (net income)

39.33 x P19,575.00 = P769,884.75 (loss of earning capacity)

Net Earnings.

The Court considered as an important element in measuring loss of earning capacity, the net earnings of the deceased as well as the latter's potentiality and capacity to increase his future income. The Supreme Court explained in *Villa Rey Transit:*

> "At this juncture, it should be noted, also, that We are mainly concerned with the determination of the losses or damages sustained by the Private respondents, as dependents and intestate heirs of the deceased, and that said damages consist, not of the full amount of his earnings, but of the support they received or would have received from him had he not died in consequence

> of the negligence of petitioner's agent. In fixing the amount of that support, We must reckon with the "necessary expenses of his own living," which should be deducted from his earnings. Thus, it has been consistently held that earning capacity, as an element of damages to one's estate for his death by wrongful act is necessarily his net earning capacity or his capacity to acquire money, "less the necessary expense for his own living." Stated otherwise, the amount recoverable is not loss of the entire earning, but rather the loss of that portion of the earnings which the beneficiary would have received. In other words, only net earnings, not gross earning, are to be considered that is, the total of the earnings less expenses necessary in creation of such earnings or income and less living and other incidental expenses."

It is therefore not the net monthly income that is actually received by the deceased that will serve as basis of the computation. The proper computation should be based on the gross income of the victim minus the necessary and incidental living expenses which the victim would have incurred if he were alive (*People v. Arnel Mataro, et al., G.R. No. 130378, March 8, 2001, 354 SCRA 27, 38-39; People v. Nullan, 305 SCRA 679, 706-707 [1999]).* Needless to state, sufficient evidence should be presented by the plaintiff to establish the net earnings of the deceased. In this connection, it was ruled that the payroll of companies and the Income Tax Returns constitute the best evidence of the salary of the deceased *(Phil. Airlines, Inc. vs. Court of Appeals, 185 SCRA 110 [1990]).*

There were instances when proof of income of the deceased was an issue that the Supreme Court required unbiased proof of the average income of the deceased *(People v. Agapito Listerio, G.R. No. 122099, July 5, 2000; People v. Sanchez, 313 SCRA 694 [1999].* The Court rejects mere estimates and bare testimonies as proof of such income even if the testimony was given by the widow *(See: People v. Efren Mindanao, G.R. No. 123095, July 6, 2000).*

Nevertheless, it is not correct to state that the award for lost income should always be supported by documentary evidence. (In fact, as will be explained hereunder, the heirs of the deceased may be entitled to lost earnings even if the deceased was not working). Hence, the testimonies of the officers of the employer of the deceased may also suffice. *(Phil. Airlines, Inc. vs. Court of Appeals, supra).* Similarly, the testimonies of the widows of the victims were held acceptable where a reasonable estimate of the income can be made on the basis of such testimonies *(People v. Gutierrez, Jr. 302 SCRA 643; People v. Verde 302 SCRA 690 [1999]; People v. Quilang 312 SCRA 314 [1999]; People v. Antonio, G.R. No. 128900, July 14, 2000, 302 SCRA*

690; People v. Daroy et. al., G.R. No. 118942, July 18, 2000; People v. Villorbam G.R. No. 132784, October 30, 2000, 344 SCRA 464; People v. Banrado, G.R. No. 132330, November 28, 2000, 346 SCRA 189).

Mere testimonies unsupported by documentary evidence were accepted in some cases because of the nature of the work of the deceased. Thus, testimonial evidence was deemed sufficient in *People v. Pedro Perreras (G.R. No. 139622, July 31, 2001)* because the victim was a waiter in a restaurant who was only earning P130.00 per day. In another case, no documentary evidence was required because the deceased was a daily wage earner who worked in a hacienda and was even receiving less than the minimum wage (*People v. Uganap, G.R. No. 130605, June 19, 2001, 358 SCRA 674, 687; see also People v. Dizon, 320 SCRA 513 [1999]).* A self-employed tricycle driver cannot likewise be expected to present documentary evidence and proof of his income must necessarily be testimonial *(People v. Leonilo Villarba, G.R. No. 132784, October 30, 2000).*

Therefore, the heirs can recover despite the non-availability of documentary evidence if there is testimony that: (a) the victim was self-employed earning less than the minimum wage under the current labor laws and judicial notice was taken of the fact that in the victim's line of work, no documentary evidence is available; and (b) the victim was employed as a daily wage worker earning less than the minimum wage under the current labor laws *(People v. Muyco, 331 SCRA 192 [1999]; People v. Dindo Pajotal, et al, G.R. No. 142870, November 14, 2001).*

Living Expenses.

The amount of the living expenses must also be established to determine the net earning. However, the Supreme Court has consistently ruled that, the amount thereof is fixed at fifty percent (50%) of the gross income in the absence of proof of the amount of living expenses to be deducted from the gross income (*Metro Manila Transit Corporation et al. v. Court of Appeals, et al., G.R. Nos. 116617 & 126395, November 16, 1998; People v. Templo, 346 SCRA 626 [2000]; People v. Agapito Listerio, G.R. No. 122099, July 5, 2000;People v. Elger Guzman, G.R. No. 132750, December 14, 2001;People v. Angelito Yatco, G.R. No. 138388, March 19, 2002;People v. Ireneo Godoy, G.R. No. 140545, May 29, 2002; Smith Bell Dodwell Shipping Agency Corporation v. Catalino Borja, et al., G.R. No. 143008, June 10, 2002).* While an amount less than fifty percent (50%) of the gross income may indeed be the actual living expenses of the deceased, courts

cannot use a lesser amount in the absence of proof thereof or in the absence of other circumstances that would justify the reduction of the living expenses (*Smith Bell Dodwell Shipping Agency Corporation v. Catalino Borja, et al., ibid.).*

Non-working victims.

The inclusion of "net earnings or income" as a variable in computing the loss of earning capacity sometimes gives the erroneous impression that if the victim was not earning any income at the time of his death, his heirs will not be entitled to damages for loss of earning capacity. The simplistic reasoning that is being applied is that income or earnings must be established and proof thereof can never be presented by the claimants if the victim was not gainfully employed at the time of the accident.

However, such position disregards the fact that the liability under Article 2206 is for loss of earning capacity rather than loss of actual earnings. Earning capacity may be impaired even if no actual earning is lost in the meantime.

In a number of cases, the Supreme Court recognized the entitlement of the heirs of the deceased for loss of earning capacity of the deceased even if the said deceased was not working at the time of the accident. What is important is that there is proof of loss of earning capacity and not necessarily actual loss of income. Section 2206 of the Civil Code provides that the defendant shall be liable for the loss of the earning capacity of the deceased, and the indemnity shall be paid to the heirs of the latter "unless the deceased on account of permanent physical disability not caused by the defendant, had no earning capacity at the time of his death." Thus, the heirs of the deceased may still be entitled to damages even if the actual income of the latter as a farmer was not duly established so long as there is indication that the said deceased had earning capacity at the time of his death *(People of the Philippines v. Elger Guzman, G.R. No. 132750, December 14, 2001).*

In *Metro Manila Transit Corporation et al. v. Court of Appeals et al.* (*G.R. Nos. 116617/126395, November 16, 1998*), the Supreme Court awarded damages in favor of the plaintiffs for the death of their non-working minor child who was killed because of the negligent driving of a bus driver. The Supreme Court used the minimum wage for non-agricultural workers in computing the net earnings. The Court explained:

Compensation for Loss of Earning Capacity. Art. 2206 of the

Civil Code provides that in addition to the indemnity for death caused by a crime or quasi delict, the "defendant shall be liable for the loss of the earning capacity of the deceased, and the indemnity shall be paid to the heirs of the latter; . . . ." Compensation of this nature is awarded not for loss of earnings but for loss of capacity to earn money. [People v. Teehankee, 249 SCRA 54, 118 (1995)] Evidence must be presented that the victim, if not yet employed at the time of death, was reasonably certain to complete training for a specific profession. [E.g., Cariaga v. Laguna Tayabas Bus Company, 110 Phil. 346 (1960)] In People v. Teehankee, [249 SCRA 54, 118-119 (1995)] no award of compensation for loss of earning capacity was granted to the heirs of a college freshman because there was no sufficient evidence on record to show that the victim would eventually become a professional pilot. [Supra note 35, at 119.] But compensation should be allowed for loss of earning capacity resulting from the death of a minor who has not yet commenced employment or training for a specific profession if sufficient evidence is presented to establish the amount thereof. In the United States it has been observed:

> This raises the broader question of the proper measure of damages in death cases involving children, housewives, the old, and others who do not have market income so that there is no pecuniary loss to survivors or to the estate of the decedent. The traditional approach was to award no or merely nominal damages in such cases. . . . Increasingly, however, courts allow expert testimony to be used to project those lost earnings. [RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 123-25 (1982)]

Thus, in *Haumersen v. Ford Motor Co.,* 40 [257 N.W. 2d 7, 17 (1977)] the court allowed the heirs of a seven-year-old boy who was killed in a car accident to recover compensation for loss of earning capacity:

> Considerable evidence was presented by plaintiffs in an effort to give the jury a foundation on which to make an award. Briefly stated, this evidence showed Charles Haumersen was a seven-year-old of above average characteristics. He was described as "very intelligent" and "all-American." He received high marks in school. He was active in church affairs and participated in recreational and athletic events, often with children older than himself. In addition, he had an unusual talent for creating numerous cartoons and other drawings, some of which plaintiffs introduced at trial.
>
> The record does not disclose passion and prejudice. The key question is whether the verdict of $100,000 has support in the evidence.
>
> Upon analysis of the record, we conclude that we should

not disturb the award.

The argument for allowing compensation for loss of earning capacity of a minor is even stronger if he or she was a student, whether already training for a specific profession or still engaged in general studies. In *Krohmer v. Dahl*, 41 [402 P. 2d 979, 982 (1965)] the court, in affirming the award by the jury of $85,000.00 to the heirs of an eighteen-year-old college freshman who died of carbon monoxide poisoning, stated as follows:

There are numerous cases that have held admissible evidence of prospective earnings of a student or trainee. . . . The appellants contend that such evidence is not admissible unless the course under study relates to a given occupation or profession and it is shown that the student is reasonably certain to follow that occupation or profession. It is true that the majority of these decisions deal with students who are studying for a specific occupation or profession. However, not one of these cases indicate that evidence of one's education as a guide to future earnings is not admissible where the student is engaged in general studies or whose education does not relate to a specific occupation.

In sharp contrast with the situation obtaining in People v. Teehankee, where the prosecution merely presented evidence to show the fact of the victim's graduation from high school and the fact of his enrollment in a flying school, the spouses Rosales did not content themselves with simply establishing Liza Rosalie's enrollment at UP Integrated School. They presented evidence to show that Liza Rosalie was a good student, promising artist, and obedient child. She consistently performed well in her studies since grade school. [TSN, pp. 8-9, Aug. 27, 1987.] A survey taken in 1984 when Liza Rosalie was twelve years old showed that she had good study habits and attitudes. [Exh. DD, Records, p. 263.] Cleofe Chi, guidance counselor of the University of the Philippines Integrated School, described Liza Rosalie as personable, well-liked, and with a balanced personality.44 [TSN, pp. 9-11, Aug. 27, 1987.] Professor Alfredo Rebillon, a faculty member of the University of the Philippines College of Fine Arts, who organized workshops which Liza Rosalie attended in 1982 and 1983, testified that Liza Rosalie had the potential of eventually becoming an artist. [TSN, pp. 1-7, June 22, 1987.] Professor Rebillon's testimony is more than sufficiently established by the 51 samples of Liza Rosalie's watercolor, charcoal, and pencil drawings submitted as exhibits by the spouses Rosales. [Exhs. U-1 to U-51, Records, pp. 46-96.] Neither MMTC nor Pedro Musa controverted this evidence.

Considering her good academic record, extra-curricular activities, and varied interests, it is reasonable to assume that Liza Rosalie would have enjoyed a successful professional career

> had it not been for her untimely death. Hence, it is proper that compensation for loss of earning capacity should be awarded to her heirs in accordance with the formula established in decided cases47 [E.g., Negros Navigation Co., Inc. v. Court of Appeals, 281 SCRA 534 (1997)] for computing net earning capacity x x x"

The case cited by the Supreme Court in the above-quoted case, *Edgardo Cariaga et al. v. Laguna Tayabas Bus Company (G.R. No. L-11037, December 29, 1960)*, involved a victim who was a student studying medicine. The negligence of the bus driver caused physical injuries to the student, and as a result, he became virtually invalid physically and mentally. The Supreme Court sustained the award of compensatory damages explaining that the income which the student could earn if he should finish the medical course and pass the corresponding board examinations must be deemed to be within the same category as the actual damages for medical expenses and the like because they could have reasonably been foreseen by the parties at the time he boarded the bus owned and operated by the respondent bus company. The Court explained: "At that time he was already a fourth-year student in medicine in a reputable university. While his scholastic record may not be first rate (Exhibits 4, 4-A to 4-C), it is, nevertheless, sufficient to justify the assumption that he could have finished the course and would have passed the board test in due time. As regards the income that he could possibly earn as a medical practitioner, it appears that, according to Dr. Amado Doria, a witness for the LTB, the amount of P300.00 could easily be expected as the minimum monthly income of Edgardo had he finished his studies."

Damages for loss of earning capacity was also awarded in *People of the Philippines v. Gonzalez Jr.* (G.R. No. 139542, June 21, 2001, 359 SCRA 352, 380) although the victim was not working at the time of her death. The victim was not working at that time because she was pregnant although it was established that she was a registered nurse who used to work in Saudi Arabia. The Court concluded that earning capacity was duly established:

> " x x x while there is no evidence as to Feliber's actual income at the time of her death, in view of her temporary separation from work because of pregnancy, we do not consider it reversible error for the trial court to peg her earning capacity to that of the salary of a government nurse under the salary standardization law as fair estimate or reasonable assessment of her earning capacity at the time of her death. It would be grossly iniquitous to deny her spouse and her children damages for support that they would have received, considering clear evidence on record that she did have earning capacity at the time of her death." (*pp. 380-381*)

In *People of the Philippines v. Mayor Antonio L. Sanchez et al.* (*G.R. Nos. 121039-45, October 18, 2001*), the Supreme Court rejected the argument that proof of the actual income of the victims is necessary holding that it is well-settled that to be compensated for loss of earning capacity, it is not necessary the victims was gainfully employed at the time of his or her death. Compensation is awarded not for loss of earnings but for loss of capacity to earn money. The victims in the case were senior agriculture students in the country's leading educational institution in agriculture and the Supreme Court believed that it would not be unreasonable to assume that in 1993, they would have earned more than the minimum wage. Thus, the Court believed that it would be fair and reasonable to fix the monthly income that each of the victims would earn in 1993 at P8,000.00 per month and their deductible living and other incidental expenses at P3,000.00 per month.

Life Expectancy.

The formula used in *Villa Rey Transit* shows that life expectancy of the deceased is not only relevant but also an important element in fixing the amount recoverable. It is important to emphasize in this connection that it is the life of the deceased or victim that is the element of the formula for computing loss of earning capacity and not that of the heirs (*Gregorio Pestano et al. v. Spouses Teotimo & Paz C. Sumayang, G.R. No. 139875, December 4, 2000).*

In determining the life expectancy of the victim, the Supreme Court had repeatedly used the American Expectancy Table of Mortality or the Actuarial of Combined Experience Table of Mortality that are used by insurers. The table being used by insurance companies is adopted because "there is a link here with actuarial tables, which were created by life assurance companies for the purpose of determining what capital sum should be charged for an annuity, since the insurer is obviously vitally concerned to make the estimate of the annuitant's life expectancies. Since the table are concerned with assessing the capital 'price' of a future stream of income, the information on which they are based can easily be used to determine the present capital 'value' of a future stream of loss." *(Winfield and Jolowich, p. 770).*

In this jurisdiction, the multiplier that corresponds to the life expectancy of the victim may be reduced depending on the circumstances. The reduction is usually made for two (2) reasons. *First*, some allowance must be made for the general vicissitudes of life, that is to say, damaging events like early death or unemployment which might have affected the plaintiff even if the defendant had not injured him.

Second, account must also be taken of the fact that the lump sum of damage will itself produce an investment income. The theoretical aim of the process is to provide a lump sum sufficient, if invested, to produce an income equal to the lost income when the interest is supplemented by withdrawal of capital. *(Winfield and Jolowich, p. 769).*

Several factors were considered by the Supreme Court in reducing the life expectancy multiplier in some of the cases that it decided. For instance, the Supreme Court reduced the multiplier in one case because it considered the fact that a man does not expect to work up to the final month or year of his life in reducing the multiplier. *(People vs. Quilaton, p. 289).* The multiplier can likewise be reduced by considering the medical history of the deceased. Thus, in one case, the Supreme Court considered the fact that the deceased underwent a major surgery such as a caesarian section. From 24 years, the life expectancy was reduced to 20 years. *(MD Transit vs. Court of Appeals, p. 546).* In another case, the multiplier was reduced from 33 years to 25 years because the medical history of the deceased showed that he had complained of and had been treated for such ailments as backaches, chest pains and occasional feeling of tiredness. *(Davila vs. PAL, p. 504).*

The nature of the work may likewise result in the reduction of the multiplier. Thus, a reduction was made in a case where the deceased was a jeepney driver. The Supreme Court observed that drivers of passenger jeepneys cannot continue the backbreaking pace and unnerving nature of their work for many years. *(People vs. Daniel, p. 104 [1985]).* In another case, the Supreme Court likewise suggested that habit and manner of life should be taken into account. Thus, a reduction can be made if the deceased had been consistently engaged in a dangerous and risky activity tending to shorten his life. *(Rodriguez-Luna vs. Intermediate Appellate Court, 135 SCRA 242, 248 [1985]).*

If there is no circumstance that may be used to reduce the multiplier representing the life expectancy of the victim, the amount is computed based on the prescribed formula: "*2/3 x 80 — age at death.*" The resulting amount should be used as multiplier even if the computed life expectancy goes beyond the victim's retirement age. The life expectancy of a victim is not based on the retirement age prescribed by law for regular employees in the government or in the private sector. The presumption is that the victim could have earned income even if he is beyond his retirement age (*Smith Bell Dodwell Shipping Agency Corporation v. Catalino Borja, et al., supra.).*

Alternative Formula for Life Expectancy.

In *People vs. Gumercindo Quilaton y Ebarola* (205 SCRA 279 [1992]), Justice Feliciano proposed a new formula for life expectancy based on the 1980 Commissioner's Standard Ord. Mortality Table. The formula states:

$\sum$ (Lx + 1, Lx + 2, . . . Lx + n), where n = 100 – x

x = age upon death

L = number of people surviving after number of years

Justice Feliciano explained that the formula adopted in *Villa-Rey* is already obsolete because it was based on the prevailing situation in the 1970s. "Actuarial experience subsequent to 1970 has, however, changed and indicates a longer life expectancy in the Philippines due to conditions including, among other thins, advances in medical science, improved nutrition and food supply, diet consciousness and health maintenance." *(People vs. Quilaton, p. 289)*. However, the proposed formula of Justice Feliciano did not gain acceptance in subsequent cases and the Supreme Court reverted to the *Villa-Rey* formula in the cases that it decided after *People vs. Guercindo Quilaton* was promulgated. *(See People vs. Suitos, 220 SCRA 420 [1993]; Baliwag Transit, Inc. vs. Court of Appeals, 262 SCRA 230 [1996]; People vs. Cordero, 263 SCRA 122, 141 [1996]; People vs. Aringue, 283 SCRA 291, 306 [1997])*.

Inflation and Reduction to Present Worth.

A basic rule in American law is that the award in favor of the plaintiff should be reduced to its present worth. Thus, the total amount of actual income of the deceased up to the time of his death will not be all given to the plaintiff. The aim is to provide a lump sum sufficient, if invested, to produce an income equal to the lost income when the interest is supplemented by withdrawal of capital. It was also observed that the object of discounting lost future wages to present value is to give the plaintiff an amount of money which, invested safely, will grow to a sum equal to wages. *(O'Shea vs. Riverway Towing Co., 677 F. 2d 1194, 7th Circuit, [1982])*. For example, if the court believes that but for the accident, the plaintiff would have earned P200,000.00 in the year 2000 and the court was computing in 1990 his damages based on lost earnings, the court would need to determine the sum of money which if invested safely for a period of

ten (10) years, would grow to P200,000.00.

In this jurisdiction, it appears that there are two (2) ways that reduction to the present worth of the award is accomplished. First it is accomplished by reducing the multiplier that corresponds to the life expectancy. Another method of reduction is by maintaining the amount of income at the last income of the deceased or the permanently disabled. As observed in *Villa-Rey Transit:*

> "With respect to the rate at which the damages shall be computed, petitioner impugns the decision appealed from upon the ground that the damages awarded therein will have to be paid now, whereas most of those sought to be indemnified will be suffered years later. This argument is basically true, and this is, perhaps, one of the reasons why the Alcantara case points out the absence of a "fixed basis" for the ascertainment of the damages recoverable in litigations like the one at bar. Just the same, the force of the said argument of petitioner herein is offset by the fact that, although payment of the award in the case at bar will have to take place upon the finality of the decision therein, the liability of petitioner herein had been fixed at the rate only of P2,184.00 a year, which is the annual salary of Policronio Quintos, Jr. at the time of his death, as a young "training assistant" in the Bacnotan Cement Industries, Inc. In other words, unlike the Alcantara case, on which petitioner relies, the lower courts did not consider, in the present case, Policronio's potentiality and capacity to increase his future income. Indeed, upon the conclusion of his training period, he was supposed to have a better job and be promoted from time to time, and, hence, to earn more, if not — considering the growing importance of trade, commerce and industry and the concomitant rise in the income level of officers and employees therein — much more."

It is noticeable however that no provision for inflation is made in the prevailing formula. In some jurisdictions, a similar rule is in force, that is, the award is not increased to provide for the contingent inflation. Money is treated as retaining its value at the date of judgment. This approach has been justified on the ground that protection against inflation is built into the system because there is a tendency for high inflation to be accompanied by high rates of interest. *(Winfield and Jolowich, p. 771).*

f. Permanent Incapacity.

The plaintiff is also entitled to damages for loss of earning capacity when the defendant's act or omission resulted in his permanent incapacity. Thus, in *Borromeo vs. Manila Electric Railroad & Light*

Co. (44 Phil. 165, 167 [1922]), the Supreme Court awarded in favor of the plaintiff an amount for his loss of earning capacity because he lost his left foot. The Court observed that because of such loss, the plaintiff could no longer be employed as a marine engineer on any vessel as evidenced by the fact that the Collector of Customs has refused to grant him a license to follow his profession as a marine engineer.

g. Loss of Profits.

Under the Old Civil Code, there was, early on, doubt if the plaintiff can sue for loss of profits in his business. Whatever doubt was, however, removed in the case of *Algarra vs. Sandejas* (27 Phil. 284) where the Supreme Court adopted the principles then being enforced by American Courts.

The right to recover lost profits is now expressly recognized under the New Civil Code. This may take the form of commissions that were lost by reason of the acts or omissions of the defendant. *(General Enterprises, Inc. vs. Lianga Bay Logging Co., Inc.)*. This may also take the form of income that was stipulated in the contract that was terminated in a wanton and fraudulent manner. *(Consolidated Dairy Products, et al. vs. Court of Appeals, 212 SCRA 810, 822 [1992]).*

The Supreme Court explained in *Consolidated Dairy Products (ibid.)* that the amount of lost profits may be determined by considering the average profit for the preceding years multiplied by the number of years during which the business is affected by the wrongful act or breach. In the said case, the Supreme Court ruled that it was reasonable to award as lost profit the average of the yearly profit for five (5) years preceding the closure of the business multiplied by the number of remaining year of the contract.

In *G.A. Machineries, Inc. vs. Yaptinchay (126 SCRA 78, 88 [1983]),* the Supreme Court ruled that the income of similar businesses or activities may be considered. Thus, if the question is loss of profit of a freight truck, the average income of other trucks can be considered.

However, it is basic that unrealized profit cannot be awarded if the basis is too speculative and conjectural to show actual damages for a future period. The plaintiff must therefore present reports and documents that may show the average actual profits earned by the business as well as other evidence of profitability which are necessary to prove plaintiff's claim for said amount. *(BA Finance Corp. vs. Court of Appeals, 161 SCRA 608, 622; Gaw vs. IAC, 220 SCRA 405, 418 [1993])*. In *Pedro Velasco vs. Manila Electric Co.* (42 SCRA 556,

559-560 [1971]), the Supreme Court ruled that lost profit was not sufficiently established where the plaintiff merely showed that he lost a chance to sell his house for a certain price. The Court explained that there was no adequate proof of loss since there was no evidence of the depreciation in the market value of the house in question caused by the acts of the defendant.

CASE:

ALGARRA vs. SANDEJAS
27 PHIL. 284

"x x x In this respect the law of damages under Article 1902, as laid down by the decisions of the supreme court of Spain, has been indirectly modified by the present Code of Civil Procedure so that the finding of the lower court as to the amount of damages is not conclusive on appeal.

Actual damages, under the American system, include pecuniary recompense for pain and suffering, injured feelings, and the like. Article 1902, as interpreted by this court in *Meralco vs. Velasco* (11 Phil. Rep., 287), does not extend to such incidents. Aside from this exception, actual damages, in this jurisdiction, in the sense that they mean just compensation for the loss suffered, are practically synonymous with actual damages under the American system.

This court has already gone some distance in incorporating into our jurisprudence those principles of the American law of actual damages which are of a general and abstract nature. In *Baer Senior & Co.'s Successors vs. Compañia Maritima* (6 Phil. Rep., 215), the American principle of admiralty law that the liability of the ship for a tow is not so great as that for her cargo was applied in determining the responsibility of a ship, under the Code of Commerce, for her tow. In *Rodriguez vs. Findlay & Co.* (14 Phil. Rep., 294), which was an action for breach of contract of warranty, the following principle, supported entirely by American authority, was used in computing the amount of damages due the plaintiff:

> "The damages recoverable of a manufacturer or dealer for the breach of warranty of machinery, which he contracts to furnish, or place in operation for a known purpose are not confined to the difference in value of the machinery as warranted and as it proves to be, but includes such consequential damages as are the direct, immediate, and probable result of the breach."

In *Aldaz vs. Gay* (7 Phil. Rep., 268), it was held that the earnings or possible earnings of a workman wrongfully discharged should be considered in mitigation of his damages for the breach of contract by his employer, with the remark that nothing had been brought out to the attention to the contrary under Spanish jurisprudence.

In *Fernandez vs. M. E. R. & L. Cl.* (14 Phil. Rep., 274), a release or

compromise for personal injury sustained by negligence attributed to the defendant company was held a bar to an action for the recovery of further damages, on the strength of American precedents.

In *Taylor vs. M. E. R. & L. Co., supra,* in the course of an extended reference to American case law, the doctrine of the so-called "Turntable" and "Torpedo" cases was adopted by this court as a factor in determining the question of liability for damages in such cases as the one the court then had under consideration.

In *Martinez vs. Van Buskirk* (18 Phil. Rep., 79), this court, after remarking that the rules under the Spanish law by which the fact of negligence is determined are, generally speaking, the same as they are in Anglo-Saxon countries, approved the following well-known rule of the Anglo-Saxon law of negligence, relying exclusively upon American authorities: ". . . acts, the performance of which has not proven destructive or injurious and which have been generally acquiesced in by society for so long a time as to have ripened into a custom, cannot be held to be unreasonable or imprudent and that, under the circumstances, the driver was not guilty of negligence in so leaving his team while assisting in unloading his wagon."

This court does not, as a rule, content itself in the determination of cases brought before it, with a mere reference to or quotation of the articles of the codes or laws applicable to the questions involved, for the reason that it is committed to the practice of citing precedents for its rulings wherever practicable. *(See Ocampo vs. Cabangis, 15 Phil. Rep., 626).* No better example of the necessity of amplifying this treatment of a subject given in the code is afforded than Article 1902 of the Civil Code. That article requires that the defendant repair the damage done. There is, however, a world of difficulty in carrying out the legislative will in this particular. The measure of damages is an ultimate fact, to be determined from the evidence submitted to the court. The question is sometimes a nice one to determine, whether the offered evidence is such as ought to be considered by the court in fixing the quantum of damages; and while the complexity of human affairs is such that two cases are seldom exactly alike, a thorough discussion of each case may permit of their more or less definite classification, and develop leading principles which will be of great assistance to a court in determining the question, not only of damages, but of the prior one of negligence. We are of the opinion that as the Code is so indefinite (even though from necessity) on the subject of damages arising from fault or negligence, the bench and bar should have access to and avail themselves of those great, underlying principles which have been gradually and conservatively developed and thoroughly tested in Anglo-Saxon courts. A careful and intelligent application of these principles should have a tendency to prevent mistakes in the rulings of the court on the evidence offered, and should assist in determining damages, generally, with some degree of uniformity.

The law of damages has not, for some reason, proved as favorite a theme with the civil-law writers as with those of the common-law school. The decisions of the supreme court of Spain, though numerous on damages

arising from contractual obligations, are exceedingly few upon damages for personal injuries arising *ex delicto*. The reasons for this are not important to the present discussion. It is sufficient to say that the law of damages has not received the elaborate treatment that it has at the hands of the Anglo-Saxon jurists. If we in this jurisdiction desire to base our conclusions in damage cases upon controlling principles, we may develop those principles and incorporate them into our jurisprudence by that difficult and tedious process which constitutes the centuries-old history of Anglo-Saxon jurisprudence; or we may avail ourselves of these principles in their present state of development without further effort than it costs to refer to the works and writings of many eminent text-writers and jurists. We shall not attempt to say that all these principles will be applicable in this jurisdiction. It must be constantly borne in mind that the law of damages in this jurisdiction was conceived in the womb of the civil law and under an entirely different form of government. These influences have had their effect upon the customs and institutions of the country. Nor are the industrial and social conditions the same. An act which might constitute negligence or damage there might not constitute negligence or damage here, and vice versa. As stated in Story on Bailments, Section 12, "It will thence follow that, in different times and in different countries, the standard (of diligence) is necessary variable with respect to the facts, although it may be uniform with respect to the principle. So that it may happen that the same acts which in one country or in one age may be deemed negligent acts, may at another time or in another country be justly deemed an exercise of ordinary diligence."

The abstract rules for determining negligence and the measure of damages are, however, rules of natural justice rather than man-made law, and are applicable under any enlightened system of jurisprudence. There is all the more reason for our adopting the abstract principles of the Anglo-Saxon law of damages, when we consider that there are at least two important laws on our statute books of American origin, in the application of which we must necessarily be guided by American authorities: they are the Libel Law (which, by the way, allows damages for injured feelings and reputation, as well as punitive damages, in a proper case), and the Employer's Liability Act.

The case at bar involves actual incapacity of the plaintiff for two months, and loss of the greater portion of his business. As to the damages resulting from the actual incapacity of the plaintiff to attend to his business there is no question. They are, of course, to be allowed on the basis of his earning capacity, which in this case, is P50 per month. The difficult question in the present case is to determine the damage which has resulted to his business through his enforced absence. In *Sanz vs. Lavin Bros.* (6 Phil. Rep., 299), this court, citing numerous decisions of the supreme court of Spain, held that evidence of damages "must rest upon satisfactory proof of the existence in reality of the damages alleged to have been suffered." But, while certainty is an essential element of an award of damages, it need not be a mathematical certainty. That this is true is adduced not only from the personal injury cases from the supreme court of Spain which we have discussed above, but by many cases decided by this court, reference to which has already been made. As stated

in Joyce on Damages, Section 75, "But to deny the injured party the right to recover any actual damages in cases of torts because they are of such a nature as cannot be thus certainly measured, would be to enable parties to profit by and speculate upon their own wrongs; such is not the law."

As to the elements to be considered in estimating the damage done to plaintiff's business by reason of his accident, this same author, citing numerous authorities, has the following to say: "It is proper to consider the business the plaintiff is engaged in, the nature and extent of such business, the importance of his personal oversight and superintendence in conducting it, and the consequent loss arising from his inability to prosecute it."

The business of the present plaintiff required his immediate supervision. All the profits derived therefrom were wholly due to his own exertions. Nor are his damages confined to the actual time during which he was physically incapacitated for work, as is the case of a person working for a stipulated daily or monthly or yearly salary. As to persons whose labor is thus compensated and who completely recover from their injuries, the rule may be said to be that their damages are confined to the duration of their enforced absence from their occupation. But the present plaintiff could not resume his work at the same profit he was making when the accident occurred. He had built up an established business which included some twenty regular customers. These customers represented to him a regular income. In addition to this he made sales to other people who were not so regular in their purchases. But he could figure on making at least some sales each month to others besides his regular customers. Taken as a whole his average monthly income from his business was about P50. As a result of the accident, he lost all but four of his regular customers and his receipts dwindled down to practically nothing. Other agents had invaded his territory, and upon becoming physically able to attend to his business, he found that it would be necessary to start with practically no regular trade, and either win back his old customers from his competitors or else secure others. During this process of reestablishing his patronage his income would necessarily be less than he was making at the time of the accident and would continue to be so for some time. Of course, if it could be mathematically determined how much less he will earn during this rebuilding process than he would have earned if the accident had not occurred, that would be the amount he would be entitled to in this action. But manifestly this ideal compensation cannot be ascertained. The question therefore resolves itself into whether this damage to his business can be so nearly ascertained as to justify a court in awarding any amount whatever.

When it is shown that a plaintiff's business is a going concern with a fairly steady average profit on the investment, it may be assumed that had the interruption to the business through defendant's wrongful act not occurred, it would have continued producing this average income "so long as is usual with things of that nature." When in addition to the previous average income of the business it is further shown what the reduced receipts of the business are immediately after the cause of the interruption has been

removed, there can be no manner of doubt that a loss of profits has resulted from the wrongful act of the defendant. In the present case, we not only have the value of plaintiff's business to him just after the accident. At the trial, he testified that his wife had earned about fifteen pesos during the two months that he was disabled. That this almost total destruction of his business was directly chargeable to defendant's wrongful act, there can be no manner of doubt; and the mere fact that the loss can not be ascertained with absolute accuracy, is no reason for denying plaintiff's claim altogether. As stated in one case, it would be a reproach to the law if he could not recover damages at all. *(Baldwin vs. Marqueze, 91 Ga., 404).*

"Profits are not excluded from recovery because they are profits; but when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries should be based." *(Brigham vs. Carlisle [Ala.], 56 Am. Rep., 28, as quoted in Wilson vs. Wernwag, 217 Pa., 82).*

The leading English case on the subject is *Phillips vs. London & Southwestern Ry. Co.* (5 Q. B. D., 78; 41 L. T., 121; 8 Eng. Raul. Cases, 447). The plaintiff was a physician with a very lucrative practice. In one case, he had received a fee of 5,000 guineas; but it appeared that his average income was between 6,000 and 7,000 pounds sterling per year. The report does not state definitely how serious plaintiff's injuries were, but apparently he was permanently disabled. The following instruction to the jury was approved, and we think should be set out in this opinion as applicable to the present case:

> "You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered."

The jury's award was seven thousand pounds. Upon a new trial, on the ground of the insufficiency of the damages awarded, plaintiff received 16,000 pounds. On the second appeal, Bramwell, L.J., put the case of a laborer earning 25 shillings a week, who, on account of injury, was totally incapacitated for work for twenty-six weeks, and then for ten weeks could not earn more than ten shillings a week, and was not likely to get into full work for another twenty weeks. The proper measure of damages would be in that case 25 shillings a week for twenty-six weeks, plus 15 shillings a week for the ten and twenty weeks, and damages for bodily suffering and medical expenses. Damages for bodily suffering, of course, are not, for reasons stated above, applicable to this jurisdiction; otherwise, we believe this example to be the ideal compensation for loss of profits which courts should strive to reach, in cases like the present.

In *Joslin vs. Grand Rapids Ice & Coal Co.* (53 Mich., 322), the court said: "The plaintiff, in making proof of his damages, offered testimony to the effect that he was an attorney at law of ability and in good standing, and the extent and value of his practice, and that, in substance, the injury had rendered him incapable of pursuing his profession. This was objected to as irrelevant, immaterial and incompetent. We think this was competent. It was within the declaration that this standing in his profession was such as to command respect, and was proper to be shown, and his ability to earn, and the extent of his practice, were a portion of the loss he had sustained by the injury complained of. There was no error in permitting this proof, and we further think it was competent, upon the question of damages under the evidence in this case, for the plaintiff to show, by Judge Hoyt, as was done, that an interruption in his legal business and practice for eight months was a damage to him. It seems to have been a part of the legitimate consequences of the plaintiff's injury."

In *Luck vs. City of Ripon* (52 Wis., 196), plaintiff was allowed to prove that she was a midwife and show the extent of her earnings prior to the accident in order to establish the damage done to her business.

The pioneer case of *Goebel vs. Hough* (26 Minn., 252) contains perhaps one of the clearest statements of the rule and is generally considered as one of the leading case on this subject. In that case the court said:

> "When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are; nor are the ordinary profits incident to such a business contingent or speculative, the sense that excludes profits from consideration as an element of damages. What they would have been, in the ordinary course of the business, for a period during which it was interrupted, may be shown with reasonable certainty. What effect extraordinary circumstances would have had upon the business might be contingent and conjectural, and any profits anticipated from such causes would be obnoxious to the objection that they are merely speculative; but a history of the business, for a reasonable time prior to a period of interruption, would enable the jury to determine how much would be done under ordinary circumstances, and in the usual course, during the given period; and the usual rate of profit being shown, of course the aggregate becomes only a matter of calculation."

In the very recent case of *Wellington vs. Spencer* (Okla., 132 S.W., 675), plaintiff had rented a building from the defendant and used it as a hotel. Defendant sued out a wrongful writ of attachment upon the equipment of the plaintiff, which caused him to abandon his hotel business. After remarking that the earlier cases held that no recovery could be had for prospective profits, but that the later authorities have held that such damages may be

allowed when the amount is capable of proof, the court had the following to say:

> "Where the plaintiff has just made his arrangements to begin business, and he is prevented from beginning either by tort or a breach of contract, or where the injury is to a particular subject matter, profits of which are uncertain, evidence as to expected profits must be excluded from the jury because of the uncertainty. There is as much reason to believe that there will be no profits as to believe that there will be profits, but no such argument can be made against proving a usual profit of an established business. In this case the plaintiff, according to his testimony, had an established business, and was earning a profit in the business, and had been doing that for a sufficient length of time that evidence as to prospective profits was not entirely speculative. Men who have been engaged in business calculate with a reasonable certainty the income from their business, make their plans to live accordingly, and the value of such business is not such a matter of speculation as to exclude evidence from the jury."

A good example of a business not established for which loss of profits will not be allowed may be found in *States vs. Durkin* (65 Kan., 101). Plaintiff's formed a partnership and entered the plumbing business in the city of Topeka in April. In July of the same year, they brought an action against a plumbers' association on the ground that the latter had formed an unlawful combination in restraint of trade and prevented them from securing supplies for their business within a reasonable time. The court said:

> "In the present case the plaintiffs had only in business a short time — not so long that it can be said the they had an established business. They had contracted three jobs of plumbing, had finished two, and lost money on both; not, however, because of any misconduct or wrongful acts on the part of the defendants or either of them. They carried no stock in trade, and their manner of doing business was to secure a contract and then purchase the material necessary for its completion. It is not shown that they had any means or capital invested in the business other than their tools. Neither of them had prior thereto managed or carried on a similar business. Nor was it shown that they were capable of so managing this business as to make it earn a profit. There was little of that class of business being done at that time, and little, if any, profit derived therefrom. The plaintiffs' business lacked duration, permanency, and recognition. It was an adventure, as distinguished from an established business. Its profits were speculative and remote, existing only in anticipation. The law, with all its vigor and energy in its effort to right wrongs award damages for injuries sustained, may not enter into the domain of speculation or conjecture. In view of the character and condition of the plaintiffs' business, the jury had no sufficient evidence from which to ascertain profits."

Other cases which hold that the profits of an established business may be considered in calculating the measure of damages for an interruption of it are: *Wilkinson vs. Dunbar* (149 N. C., 20); *Kinney vs. Crocker* (18 Wis., 80);

Sachra vs. Manilla (120 Ia., 562); *Kramer vs. City of Los Angeles* (147 Cal., 668); *Mugge vs. Erkman* (161 Ill. App., 180); *Fredonia Gas Co. vs. Bailey* (77 Kan., 296); *Morrow vs. Mo. Pac. R. Co.* (140 Mo. App., 200); *City of Indianapolis vs. Gaston* (58 Ind., 224); *National Fibre Board vs. Auburn Electric Light Co.* (95 Me., 318); *Sutherland on Damages*, Sec. 70.

We have now outlined the principles which should govern the measure of damages in this case. We are of the opinion that the lower court had before it sufficient evidence of the damage to plaintiff's business in the way of prospective loss of profits to justify it in calculating his damages as to this item. That evidence has been properly elevated to this court for review. Under Section 496 of the Code of Civil Procedure, we are authorized to enter final judgment or direct a new trial, as may best subserve the ends of justice. We are of the opinion that the evidence presented as to the damage done to plaintiff's business is credible and that it is sufficient and clear enough upon which to base a judgment for damages. Plaintiff having had four years' experience in selling goods on commission, it must be presumed that he will be able to rebuild his business to its former proportions; so that at some time in the future his commissions will equal those he was receiving when the accident occurred. Aided by his experience, he should be able to rebuild this business to its former proportions in much less time than it took to establish it as it stood just prior to the accident. One year should be sufficient time in which to do this. The profits which plaintiff will receive from the business in the course of its reconstruction will gradually increase. The injury to plaintiff's business begins where these profits leave off, and, as a corollary, there is where defendant's liability begins. Upon this basis, we fix the damages to plaintiff's business at P250."

h. Attorney's Fees.

The Code Commission believes that a provision for the award of attorney's fees should be included in the Civil Code. The Commission explained:

> "In the matter of attorney's fees and expenses of litigation, the Commission believes that, following the example of the statutes of some States of the American Union, such fees and expenses should be allowed in certain special cases. These are enumerated in Article 2228 of the Project. No fear need be entertained that litigation would be encouraged by this article. On the contrary, it may be said that this article will lessen litigation because the obligors referred to will be more likely to satisfy claims extra-judicially if they are advised that they would otherwise have to pay the fees of the opposing counsel and reimburse the other party for expenses of litigation. In all the exceptional cases enumerated, it is but just that the losing party should pay the attorney's fees and expenses of litigation."

Article 2208 enumerates all the cases when the award of at-

torney's fees in the concept of damages is justified. The damages contemplated by such article is an amount that is due to the plaintiff and not to his counsel. *(Quirante vs. The Hon. Intermediate Appellate Court, G.R. No. 73886, January 31, 1989).* Consequently, the amount agreed upon by the plaintiff and his counsel does not control the amount of attorney's fees that should be awarded. In the same vein, the plaintiff's counsel does not have a right to enforce the award of attorney's fees because, as stated earlier, the same is due to the plaintiff and not to his counsel. The governing statute provides:

> "Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:
>
> (1) When exemplary damages are awarded;
>
> (2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
>
> (3) In criminal cases of malicious prosecution against the plaintiff;
>
> (4) In case of a clearly unfounded civil action or proceeding against the plaintiff;
>
> (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim;
>
> (6) In actions for legal support;
>
> (7) In actions for the recovery of wages of household helpers, laborers and skilled workers;
>
> (8) In actions for indemnity under workmen's compensation and employer's liability laws;
>
> (9) In a separate civil action to recover civil liability arising from a crime;
>
> (10) When at least double judicial costs are awarded;
>
> (11) In any other case where the court deems it just and equitable that attorney's fees and expenses of litigation should be recovered.
>
> In all cases, the attorney's fees and expenses of litigation must be reasonable."

The amount of attorney's fees to be awarded is left to the discretion of the courts. Necessarily, the award must be reasonable under

the circumstances. *(Tongoy vs. Court of Appeals, June 28, 1983)*. The plaintiff must allege the basis of his claim for attorney's fees in the complaint. In making such award, the court must state in its decision the legal and factual basis for the award. Needless to state, the basis should be one of the eleven cases specified in Article 2208 of the Civil Code. *(Agustin vs. Court of Appeals, June 6, 1990; Bicarme vs. Court of Appeals, June 6, 1990; People v. Bergante, 286 SCRA 629 [1998])*.

i. Interests.

The Code Commission included provisions in the Civil Code allowing interest on damages because they believed that "such interest is in fact a part of the loss suffered." The pertinent articles of the Code provides:

> "Art. 2209. If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six per cent *per annum*. (1108)
>
> Art. 2210. Interest may, in the discretion of the court, be allowed upon damages awarded for breach of contract.
>
> Art. 2211. In crimes and quasi-delicts, interest as a part of the damages may, in a proper case, be adjudicated in the discretion of the court.
>
> Art. 2212. Interest due shall earn legal interest from the time it is judicially demanded, although the obligation may be silent upon this point. (1109a)
>
> Art. 2213. Interest cannot be recovered upon unliquidated claims or damages, except when the demand can be established with reasonable certainty."

The rules on the award of interest on damages was explained in *Crismina Garments, Inc. vs. Court of Appeals* (G.R. No. 128721, March 9, 1999) by the Supreme Court:

> "x x x In *Reformina vs. Tomol Jr.*, this Court stressed that the interest rate under CB Circular No. 416 applies to (1) loans; (2) forbearance of money, goods or credits; or (3) a judgment involving a loan or forbearance of money, goods or credits. Cases beyond the scope of the said circular are governed by Article 2209 of the Civil Code, which considers interest a form of indemnity for the delay in the performance of an obligation.

In *Eastern Shipping Lines, Inc. vs. Court of Appeals*, the Court gave the following guidelines for the application of the proper interest rates:

"I. When an obligation, regardless of its source, *i.e.*, law, contracts, quasi-contracts, delicts or quasi-delicts is breached, the contravenor can be held liable for damages. The provisions under Title XVIII on 'Damages' of the Civil Code govern in determining the measure of recoverable damages.

II. With regard particularly to an award of interest in the concept of actual and compensatory damages, the rate of interest, as well as the accrual thereof, is imposed, as follows:

1. When the obligation is breached, and it consists in the payment of a sum of money, *i.e.*, a loan or forbearance of money, the interest due should be that which may have been stipulated in writing. Furthermore, the interest due shall itself earn legal interest from the time it is judicially demanded. In the absence of stipulation, the rate of interest shall be 12% per annum to be computed from default, *i.e.*, from judicial or extrajudicial demand under and subject to the provisions of Article 1169 of the Civil Code.

"2. When an obligation, not constituting a loan or forbearance of money, is breached, an interest on the amount of damages awarded may be imposed at the discretion of the court at the rate of 6% per annum. No interest, however, shall be adjudged on unliquidated claims or damages except when or until the demand can be established with reasonable certainty. Accordingly, where the demand is established with reasonable certainty, the interest shall begin to run from the time the claim is made judicially or extrajudicially (Art. 1169, Civil Code) but when such certainty cannot be so reasonably established at the time the demand is made, the interest shall begin to run only from the date the judgment of the court is made (at which time the quantification of damages may be deemed to have been reasonably ascertained). The actual base for the computation of legal interest shall, in any case, be . . . the amount finally adjudged.

"3. When the judgment of the court awarding a sum of money becomes final and executory, the rate of legal interest, whether the case falls under paragraph 1 or paragraph 2, above, shall be 12% per annum from such finality until its satisfaction, this interim period being deemed to be by then an equivalent to a forbearance of credit."

In *Keng Hua Paper Products Co., Inc. vs. CA*, we also ruled that the monetary award shall earn interest at twelve percent (12%) per annum from the date of the finality of the judgment until its satisfaction, regardless of whether or not the case involves a loan or forbearance of money. The interim period is deemed to

be equivalent to a forbearance of credit.

Because the amount due in this case arose from a contract for a piece of work, not from a loan or forbearance of money, the legal interest of six percent (6%) per annum should be applied. Furthermore, since the amount of the demand could be established with certainty when the Complaint was filed, the six percent (6%) interest should be computed from the filing of the said Complaint. But after the judgment becomes final and executory until the obligation is satisfied, the interest should be reckoned at twelve percent (12%) per year.

Private respondent maintains that the twelve percent (12%) interest should be imposed, because the obligation arose from a forbearance of money. This is erroneous. In *Eastern Shipping*, the Court observed that a "forbearance" in the context of the usury law is a "contractual obligation of lender or creditor to refrain, during a given period of time, from requiring the borrower or debtor to repay a loan or debt then due and payable." Using this standard, the obligation in this case was obviously not a forbearance of money, goods or credit.

j. Mitigation of Liability.

Chapter 6 of this work discusses the different partial defenses that result in mitigation of liability of the defendant. The Title on Damages likewise contains provisions allowing mitigation of liability. Thus, Articles 2203, 2204, 2214 and 2215 provides:

"Art. 2203. The party suffering loss or injury must exercise the diligence of a good father of a family to minimize the damages resulting from the act or omission in question.

Art. 2204. In crimes, the damages to be adjudicated may be respectively increased or lessened according to the aggravating or mitigating circumstances.

Art. 2214. In quasi-delicts, the contributory negligence of the plaintiff shall reduce the damages that he may recover.

Art. 2215. In contracts, quasi-contracts, and quasi-delicts, the court may equitably mitigate the damages under circumstances other than the case referred to in the preceding article, as in the following instances:

(1) That the plaintiff himself has contravened the terms of the contract;

(2) That the plaintiff has derived some benefit as a result of the contract;

(3) In cases where exemplary damages are to be awarded,

that the defendant acted upon the advice of counsel;

(4) That the loss would have resulted in any event;

(5) That since the filing of the action, the defendant has done his best to lessen the plaintiff's loss or injury.

(1) Avoidable Consequences.

Article 2203 of the Civil Code embodies what is known as the doctrine of avoidable consequences. The principle is that a party cannot recover damages flowing from consequences which the party could reasonably have avoided. It has a reasonable corollary, that is, a person who reasonably attempts to minimize his damages can recover the expenses that he incurred. *(22 Am. Jur. 2d 579)*. Although the result is the same, it should be differentiated from contributory negligence because in the latter, the plaintiff's act or omission occurs before or at the time of the act or omission of the defendant. The acts of the plaintiff under the doctrine of avoidable consequences occur after the act or omission of the defendant.

In *Lina vs. Purisima* (82 SCRA 344, 359), the Supreme Court explained that the law on damages imposes upon the claimant, regardless of the unquestionability of his or her entitlement thereto, the obligation to minimize the same as much as possible. Such indeed is the demand of equity, for the juridical concept of damages is nothing more than to trespass what has been lost materially and morally. It may not be taken advantage of to allow unjust enrichment. Any relevant act of unfairness on the part of the claimant correspondingly writes off the moral wrong involved in the juridical injury inflicted upon him or her.

The test that should be applied in determining if mitigation should result is the test of a reasonable man. The Supreme Court explained in one case that it is the duty of one injured by the unlawful act of another to take such measures as prudent man usually takes under such circumstances to reduce the damages as much as possible. The burden of proof rests upon the defendant to show that the plaintiff might have reduced the damages. *(Cerrano vs. Tan Chuco, 38 Phil. 392, 399 [1918])*. It does not mean that the injured party must make extraordinary efforts or do what is unreasonable or impracticable in his efforts to minimize damages; reasonable diligence and ordinary care are all that is required to allow full recovery of all damages caused by the defendant's wrongful activity. *(22 Am. Jur. 2d 53)*. It does not include yielding to a wrongful demand of wrongdoer to save the wrongdoer himself. *(ibid., p. 55)*.

In *Lasam vs. Smith* (45 Phil. 657, 663 [1924]), one of the plain-

tiffs claimed damages resulting from the fracture of a bone of a wrist and from her objections to having a decaying splinter of the bone removed by a surgical operation. As a consequence of her refusal to submit to such operation, a series of infections ensued which required constant and expensive medical treatment for several years. The Supreme Court ruled that the defendant should not be charged with those expenses. It sustained the discretionary power of the courts to moderate the liability of the defendant according to the circumstances.

CASE:

PEDRO J. VELASCO vs. MANILA ELECTRIC CO.
40 SCRA 342, 357 [1971]

[Defendant corporation was found to have maintained nuisance in the form of a sub-station that emitted noise at unreasonable levels to the detriment of the plaintiff. The Supreme Court ordered defendant Manila Electric Company to either transfer its substation at South D and South 6 Streets, Diliman, Quezon City, or take appropriate measures to reduce its noise at the property line between the defendant company's compound and that of the plaintiff-appellant to an average of forty (40) to fifty (50) decibels within 90 days from finality of this decision; and to pay the said plaintiff-appellant P20,000.00 in damages and P5,000.00 for attorney's fees. The complete facts of this case were reproduced in Chapter 10.]

Regarding the amount of damages claimed by appellant, it is plain that the same are exaggerated. To begin with, the alleged loss of earnings at the rate of P19,000 per annum is predicated on the Internal Revenue assessment, Exhibit "QQ-1," wherein appellant was found to have undeclared income of P8,338.20 in additional to his declared gross income of P10,975.00 for 1954. There is no competent showing, however, that the source of such undeclared income was appellant's profession. In fact, the inference would be to the contrary, for his gross income from the previous years 1951 to 1953 [Exhibits "QQ-1(d)" to "QQ-1(f)"] was only P8,085.00, P5,860.00 and P7,120.00, respectively, an average of P7,000.00 per annum. Moreover, while his 1947 and 1948 income was larger (P9,995.00 and P11,900.00), it appears that P5,000 thereof was the appellant's annual salary from the Quezon Memorial Foundation, which was not really connected with the usual earnings derived from practice as a physician. Considering, therefore, his actual earnings, the claimed moral damages of P100,000.00 are utterly disproportionate. The alleged losses for shortening of appellant's life expectancy are not only inflated but speculative.

As to the demand for exemplary or punitive damages, there appears no adequate basis for their award. While the appellee Manila Electric Company was convicted for erecting the substation in question without permit

from the Public Service Commission, We find reasonable its explanation that its officials and counsel had originally deemed that such permit was not required as the installation was authorized by the terms of its franchise (as amended by Republic Act No. 150) requiring it to spend within 5 years not less than forty million pesos for maintenance and additions to its electric system, including needed power plants and substations. Neither the absence of such permit from the Public Service Commission nor the lack of permit from the Quezon City authorities (a permit that was subsequently granted) is incompatible with the Company's good faith, until the courts finally ruled that its interpretation of the franchise was incorrect.

There are, moreover, several factors that mitigate defendant's liability in damages. The first is that the noise from the substation does not appear to be an exclusive causative factor of plaintiff-appellant's illnesses. This is proved by the circumstance that no other person in Velasco's own household nor in his immediate neighborhood was shown to have become sick despite the noise complained of. There is also evidence that at the time the plaintiff-appellant appears to have been largely indebted to various credit institutions, as a result of his unsuccessful gubernatorial campaign, and this court can take judicial cognizance of the fact that financial worries can affect unfavorably the debtor's disposition and mentality.

The other factor militating against full recovery by the petitioner Velasco in his passivity in the face of the damage caused to him by the noise of the substation. Realizing as a physician that the latter was disturbing or depriving him of sleep and affecting both his physical and mental well being, he did not take any steps to bring action to abate the nuisance or remove himself from the affected area as soon as the deleterious effects became noticeable. To evade them, appellant did not even have to sell his house; he could have leased it and rented other premises for sleeping and maintaining his office and thus preserve his health as ordinary prudence demanded. Instead, he obstinately stayed until his health became gravely affected, apparently hoping that he would thereby saddle appellee with large damages.

The law in this jurisdiction is clear. Article 2203 prescribes that "The party suffering loss or injury must exercise the diligence of a good father of a family to minimize the damages resulting from the act or omission in question." This codal rule, which embodies the previous jurisprudence on the point, clearly obligates the injured party to undertake measures that will alleviate and not aggravate his condition after the infliction of the injury, and places upon him the burden of explaining why he could not do so. This was not done.

Appellant Velasco introduced evidence to the effect that he tried to sell his house to Jose Valencia, Jr., in September, 1953, and on a 60-day option, for P95,000.00, but that the prospective buyer backed out on account of his wife objecting to the noise of the substation. There is no reliable evidence, however, how much were appellant's lot and house worth, either before the option was given to Valencia or after he refused to proceed with the sale or even during

the intervening period. The existence of a previous offer for P125,000.00, as claimed by the plaintiff, was not corroborated by Valencia. What Valencia testified to in his deposition is that when they were negotiating on the price Velasco mentioned to him about an offer by someone for P125,000.00. The testimony of Valencia proves that in the dialogue between him and Velasco, part of the subject of their conversation was about the prior offer, but it does not corroborate or prove the reality of the offer for P125,000.00. The testimony of Velasco on this point, standing alone, is not credible enough, what with his penchant for metaphor and exaggeration, as previously adverted to. It is urged in appellant's brief, along the lines of his own testimony, that since one (1) transformer was measured by witness Jimenez with a noise intensity of 47.2 decibels at a distance of 30.48 meters, the two (2) transformers of the substation should create an intensity of 94.4 decibels at the same distance. If this were true, then the residence of the plaintiff is more noisy than the noisiest spot at the Niagara Falls, which registers only 92 decibels. (Exhibit "15-A").

Since there is no evidence upon which to compute any loss or damage allegedly incurred by the plaintiff by the frustration of the sale on account of the noise, his claim therefore was correctly disallowed by the trial court. It may be added that there is no showing of any further attempts on the part of appellant to dispose of the house, and this fact suffices to raise doubts as to whether he truly intended to dispose of it. He had no actual need to do so in order to escape deterioration of his health, as heretofore noted.

Despite the wide gap between what was claimed and what was proved, the plaintiff is entitled to damages for the annoyance and adverse effects suffered by him since the substation started functioning in January, 1954. Considering all the circumstances disclosed by the record, as well as appellant's failure to minimize the deleterious influences from the substation, this Court is of the opinion that an award in the amount of P20,000.00, by way of moderate and moral damages up to the present, is reasonable. Recovery of attorney's fees and litigation expenses in the sum of P5,000.00 is also justified — the factual and legal issues were intricate (the transcript of the stenographic notes is about 5,000 pages, aside from an impressive number of exhibits), and raised for the first time in this jurisdiction.

The last issue is whether the City Engineer of Quezon City, Anastacio A. Agan, a co-defendant, may be held solidarily liable with Meralco.

Agan was included as a party defendant because he allegedly: (1) did not require the Meralco to secure a building permit for the construction of the substation; (2) even defended its construction by not insisting on such building permit; and (3) did not initiate its removal or demolition and the criminal prosecution of the officials of the Meralco.

The record does not support these allegations. On the first plea, it was not Agan's duty to require the Meralco to secure a permit before the construction but for Meralco to apply for it, as per Section 1, Ordinance No. 1530, of Quezon City. The second allegation is not true, because Agan

wrote the Meralco requiring it to submit the plan and to pay permit fees. (t.s.n., 14 January 1960, pages 2081-2082). On the third allegation, no law or ordinance has been cited specifying that it is the city engineer's duty to initiate the removal or demolition of, or for the criminal prosecution of, those persons who are responsible for the nuisance. Republic Act 537, Section 24 (d), relied upon by the plaintiff, requires an order by, or previous approval of, the mayor for the city engineer to cause or order the removal of buildings or structures in violation of law or ordinances, but the mayor could not be expected to take action because he was of the belief, as he testified, that the sound "did not have any effect on his body."

B. MORAL DAMAGES.

a. Concept.

The Civil Code provides that moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act for omission. *(Article 2217, Civil Code).*

The award of moral damages is designed to compensate the claimants for actual injury and is not meant to enrich the complainant at the expense of the defendant. They are awarded only to enable the injured party to obtain means, diversions or amusement that will serve to alleviate the moral suffering he has undergone by reason of the defendant's culpable action. *(Kierulf vs. Court of Appeals, 269 SCRA 433 [1997]; Zenith Insurance Corporation vs. Court of Appeals, 185 SCRA 308 [1990]).* Its aim is the restoration within the limits of the possible the spiritual *status quo ante*. *(Visayan Sawmil Co., Inc. vs. Court of Appeals, 219 SCRA 378 [1993]).*

It must be understood to be in the concept of grants not punitive or corrective in nature, calculated to compensate the claimant for the injury suffered. In other words, moral damages are not awarded to punish the defendant but to compensate the victim. *(People vs. Aringue, 283 SCRA 291 [1997]; Morales vs. Court of Appeals, 274 SCRA 282 [1997]; Del Mundo vs. Court of Appeals, 240 SCRA 348 [1996]; De la Serna vs. Court of Appeals, 233 SCRA 325 [1994]; Bautista vs. Mangaldan Rural Bank, Inc., 230 SCRA 16 [1994]; Zenith Insurance Corp. vs. Court of Appeals, 185 SCRA 398 [1990]; Simex International (Manila), Inc. vs. Court of Appeals, 183 SCRA 360 [1990]; Robleza vs. Court of Appeals, 174 SCRA 354 [1989]).*

The Code Commission observed that moral damages were not

expressly recognized in the Old Civil Code, although it was observed in one case — involving injury to reputation — that "such damages have been allowed by the Supreme Court of Spain, and some Spanish jurists believe that moral damages are allowable." Likewise, the Supreme Court of the Philippines has awarded moral damages in a few cases decided prior to the adoption of the New Civil Code. The Commission explained the provision allowing moral damages:

> "Denial of the award of moral damages has been predicated on the idea that physical suffering, mental anguish and similar injury are incapable of pecuniary estimation. But it is unquestionable that the loss or injury is just as real as in other cases. The ends of justice are better served by giving the judge discretion to adjudicate some definite sum as moral damages. That is more equitable than that the sufferer should be uncompensated. The wrongdoer cannot complain because it was he who caused the injury. In granting moral damages, the Project proceeds upon the ancient maxim that when there is a wrong there is a remedy."

Justice Capistrano, one of the members of the Code Commission, gave the following background on the inclusion of a chapter on moral damages in the New Civil Code in his concurring opinion in *Macondray & Co., Inc. vs. Villarosa, Inc., et al.* (1 CAR 2s 413, July 14, 1961):

> The law on moral damages found in Arts. 2217 to 2220 *(Sec. 1, Chapter 3, Title XVII, Book IV)* of the Civil Code is new. The Spanish Civil Code of 1889 contained no provisions on moral damages. The Code Commission, however, was aware that two recent and progressive decisions of the Supreme Court *(Lilius vs. Manila Railroad Co., 59 Phil. 758; Castro vs. Acro Taxicab Co., Inc., 82 Phil. 359)* had held that damages could be recovered in case of a wrongful act resulting in physical injuries for the physical pain suffered by the offended party and that the American jurisprudence contains a big and rich field of law on moral damages. In view of its duty to codify the laws "in accord- ance . . . with modern trends in legislation and the progressive principles of law" (Exec. Order No. 48), the Commission resolved to include a section (Sec. 2) on 'moral damages' in Chapter 3, Title XVIII on "Damages" in the Project of Civil Code.
>
> After consulting the American jurisprudence on moral damages, the Code Commission formulated Art. 2217 as the basic rule or principle giving, in the first sentence, the concept of moral damages or what it includes, and, in the second sentence, the requisite that the moral damages be the proximate result of the guilty party's wrongful act or omission. x x x
>
> It is clear from the article that moral moral damages can be

> recovered in every case of "wrongful act or omission" (a broad term which includes delict, quasi-delict, and breach of contract which is *sui generis*) causing, as the proximate result thereof, 'physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury.'"

b. Proof and Proximate Cause.

No proof of pecuniary loss is necessary in order that moral damages may be adjudicated. The assessment of such damages is left to the discretion of the court, according to the circumstances of each case. *(Article 2216, Civil Code)*. However, there must be proof that the defendant caused physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury to the plaintiff. Without allegation and proof of such sufferings, no moral damages can be awarded. *(Compania Maritima vs. Allied Free Worker's Union, 77 SCRA 24)*. Nevertheless, the language of the law need not be used to warrant the award of moral damages. *(Mirana-Ribaya vs. Carbonell, 95 SCRA 672)*. So long as there is satisfactory proof of the psychological and mental trauma actually suffered by a party, the grant to him of moral damages is warranted. *(Del Rosario vs. Court of Appeals, 267 SCRA 58 [1997])*.

Aside from the fact that there is a need for the claimant to satisfactorily prove the existence of the factual basis of the damages, it is also necessary to prove its causal relation to the defendant's act. *(Raagas vs. Traya, 22 SCRA 839 [1968])*. While moral damages is incapable of pecuniary estimation, they are recoverable if they are the proximate cause of the defendant's wrongful act or omission. *(Enervida vs. De la Torre, 55 SCRA 339; Yutuk vs. Manila Electric Co., 2 SCRA 337 [1961])*.

The exception to the rule that the factual basis for moral damages must be alleged are criminal cases. Moral damages may be awarded to the victim in criminal proceedings in such amount as the court deems just without the need for pleading or proof of the basis thereof. *(People vs. Prades, G.R. No. 127569, July 30, 1998; People vs. Moreno, G.R. No. 126921, August 28, 1998; People vs. Bagayong, G.R. No. 126518, December 2, 1998)*.

c. Cases when Moral Damages are allowed.

Articles 2219 and 2220 of the Civil Code enumerate the cases

when moral damages may be awarded by the courts:

> "Art. 2219. Moral damages may be recovered in the following and analogous cases:
>
> (1) A criminal offense resulting in physical injuries;
>
> (2) Quasi-delicts causing physical injuries;
>
> (3) Seduction, abduction, rape, or other lascivious acts;
>
> (4) Adultery or concubinage;
>
> (5) Illegal or arbitrary detention or arrest;
>
> (6) Illegal search;
>
> (7) Libel, slander or any other form of defamation;
>
> (8) Malicious prosecution;
>
> (9) Acts mentioned in Article 309;
>
> (10) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.
>
> The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.
>
> The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named.
>
> Art. 2220. Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith."

The different cases identified by law when moral damages may be awarded are discussed elsewhere in this work. It is well to point out however certain basic rules on the award of moral damages. For instance, it is well settled that no moral damages may be awarded in the absence of a wrongful act or omission or of fraud or bad faith. *(Ong Yui vs. Court of Appeals, 91 SCRA 223; Castillo vs. Castillo, 95 SCRA 40; St. Peter Memorial Park, Inc. vs. Cleofas, 92 SCRA 389).* The same rule applies to cases involving breach of contract, that is, no moral damages may be awarded where the breach of contract is not malicious. *(Francisco vs. GSIS, 7 SCRA 577 [1963]; Mercado vs. Lira, 3 SCRA 124 [1961]; Martinez vs. Gonzales, 6 SCRA 331 [1962]).*

The presence of contractual negligence is insufficient for such award. *(Phil. National Railways vs. Court of Appeals, 139 SCRA*

87). Although the enumeration in Article 2119 is not exclusive, the "analogous cases" mentioned in the said Article does not include a case where a passenger suffered physical injuries because of the carrier's negligence. *(Mercado vs. Lira, 3 SCRA 124 [1961]).*

Justice Vitug summarized the rules regarding the award of moral damages in *Expert Travel & Tours, Inc. vs. The Hon. Court of Appeals and Ricardo Lo* (G.R. No. 130030, June 25, 1999):

> "Moral damages are not punitive in nature but are designed to compensate and alleviate in some way the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury unjustly caused to a person. Although incapable of pecuniary computation, moral damages, nevertheless, must somehow be proportional to and in approximation of the suffering inflicted. Such damages, to be recoverable, must be the proximate result of a wrongful act or omission the factual basis for which is satisfactorily established by the aggrieved party. An award of moral damages would require certain conditions to be met, to wit: (1) *First*, there must be an injury, whether physical, mental or psychological, clearly sustained by the claimant; (2) *second*, there must be a culpable act or omission factually established; (3) *third*, the wrongful act or omission of the defendant is the proximate cause of the injury sustained by the claimant; and (4) *fourth*, the award of damages is predicated on any of the cases stated in Article 2219. Under the provisions of this law, in *culpa contractual* or breach of contract, moral damages may be recovered when the defendant acted in bad faith or was guilty of gross negligence (amounting to bad faith) or in wanton disregard of his contractual obligation and, exceptionally, when the act of breach of contract itself is constitutive of tort resulting in physical injuries. By special rule in Article 1764, in relation to Article 2206, of the Civil Code, moral damages may also be awarded in case the death of a passenger results from a breach of carriage. In *culpa aquiliana*, or *quasi-delict*, (a) when an act or omission causes physical injuries, or (b) where the defendant is guilty of intentional tort, moral damages may aptly be recovered. This rule also applies, as aforestated, to contracts when breached by tort. In *culpa criminal*, moral damages could be lawfully due when the accused is found guilty of physical injuries, lascivious acts, adultery or concubinage, illegal or arbitrary detention, illegal arrest, illegal search, or defamation. Malicious prosecution can also give rise to a claim for moral damages. The term "analogous cases," referred to in Article 2219, following the *ejusdem generis* rule, must be held similar to those expressly enumerated by the law."

In *Macondray & Co., Inc. vs. Villarosa, et al*. (1 CAR 2s 402, 415 [1961]), Justice Capistrano explained that moral damages can be recovered in every case of wrongful act or omission causing, as the proximate result thereof physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar injury. "In view of the fact that the question of moral damages is a novel one in the civil law, the Code Commission considered it advisable, for the convenience of the bar and the bench, to mention some cases as examples of wrongful acts where moral damages may be recovered. It was not prepared at that time to make a complete and exclusive enumeration of all such wrongful acts and omissions." The Commission purposely added the words "and analogous cases" in the opening sentence of the article in order to avoid a possible erroneous interpretation that the enumeration made therein was intended by the Commission to mean other cases of 'wrongful act or omission,' causing, as the proximate result thereof the sufferings mentioned earlier.

Justice Capistrano also noted in the said case that "the enumeration does not mention any wrongful omission. This is so because, as pointed out, the enumeration was not intended to be complete and exclusive. The cases of wrongful acts mentioned, enumerated merely for purposes of style, were those which the Commission could readily give at the time of its deliberation (about two hours) on the formulation of the article." Justice Capistrano went on further to explain that "it is obvious from a reading of the enumeration that those mentioned are clearly cases which immediately suggest physical or moral suffering. Thus, the delicts or crimes mentioned in Nos. (1) and (2) immediately suggest physical suffering. But it was not meant that other crimes and quasi-delicts not resulting in, or causing physical injuries were to be excluded. This is apparent from the fact that Nos. (3) to (7) involve crimes not resulting in physical injuries, and No. (8) a quasi-delict (malicious prosecution is no longer punished as a crime in the Revised Penal Code) not causing physical injuries, all of which, however, immediately suggest moral suffering; and the fact that No. (9) involves quasi-delicts clearly causing moral suffering, while No. (1) covers quasi-delicts immediately suggesting moral suffering. The Commission did not resolve to make an exclusive enumeration, for that would have required an examination of all the provisions of the Project of the Civil Code and of the Revised Penal Code in order to determine all the cases where moral damages could be recovered. It did not have the time nor the inclination to do so. The Commission also felt that the 'analogous cases' for recovery of moral damages should be left to the courts to determine. There was no good reason to

narrow the coverage of the law to the few cases mentioned in Article 2219 considering that the field of moral injury is a vast one in the civil and criminal laws, and that the field of moral damages in American jurisprudence is equally extensive." (*ibid*., pp. 415-416).

(1) Unfounded Suits.

It is also well settled that moral damages (and attorney's fees under paragraph [4] of Article 2208 of the Civil Code) cannot be assessed against the plaintiff by the mere fact that he filed a case against the defendant so long as the same was done in good faith. *(Grapilon vs. Mun. Council of Carigara, 2 SCRA 103 [1961]; National Rice and Corn Corporation vs. Antonio, 2 SCRA 643 [1961]; Solis & Yarisantos vs. Salvador, 14 SCRA 887 [1965]; Francel Realty Corp. vs. Court of Appeals, 252 SCRA 156 [1996]; Mijares vs. Court of Appeals, 271 SCRA 558 [1997])*. The rule applies even if the plaintiff's case is declared to be unfounded. *(De la Pena vs. Court of Appeals, 231 SCRA 456 [1994])*. No damages can be charged on those who may exercise the right to litigate in good faith even if done erroneously *("J" Marketing Corporation v. Sia, Jr., 285 SCRA 580 [1998])*.

Nevertheless, there are instances when award of moral damages (as well as attorney's fees) is justified if there is clear abuse of court processes. There can be no blanket clearance against the filing of all types of cases *(Cometa v. Court of Appeals, 301 SCRA 459 [1999])*. Although no person should be penalized for the exercise of the right to litigate, this right must be exercised in good faith. Absence of good faith is established if the plaintiff clearly has no cause of action against the defendant but he recklessly filed the suit anyway and wantonly pursued pointless appeals, thereby causing the defendant to spend valuable time, money and effort in unnecessarily defending himself, incurring damages in the process *(Industrial Insurance Co. v. Pablo Bondad, G.R. No. 136722, April 12, 2000, 330 SCRA 706, 707)*.

(2) Labor Cases.

Moral damages may be recovered where the dismissal of the employee was attended by bad faith or fraud or constitute an act oppressive to labor, or was done in a manner contrary to morals, good customs, or public policy. *(Triple Eight Integrated Services, Inc. vs. NLRC, 299 SCRA 608, 620-621 [1998]; Hilario vs. NLRC, 252 SCRA 555 [1996]; Estiva vs. NLRC, 225 SCRA 169 [1993])*. For example, the award of moral damages was warranted under the following factual circumstances:

> "According to the facts of the case as stated by public respondent, Osdana was made to perform such menial chores, as dishwashing and janitorial work, among others, contrary to her job designation as waitress. She was also made to work long hours without overtime pay. Because of such arduous working conditions, she developed Carpal Tunnel Syndrome. Her illness was such that she had to undergo surgery twice. Since her employer determined itself that she was no longer fit to continue working, they sent her home posthaste without as much as separation pay or compensation for the months when she was unable to work because of her illness." *(Panay Electric Co., Inc. vs. NLRC, 248 SCRA 688).*

Criminal Taking of Life.

In a number of cases, the Supreme Court upheld the rule that in the present stage of our case law involving criminal taking of human life, evidence must be adduced by the offended party to warrant an award of moral damages (*See: People v. Acaya, 327 SCRA 269 [2000];People v. Pirame, 327 SCRA 552 [2000]).* However, the rule was clarified by stating that no such proof is necessary in case of violent death. The Supreme Court explained in *Carlos Arcona y Moban v. The Court of Appeals and the People of the Philippines (G.R. No. 134784, December 9, 2002; see also People v. Cabote, G.R. 136143, November 15, 2001 and People v. Panado, 348 SCRA 679, 690-691 [2000]; People v. Cortez, 348 SCRA 663 [2000])* that "as borne out by human nature and experience, a violent death invariably and necessarily brings about emotional pain and anguish on the part of the victim's family. It is inherently human to suffer sorrow, torment, pain and anger when a loved one becomes the victim of a violent or brutal killing. Such violent death or brutal killing not only steals from the family of the deceased his precious life, deprives them forever of his love, affection and support, but often leaves them with the gnawing feeling that an injustice has been done to them. For this reason, moral damages must be awarded even in the absence of any allegation and proof of the heirs' emotional suffering."

d. Factors to Consider in Determining Amount.

There is no hard and fast rule in the determination of what would be a fair amount of moral damages, since each case must be governed by its own peculiar circumstances. *(Philippine National Bank vs. Court of Appeals, 266 SCRA 136).* The Court should take into consideration the circumstances obtaining in the case and assess damages according to its discretion *(Fule v. Court of Appeals, 286 SCRA 698 [1998]).*

There are, however, factors specified by law and established by jurisprudence that could affect the amount to be recovered. An example of these is Article 2218 of the Civil Code which provides that in the adjudication of moral damages, the sentimental value of property, real or personal, may be considered.

(1) Extent of Humiliation

The extent of humiliation may also determine the amount of moral damages that can be awarded. Thus, in one case, moral damages was awarded and fixed because of the humiliation caused by the dicriminatory acts of an airline company. *(Philippine Airlines vs. Court of Appeals, 275 SCRA 621 [1997]).* In another, moral damages was awarded because the plaintiff was slapped in the face. *(Ford vs. Court of Appeals, 186 SCRA 21 [1990]).*

(2) Pain and Suffering

The extent of pain and suffering likewise determines the award *(Valenzuela vs. Court of Appeals, supra at p. 37).* For instance, an increase in the amount of moral damages was justified in an attempted homicide case where the accused bit the ear of the complainant causing mutilation. The nature of the injuries and the degree of physical suffering endured by the complainant warrants an increase. The tragic incident left indelible marks on the complainant's body and will serve as a constant reminder of his traumatic experience. *(Sumaplong vs. Court of Appeals, 268 SCRA 764, 776 [1997]).* The award was also justified in another case because of the pain and disfigurement suffered by the respondent, a pretty girl of 16 whose left arm was scraped of flesh from shoulder to elbow *(De Leon Brokerage Co. v. Court of Appeals, No. L-15247, February 28, 1962; see also Ong v. Court of Appeals, 301 SCRA 387 [1999]; Salao v. Court of Appeals, 284 SCRA 493 [1998]).*

In *Valenzuela vs. Court of Appeals (supra)*, the Supreme Court was confronted with a situation where the injury suffered by the plaintiff would have led to expenses which were difficult to estimate because while they would have been a direct result of the injury (amputation), and though certain to be incurred by the plaintiff, they were likely to arise only in the future. The amount P1,000,000.00 in moral damages was awarded in the said case. Describing the nature of the injury, the Court therein stated:

> "As a result of the accident, Ma. Lourdes Valenzuela underwent a traumatic amputation of her left lower extremity at the distal left thigh just above the knee. Because of this, Valenzuela

> will forever be deprived of the full ambulatory functions of her left extremity, even with the use of state of the art prosthetic technology. Well beyond the period of hospitalization (which was paid for by Li), she will be required to undergo adjustments in her prosthetic devise due to the shrinkage of the stump from the process of healing.
>
> These adjustments entail costs, prosthetic replacements and months of physical and occupational rehabilitation and therapy. During her lifetime, the prosthetic devise will have to be replaced and readjusted to changes in the size of her lower limb effected by the biological changes of middle-age, menopause and aging. Assuming she reaches menopause, for example, the prosthetic will have to be adjusted to respond to the changes in bone resulting from a precipitate decrease in calcium levels observed in the bones of all post-menopausal women. In other words, the damage done to her would not only be permanent and lasting, it would also be permanently changing and adjusting to the physiologic changes which her body would normally undergo through the years. The replacements, changes, and adjustments will require corresponding adjustive physical and occupational therapy. All of these adjustments, it has been documented, are painful.
>
> x x x x x x x x x
>
> A prosthetic devise, however technologically advanced, will only allow a reasonable amount of functional restoration of the motor functions of the lower limb. The sensory functions are forever lost. The resultant anxiety, sleeplessness, psychological injury, mental and physical pain are inestimable.

In *Ramos vs. Court of Appeals* (G.R. No. 124354, Dec. 29, 1999), the victim, petitioner Erlinda Ramos, was in her mid-forties when the incident occurred. She has been in a comatose state for over fourteen years at the time the Supreme Court promulgated its decision in December 1999. In the meantime, the burden of care has been heroically shouldered by her husband and children, who, in the intervening years have been deprived of the love of a wife and a mother. Thus, the Court justified the award of moral damages in the amount of P2,000,000.00 stating that:

> "Meanwhile, the actual physical, emotional and financial cost of the care of petitioner would be virtually impossible to quantify. Even the temperate damages herein awarded would be inadequate if petitioner's condition remains unchanged for the next ten years.
>
> We recognized, in Valenzuela that a discussion of the victim's actual injury would not even scratch the surface of the resulting moral damage because it would be highly speculative

to estimate the amount of emotional and moral pain, psychological damage and injury suffered by the victim or those actually affected by the victim's condition.

The husband and the children, all petitioners in this case, will have to live with the day to day uncertainty of the patient's illness, knowing any hope of recovery is close to nil. They have fashioned their daily lives around the nursing care of petitioner, altering their long term goals to take into account their life with a comatose patient. They, not the respondents, are charged with the moral responsibility of the care of the victim. The family's moral injury and suffering in this case is clearly a real one. For the foregoing reasons, an award of P2,000,000.00 in moral damages would be appropriate."

(3) Official, political, social and financial standing.

Official, political, social and financial standing of the offended party and the business and financial position of the offender affect the amount of damages. *(Lopez vs. Pan American World Airways, 16 SCRA 431; Zulueta vs. Pan American World Airways, Inc., 43 SCRA 397; Kierulf vs. Court of Appeals, 269 SCRA 133 [1997]).* In another case, the Supreme Court ruled that the age of the claimant is material in the determination of the amount of moral damages due to the plaintiff. *(Zamboanga Trans Co., Inc. vs. Court of Appeals, 30 SCRA 717 [1969]; Domingding vs. Ng, 103 Phil. 111; Yutuk v. Manila Electric Co., May 31, 1961).*

The Court considered the credit standing of the plaintiff in awarding moral damages in *Producer's Bank of the Philippines v. Court of Appeals (G.R. No. 111584, September 17, 2001, 365 SCRA 326).* The wrongful dishonor of a check that was issued by the plaintiff affected his credit standing. The plaintiff was a businessman engaged in several businesses and his suppliers discontinued the credit line that they extended causing his businesses to collapse. The Court quoted *Leopoldo Araneta v. Bank of America (40 SCRA 144 [1971])* where it was explained that: "The financial credit of a businessman is a prized and valuable asset, it being a significant part of the foundation of his business. Any adverse reflection thereon constitutes some financial loss to him."

There are those who believe that financial standing of the offended party does not affect the amount of recoverable moral damages *(Layda vs. Court of Appeals, 90 SCRA 724).* The theory is that moral sufferings of a rich person is the same as the intensity of suffering of a poor litigant. Hence, the pain and suffering of a person who lost

his limb is the same whether the victim is rich or poor. However, Supreme Court continues to consider financial standing in a number of cases that it decided.

e. Persons who may Recover.

Generally, the person who endured physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury is the person who can recover moral damages. If the basis of the claim is physical suffering, only the one who suffered and not his or her spouse may recover. *(Sobereno vs. Manila Railroad Co., Nov. 23, 1966).* In the same manner, a person who symphatized with an injured relative is not entitled to recover for the physical suffering of another. *(Strebel vs. Figueros, 96 Phil. 321).*

The exception to said rule (where only the victim can recover) is found in the last two paragraphs of Article 2219:

> "The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.
>
> The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named."

It should be noted however that in those cases, the relatives have also suffered although they are not the victims of the assault. They must also have suffered mental anguish, serious anxiety, wounded feelings, moral shock and other similar injuries.

f. Corporations.

Corporations and other artificial being are not entitled to recover moral damages. There was confusion before regarding the right of corporation because of the *obiter* of the Supreme Court in a number of cases. However, the rule was finally clarified in *ABS-CBN Broadcasting Corporation vs. Honorable Court of Appeals* (G.R. No. 128690, January 21, 1999):

> "Moral damages are in the category of an award designed to compensate the claimant for actual injury suffered and not to impose a penalty on the wrongdoer. The award is not meant to enrich the complainant at the expense of the defendant, but to enable the injured party to obtain means, diversion, or amusements that will serve to obviate the moral suffering he has undergone. It is aimed at the restoration, within the limits of the possible,

> of the spiritual status *quo ante*, and should be proportionate to the suffering inflicted. Trial courts must then guard against the award of exorbitant damages; they should exercise balanced, restrained and measured objectivity to avoid suspicion that it was due to passion, prejudice, or corruption on the part of the trial court.
>
> The award of moral damages cannot be granted in favor of a corporation because, being an artificial person and having existence only in legal contemplation, it has no feelings, no emotions, no senses. It cannot, therefore, experience physical suffering and mental anguish which can be experienced only by one having a nervous system. The statement in *People vs. Manero* and *Mambulao Lumber Co. vs. PNB* that a corporation may recover moral damages if it "has a good reputation that is debased, resulting in social humiliation" is an *obiter dictum*. On this score alone the award for damages must be set aside, since RBS is a corporation."

In another case, the Supreme Court explained that while it is true that besmirched reputation is included in moral damages, it cannot cause mental anguish to a corporation, unlike in the case of a natural person, for a corporation has no reputation in the sense that an individual has, and besides, it is inherently impossible for a corporation to suffer mental anguish. Moral damages are granted in recompense for physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. A corporation, being an artificial person and having existence only in legal contemplation, has no feelings, no emotions and no senses; therefore, it cannot experience physical suffering and mental anguish. Mental suffering can be experienced only by one having a nervous system and it flows from real ills, sorrows, and griefs of life — all of which cannot be suffered by respondent bank as an artificial person *(National Power Corporation v. Philipp Brothers Oceanic, Inc., G.R. No. 126204, November 20, 2001)*.

C. NOMINAL DAMAGES.

The allowance of nominal damages is generally based on the ground that every injury from its very nature legally imports damage, or that the injury complained of would in the future be evidence in favor of the wrongdoer, especially where, if continued for a sufficient length of time, the invasion of the plaintiff's rights would ripen into a prescriptive right in favor of the defendant. *(22 Am. Jur. 2d 20)*.

In this jurisdiction, the award of nominal damages was justified by the Code Commission by stating that there are instances when

the vindication or recognition of the plaintiff's right is of the utmost importance to him, as in the case of trespass upon real property. The Commission observed that in those instances, the awarding of nominal damages does not run counter to the maxim, *"De minimis non curate lex."* (Report). The pertinent provisions of the Civil Code on nominal damages are as follows:

> "Art. 2221. Nominal damages are adjudicated in order that a right of the plaintiff, which has been violated or invaded by the defendant, may be vindicated or recognized, and not for the purpose of indemnifying the plaintiff for any loss suffered by him.
>
> Art. 2222. The court may award nominal damages in every obligation arising from any source enumerated in Article 1157, or in every case where any property right has been invaded.
>
> Art. 2223. The adjudication of nominal damages shall preclude further contest upon the right involved and all accessory questions, as between the parties to the suit, or their respective heirs and assigns."

The assessment of nominal damages is left to the discretion of the court according to the circumstances of the case. *(Ventanilla vs. Centeno, 1 SCRA 215 [1961]).* Generally, nominal damages by their nature are small sums fixed by the court without regard to the extent of the harm done to the injured party. However, it is generally held that a nominal damage is a substantial claim, if based upon the violation of a legal right; in such case, the law presumes damage although actual or compensatory damages are not proven. In truth, nominal damages are damages in name only and not in fact, and are allowed, not as an equivalent of wrong inflicted, but simply in recognition of the existence of a technical injury. *(Robes-Francisco Realty and Development Corporation vs. Court of First Instance, 86 SCRA 59).*

The view is that for every actionable injury, there is a corresponding right to damages and such injury arises whenever a legal right of the plaintiff is violated; if there is no injury as to actual damages or none appears on inquiry, the legal implication of damages remains and nominal damages are given. *(Wente vs. Shaver, 145 ALR 1176, 350 Mo 1143, 169 SW 2d 947).*

For instance, only nominal damages can be recovered by a manufacturer that was injured by a conspiracy to prevent use of his product, where the actual damages cannot be determined and whatever he suffered was also suffered by others in the same line of business so that he suffered no special damages whatsoever. *(A.T.*

Stearns Lumber Co. vs. Howlett, 25 ALR 1125, 260 Mass 45, 157 NE 82).

The award of nominal damages is also justified in the absence of competent proof of the specific amounts of actual damages suffered. *(People vs. Dianos, 297 SCRA 191; Sumaplong vs. Court of Appeals, 268 SCRA 764 [1997]; People v. Gopio, 346 SCRA 408 [2000]).* Thus, nominal damages were awarded in *Sumaplong vs. Court of Appeals (268 SCRA 764, 775-776 [1997]),* an attempted homicide case where the victim's left ear was mutilated and a permanent scar remained in the latter's forearm. In the said case, the Supreme Court observed that nominal damages is proper "whenever there has been a violation of an ascertained legal right, although no actual damages resulted or none are shown." The Court observed further that "there is no room to doubt that some species of injury was caused to the complainant because of the medical expenses he incurred in having his wounds treated, and the loss of income due to his failure to work during his hospitalization." However, only nominal damages were awarded because there was absence of competent proof of the same actual damages.

Nominal damages were also awarded in *Japan Airlines vs. Court of Appeals* (294 SCRA 19, 25-26 [1998]) where the plaintiffs sued the airline because the latter failed to transport them to Manila. The Supreme Court acknowledged that the Mount Pinatubo eruption prevented JAL from proceeding to Manila on schedule. However, the award was justified because JAL failed to make necessary arrangement to transport the plaintiffs on the first available connecting flight to Manila. It even declassified the plaintiffs from "transit passengers" to "new passengers" as a result of which plaintiffs were obliged to make the necessary arrangements themselves. However, only nominal damages were awarded in the absence of proof of actual damages.

Similarly, nominal damages were awarded in *Northwest Airlines, Inc. vs. Nicolas L. Cuenca* (14 SCRA 1063, 1066 [1965]). The plaintiff was the holder of a first class ticket from Manila to Tokyo who was rudely compelled by an agent of the airlines to move to the tourist class notwithstanding the agent's knowledge that the plaintiff was a Commissioner of Public Highways of the Republic of the Philippines who was travelling in his official capacity as a delegate of the country to a conference in Tokyo. There was also no proof of actual damages in the said case.

It follows however that nominal damages cannot co-exist with actual or compensatory damages. *(Armovit vs. Court of Appeals, 184*

SCRA 476 [1990]). The purpose of nominal damages is to vindicate or recognize a right that has been violated, in order to preclude further contest thereof; and not for the purpose of indemnifying the plaintiff for any loss suffered by him. An award of compensatory damages is a vindication of a right. It is in itself a recognition that plaintiff's right was violated, hence, the award of nominal damages is unnecessary and improper. *(Vda. De Medina vs. Cresencia, 99 SCRA 506, 510 [1956])*.

In *Erlinda Francisco v. Ricardo Ferrer, Jr. (G.R. No. 142029, February 28, 2001),* nominal damages was imposed for the insensitivity, inadvertence and inattention of the defendant to the plaintiffs' anxiety and need of the hour. The defendant was sued because she failed to deliver the wedding cake of the plaintiffs on time for the reception. The delivery was not only late but the cake that was delivered was different from what was agreed upon. The defendant initially gave the lame excuse that delivery was probably delayed because of traffic when in truth defendant knew that no cake would be delivered because the order slip got lost.

D. TEMPERATE OR MODERATE DAMAGES.

The Civil Code includes provisions allowing temperate and moderate damages. Articles 2224 and 2225 state:

> "Art. 2224. Temperate or moderate damages, which are more than nominal but less than compensatory damages, may be recovered when the court finds that some pecuniary loss has been suffered but its amount can not, from the nature of the case, be provided with certainty.
>
> Art. 2225. Temperate damages must be reasonable under the circumstances."

The Code Commission justified the adoption of the above-quoted provisions by citing the law in the United States:

> "In some States of the American Union, temperate damages are allowed. There are cases where from the nature of the case, definite proof of pecuniary loss cannot be offered, although the court is convinced that there has been such loss. For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show with certainty in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such cases, rather than that the plaintiff should suffer, without redress, from the defendant's wrongful act."

The Supreme Court explained in *Pleno vs. Court of Appeals* (*G.R. No. 56505, May 9, 1988; see also People v. Singh, G.R. No. 129782, 360 SCRA 404, 408 [2001]; People v. Plazo, 350 SCRA 433 [2001])* that:

> "Temperate damages are included within the context of compensatory damages. In arriving at a reasonable level of temperate damages to be awarded, courts are guided by the ruling that x x x there are cases where from the nature of the case, definite proof of pecuniary loss can not be offered, although the court is convinced that there has been such loss. For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show certainly in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such case, rather than the plaintiff should suffer, without redress from the defendant's wrongful act."

Thus, temperate damages to the heirs of the victim under Article 2224 of the Civil Code where it has been shown that they suffered pecuniary loss but the amount thereof cannot be proved with certainty *(People v. Singh, et al., 360 SCRA 404, 408 [2001]; People v. Plazo, 350 SCRA 433 [2001]; People v. Briones, 344 SCRA 149 [2000]; People v. De la Tongga, 336 SCRA 687 [2000]).*

In *Rogelio E. Ramos, et al. vs. Court of Appeals, et al.* (G.R. No. 124354, December 29, 1999), the Supreme Court sustained the award of temperate damages to answer for the anticipated increase in future medical expenses. The Supreme Court observed that our present laws on actual damages cannot cover such adjustments because our rules (on actual or compensatory damages) generally assume that at the time of litigation, the injury suffered as a consequence of an act of negligence has been completed and that the cost can be liquidated. However, these provisions neglect to take into account those situations, where the resulting injury might be continuing and possible future complications directly arising from the injury, while certain to occur, are difficult to predict. The Court concluded that temperate damages should be awarded to meet pecuniary loss certain to be suffered but which could not, from the nature of the case, be made with certainty. In other words, temperate damages can and should be awarded on top of actual or compensatory damages in instances where the injury is chronic and continuing. And because of the unique nature of such cases, no incompatibility arises when both actual and temperate damages are provided for.

CASES:

ROGELIO RAMOS vs. COURT OF APPEALS
G.R. No. 124354, December 29, 1999

[The victim in this case was rendered comatose by medical malpractice. The trial court awarded a total of P632,000.00 pesos (should be P616,000.00) in compensatory damages to the plaintiff, "subject to its being updated" covering the period from 15 November 1985 up to 15 April 1992, based on monthly expenses for the care of the patient estimated at P8,000.00. The High Court observed that at current levels, the P8,000/monthly amount established by the trial court at the time of its decision would be grossly inadequate to cover the actual costs of home-based care for a comatose individual. The calculated amount was not even arrived at by looking at the actual cost of proper hospice care for the patient. What it reflected were the actual expenses incurred and proved by the petitioners after they were forced to bring home the patient to avoid mounting hospital bills. The Court further explained.]

And yet ideally, a comatose patient should remain in a hospital or be transferred to a hospice specializing in the care of the chronically ill for the purpose of providing a proper milieu adequate to meet minimum standards of care. In the instant case for instance, Erlinda has to be constantly turned from side to side to prevent bedsores and hypostatic pneumonia. Feeding is done by nasogastric tube. Food preparation should be normally made by a dietitian to provide her with the correct daily caloric requirements and vitamin supplements. Furthermore, she has to be seen on a regular basis by a physical therapist to avoid muscle atrophy, and by a pulmonary therapist to prevent the accumulation of secretions which can lead to respiratory complications.

Given these considerations, the amount of actual damages recoverable in suits arising from negligence should at least reflect the correct minimum cost of proper care, not the cost of the care the family is usually compelled to undertake at home to avoid bankruptcy. However, the provisions of the Civil Code on actual or compensatory damages present us with some difficulties.

Well-settled is the rule that actual damages which may be claimed by the plaintiff are those suffered by him as he has duly proved. The Civil Code provides:

> "ARTICLE 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages."

Our rules on actual or compensatory damages generally assume that at the time of litigation, the injury suffered as a consequence of an act of negligence has been completed and that the cost can be liquidated. However, these provisions neglect to take into account those situations, as in this case, where the resulting injury might be continuing and possible future complications directly arising from the injury, while certain to occur, are difficult to predict.

In these cases, the amount of damages which should be awarded, if they are to adequately and correctly respond to the injury caused, should be one which compensates for pecuniary loss incurred and proved, up to the time of trial; and one which would meet pecuniary loss certain to be suffered but which could not, from the nature of the case, be made with certainty. In other words, temperate damages can and should be awarded on top of actual or compensatory damages in instances where the injury is chronic and continuing. And because of the unique nature of such cases, no incompatibility arises when both actual and temperate damages are provided for. The reason is that these damages cover two distinct phases.

As it would not be equitable — and certainly not in the best interests of the administration of justice — for the victim in such cases to constantly come before the courts and invoke their aid in seeking adjustments to the compensatory damages previously awarded — temperate damages are appropriate. The amount given as temperate damages, though to a certain extent speculative, should take into account the cost of proper care.

In the instant case, petitioners were able to provide only home-based nursing care for a comatose patient who has remained in that condition for over a decade. Having premised our award for compensatory damages on the amount provided by petitioners at the onset of litigation, it would be now much more in step with the interests of justice if the value awarded for temperate damages would allow petitioners to provide optimal care for their loved one in a facility which generally specializes in such care. They should not be compelled by dire circumstances to provide substandard care at home without the aid of professionals, for anything less would be grossly inadequate. Under the circumstances, an award of P1,500,000.00 in temperate damages would therefore be reasonable.

ARANETA vs. BANK OF AMERICA
40 SCRA 144 [1971]

Leopoldo Araneta, the petitioner herein, was a local merchant engaged in the import and export business. On June 30, 1961 he issued a check for $500 payable to cash and drawn against the San Francisco main office of

the Bank of America, where he had been maintaining a dollar current account since 1948. At that time he had a credit balance of $523.81 in his account, confirmed by the bank's assistant cashier in a letter to Araneta dated September 7, 1961. However, when the check was received by the bank on September 8, 1961, a day after the date of the letter, it was dishonored and stamped with the notation "Account Closed."

"Upon inquiry by Araneta as to why his check had been dishonored, the Bank of America acknowledged that it was an error, explaining that for some reason the check had been encoded with wrong account number, and promising that "we shall make every effort to see that this does not reoccur." The bank sent a letter of apology to the payee of the check, a Mr. Harry Gregory of Hongkong, stating that "the check was returned through an error on our part and should not reflect adversely upon Mr. Araneta." In all probability the matter would have been considered closed, but another incident of a similar nature occurred later.

On May 25, and 31, 1962 Araneta issued Check No. 110 for $500 and Check No. 111 for $150, respectively, both payable to cash and drawn against the Bank of America. These two checks were received by the bank on June 3, 1962. The first check appeared to have come into the hands of Rufina Saldaña, who deposited it to her account with the First National City Bank of New York, which in turn cleared it through the Federal Reserve Bank. The second check appeared to have been cleared through the Wells Fargo Bank. Despite the sufficiency of Araneta's deposit balance to cover both checks, they were again stamped with the notation "Account Closed" and returned to the respective clearing banks.

In the particular case of Check No. 110, it was actually paid by the Bank of America to the First National City Bank. Subsequently, however, the Bank of America, claiming that the payment had been inadvertently made, returned the check to the First National City Bank with the request that the amount thereof be credited back to the Bank of America. In turn, the First National City Bank wrote to the depositor of the check, Rufina Saldaña, informing her about its return with the notation "Account Closed" and asking her consent to the deduction of its amount from her deposit. However, before Mrs. Saldaña's reply could be received, the Bank of America recalled the check from the First National City Bank and honored it.

In view of the foregoing incidents, Araneta, through counsel, sent a letter to the Bank of America demanding damages in the sum of $20,000. While admitting responsibility for the inconvenience caused to Araneta, the bank claimed that the amount demanded was excessive, and offered to pay the sum of P2,000.00. The offer was rejected.

On December 11, 1962 Araneta filed the complaint in this case against the Bank of America for the recovery of the following:

1.	Actual or compensatory damages	P30,000.00
2.	Moral damages	20,000.00

3.	Temperate damages	50.000.00
4.	Exemplary damages	10,000.00
5.	Attorney's fees	10,000.00
	T O T A L	P120,000.00

The judgment of the trial court awarded all the items prayed for, but on appeal by the defendant the Court of Appeals eliminated the award of compensatory and temperate damages and reduced the moral damages to P8,000.00, the exemplary damages to P1,000.00 and the attorney's fees to P1,000.00.

Not satisfied with the decision of the appellate court, the plaintiff filed the instant petition for review, alleging two reasons why it should be allowed, as follows:

> "(1) The Court of Appeals erred in holding that temperate damages cannot be awarded without proof of actual pecuniary loss. There is absolutely no legal basis for this ruling; worse yet, it runs counter to the very provisions of ART. 2216 of the New Civil Code and to the established jurisprudence on the matter;
>
> "(2) The Court of Appeals erred in not holding that moral damages may be recovered as an item separate and distinct from the damages recoverable for injury to business standing and commercial credit. This involves the application of paragraph (2) of Art. 2205 of the New Civil Code which up to now has not yet received an authoritative interpretation from the Supreme Court . . ."

In his brief, however, the petitioner assigned five (5) errors committed by the appellate court, namely: (1) in concluding that the petitioner, on the basis of the evidence, had not sufficiently proven his claim for actual damages, where such evidence, both testimonial and documentary, stands uncontradicted on the record; (2) in holding that temperate damages cannot be awarded to the petitioner without proof of actual pecuniary loss; (3) in not granting moral damages for mental anguish, besmirched reputation, wounded feelings, social humiliation, etc., separate and distinct from the damages recoverable for injury to business reputation; (4) in reducing, without any ostensible reason, the award of exemplary damages granted by the lower court; and (5) in reducing, without special reason, the award of attorney's fees by the lower court.

We consider the second and third errors, as they present the issues raised in the petition for review and on the basis of which it was given due course.

In disallowing the award of temperate damages, the Court of Appeals ruled:

> "In view of all the foregoing considerations we hold that the plaintiff has not proven his claim that the two checks for $500 each were in partial payment of two orders for jewels worth P50,000 each. He has likewise not proven the actual damage which he claims he has suffered. And in view of the fact that he has not proven the existence of the supposed contract for him to buy jewels at a profit there is not even an occasion for an award of temperate damages on this score."

This ruling is now assailed as erroneous and without legal basis. The petitioner maintains that in an action by a ~~depositor a~~against a bank for damages resulting from the wrongful dishonor of the depositor's checks, temperate damages for injury to business standing or commercial credit may be recovered even in the absence of definite proof of direct pecuniary loss to the plaintiff, a finding — as it was found by the Court of Appeals — that the wrongful acts of the respondent had adversely affected his credit being sufficient for the purpose. The following provisions of the Civil Code are invoked:

> "ART. 2205. Damages may be recovered:
>
> (1) For loss or impairment of earning capacity in cases of temporary or permanent personal injury;
>
> (2) For injury to the plaintiff's business standing or commercial credit.
>
> x x x x x x x x x
>
> ART. 2216. No proof of pecuniary loss is necessary in order that moral, nominal, temperate, liquidated or exemplary damages may be adjudicated. The assessment of such damages, except liquidated ones, is left to the discretion of the court, according to the circumstances of each case."

Also invoked by the petitioner is the case of *Atlanta National Bank vs. Davis*, 96 Ga 334, 23 SE 190; 1 and the following citations in American Jurisprudence:

> "In some states what are called 'temperate damages' are allowed in certain classes of cases, without proof of actual or special damages, where the wrong done must in fact have caused actual damage to the plaintiff, though from the nature of the case, he cannot furnish independent, distinct proof thereof. Temperate damages are more than nominal damages, and, rather, are such as would be a reasonable compensation for the injury sustained . . ." *(15 Am. Jur. 400)*
>
> ". . . It has been generally, although not universally, held, in an action based upon the wrongful act of a bank in dishonoring checks of a merchant or trader having sufficient funds on deposit with the bank, that substantial damages will be presumed to follow such act as a necessary and natural consequence, and accordingly, that special damages need not be shown. One of the reasons given for this rule is that the

> dishonor of a merchant's or trader's check is tantamount or analogous, to a slander of his trade or business, imputing to him insolvency or bad faith . . ." *(10 Am. Jur. 2d. 545).*

On the other hand the respondent argues that since the petitioner invokes Article 2205 of the Civil Code, which speaks of actual or compensatory damages for injury to business standing or commercial credit, he may not claim them as temperate damages and thereby dispense with proof of pecuniary loss under Article 2216. The respondent cites Article 2224, which provides that "temperate or moderate damages, which are more than nominal but less than compensatory damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty," and contends that the petitioner failed to show any such loss in this case.

The question, therefore, is whether or not on the basis of the findings of the Court of Appeals, there is reason to conclude that the petitioner did sustain some pecuniary loss although no sufficient proof of the amount thereof has been adduced. In rejecting the claim for temperate damages the said Court referred specifically to the petitioner's failure to prove "the existence of a supposed contract for him to buy jewels at a profit," in connection with which he issued the two checks which were dishonored by the respondent. This may be true as far as it goes, that is, with particular reference to the alleged loss in that particular transaction. But it does not detract from the finding of the same Court that actual damages had been suffered, thus:

> ". . . Obviously, the check passed the hands of other banks since it was cleared in the United States. The adverse reflection against the credit of Araneta with said banks was not cured nor explained by the letter of apology to Mr. Gregory."
>
> x x x x x x x x x x x x
>
> ". . . This incident obviously affected the credit of Araneta with Miss Saldaña.
>
> x x x x x x x x x x x x
>
> "However, in so far as the credit of Araneta with the First National City Bank, with Miss Rufina Saldaña and with any other persons who may have come to know about the refusal of the defendant to honor said checks, the harm was done . . ."

The financial credit of a businessman is a prized and valuable asset, it being a significant part of the foundation of his business. Any adverse reflection thereon constitutes some material loss to him. As stated in the case *Atlanta National Bank vs. Davis, supra, citing 2 Morse Banks, Sec. 458*, "it can hardly be possible that a customer's check can be wrongfully refused payment without some impeachment of his credit, which must in fact be an actual injury, though he cannot, from the nature of the case, furnish independent, distinct proof thereof."

The Code Commission, in explaining the concept of temperate damages under Article 2224, makes the following comment:

> "In some States of the American Union, temperate damages are allowed. There are cases where from the nature of the case, definite proof of pecuniary loss cannot be offered, although the court is convinced that there has been such loss. For instance, injury to one's commercial credit or to the goodwill of a business firm is often hard to show with certainty in terms of money. Should damages be denied for that reason? The judge should be empowered to calculate moderate damages in such cases, rather than that the plaintiff should suffer, without redress from the defendant's wrongful act."

The petitioner, as found by the Court of Appeals, is a merchant of long standing and good reputation in the Philippines. Some of his record is cited in the decision appealed from. We are of the opinion that his claim for temperate damages is legally justified. Considering all the circumstances, including the rather small size of the petitioner's account with the respondent, the amounts of the checks which were wrongfully dishonored, and the fact that the respondent tried to rectify the error soon after it was discovered, although the rectification came after the damage had been caused, we believe that an award of P5,000 by way of temperate damages is sufficient.

Under the third error assigned by the petitioner in his brief, which is the second of the two reasons relied upon in his petition for review, he contends that moral damages should have been granted for the injury to his business standing or commercial credit, separately from his wounded feelings and mental anguish. It is true that under Article 2217 of the Civil Code. "Besmirched reputation" is a ground upon which moral damages may be claimed, but the Court of Appeals did take this element into consideration in adjudging the sum of P8,000 in his favor. We quote from the decision:

> ". . . the damages to his reputation as an established and well known international trader entitled him to recover moral damages."
>
> x x x x x x x x x
>
> ". . . It was likewise established that when plaintiff learned that his checks were not honored by the drawee Bank, his wounded feelings and the mental anguish suffered by him caused his blood pressure to rise beyond normal limits, thereby necessitating medical attendance for an extended period."

E. LIQUIDATED DAMAGES.

Liquidated damages are those agreed upon by the parties to a contract, to be paid in case of breach thereof. *(Article 2226, Civil Code)*. Ordinarily, the court cannot change the amount of liquidated damages agreed upon by the parties. However, Article 2227 of the Civil Code provides that liquidated damages, whether intended as

an indemnity or a penalty, shall be equitably reduced if they are iniquitous or unconscionable. In addition, Article 2228 provides that when the breach of the contract committed by the defendant is not the one contemplated by the parties in agreeing upon the liquidated damages, the law shall determine the measure of damages, and not the stipulation.

F. EXEMPLARY OR CORRECTIVE DAMAGES.

Corrective damages are called exemplary or "punitive" damages in American law. The Code Commission used the term "corrective," in lieu of "punitive," in harmony with the modern theory of penology. *(Report of the Code Commission).* The Commission further explained that exemplary damages are required by public policy to suppress wanton acts. They are antidotes so that the poison of wickedness may not run through the body politic. *(ibid.).*

Exemplary or corrective damages are imposed, by way of example or correction for the public good, in addition to the moral, temperate, liquidated or compensatory damages. *(Article 2229, Civil Code; Zenith Insurance Corporation vs. Court of Appeals, 185 SCRA 398 [1990]; Del Rosario vs. Court of Appeals, 267 SCRA 158 [1997]).* They are designed to reshape behavior that is socially deleterious in its consequence. *(Mevenas vs. Court of Appeals).*

Also known as "punitive" or "vindictive" damages, exemplary or corrective damages are intended to serve as a deterrent to serious wrongdoings and as a vindication of undue sufferings and wanton invasion of the rights of an injured or a punishment for those guilty of outrageous conduct. These terms are generally, but not always, used interchangeably. In common law, there is preference in the use of exemplary damages when the award is to account for injury to feelings and for the sense of indignity and humiliation suffered by a person as a result of an injury that has been maliciously and wantonly inflicted, the theory being that there should be compensation for the hurt caused by the highly reprehensible conduct of the defendant – associated with such circumstances as willfulness, wantonness, malice, gross negligence or recklessness, oppression, insult or fraud or gross fraud — that intensifies the injury. The terms punitive or vindictive damages are often used to refer to those species of damages that may be awarded against a person to punish him for his outrageous conduct. In either case, these damages are intended in good measure to deter the wrongdoer and others like him from similar conduct in the future *(People v. Catubig, No. 137842, August 23, 2001, 363 SCRA 621, 634).*

In *Philippine National Bank vs. Court of Appeals (256 SCRA 44 [1996], citing Octot vs. Ybanez, 111 SCRA 79 [1982]; De Leon vs. Court of Appeals, 165 SCRA 166 [1988])*, the Supreme Court enumerated the following requisites for the award of exemplary damages:

> "1. They may be imposed by way of example in addition to compensatory damages, and only after the claimant's right to them has been established;
>
> 2. They cannot be recovered as a matter of right, their determination depending upon the amount of compensatory damages that may be awarded to the claimant;
>
> 3. The act must be accompanied by bad faith or done in wanton, fraudulent, oppressive or malevolent manner."

The award of exemplary damages is governed by the following statutory provisions:

> "Art. 2230. In criminal offenses, exemplary damages as a part of the civil liability may be imposed when the crime was committed with one or more aggravating circumstances. Such damages are separate and distinct from fines and shall be paid to the offended party.
>
> Art. 2231. In quasi-delicts, exemplary damages may be granted if the defendant acted with gross negligence.
>
> Art. 2232. In contracts and quasi-contracts, the court may award exemplary damages if the defendant acted in a wanton, fraudulent, reckless, oppressive, or malevolent manner.
>
> Art. 2233. Exemplary damages cannot be recovered as a matter of right; the court will decide whether or not they should be adjudicated.
>
> Art. 2234. While the amount of the exemplary damages need not be proved, the plaintiff must show that he is entitled to moral, temperate or compensatory damages before the court may consider the question of whether or not exemplary damages should be awarded. In case liquidated damages have been agreed upon, although no proof of loss is necessary in order that such liquidated damages may be recovered, nevertheless, before the court may consider the question of granting exemplary in addition to the liquidated damages, the plaintiff must show that he would be entitled to moral, temperate or compensatory damages were it not for the stipulation for liquidated damages.
>
> Art. 2235. A stipulation whereby exemplary damages are renounced in advance shall be null and void."

Consistent with the above-stated statutory and juris-

prudential rules, the Supreme Court sustained the award of exemplary damages where there was gross carelessness or negligence amounting to wanton misconduct. *(Radio Communications of the Philippines vs. Court of Appeals, 195 SCRA 147 [1991]).* It was also awarded due to the presence of a fraudulent conduct. *(Geraldez vs. Court of Appeals, 230 SCRA 320 [1994]).* In a case involving contract of carriage of passengers, the Court justified the award of exemplary damages to deter the airlines from the commission of acts of discourtesy to passengers. *(Northwest Airlines vs. Court of Appeals, 186 SCRA 440 [1990]).*

a. Criminal Cases.

The Civil Code authorizes the imposition of exemplary damages in criminal cases where there is an aggravating circumstance. The term "aggravating circumstances" used by the Civil Code, the law not having specified otherwise, is to be understood in its broad or generic sense.

The commission of an offense has a two-pronged effect, one on the public as it breaches the social order and the other upon the private victim as it causes personal sufferings, each of which is addressed by, respectively, the prescription of heavier punishment for the accused and by an award of additional damages to the victim. The increase of the penalty or a shift to a graver felony underscores the exacerbation of the offense by the attendance of aggravating circumstances, whether ordinary or qualifying, in its commission. Unlike the criminal liability which is basically a State concern, the award of damages, however, is likewise, if not primarily, intended for the offended party who suffers thereby. It would make little sense for an award of exemplary damages to be due the private offended party when the aggravating circumstance is ordinary but to be withheld when it is qualifying. Withal, the ordinary or qualifying nature of an aggravating circumstance is a distinction that should only be of consequence to the criminal, rather than to the civil, liability of the offender. In fine, relative to the civil aspect of the case, an aggravating circumstance, whether ordinary or qualifying, should entitle the offended party to an award of exemplary damages within the unbridled meaning of Article 2230 of the

Civil Code *(People v. Catubig, supra.)*.

Nevertheless, the award of exemplary damages is also justified, not only due to the presence of aggravating circumstance, but also if the circumstances show the depravity of the mind of the accused. Hence, exemplary damages was awarded against an accused who assaulted a pregnant woman. By sexually assaulting a pregnant woman, the accused has shown moral corruption, perversity and wickedness. (People vs. Cristobal, 252 SCRA 507 [1996]). It was also imposed to deter fathers with perverse tendencies or aberrant sexual behavior from abusing their own daughters. (People vs. Matrimonio, 215 SCRA 613 [1992]).

NOTES

1. CHAPTER 1.

ALTERNATIVE COMPENSATION SCHEME (p. 11)

A. WORKMEN'S COMPENSATION STATUTES

The disquisition of Justice Gutierrez in *Floresca v. Philez Mining Corporation (136 SCRA 141 [1985])* on workmen's compensation states:

> "Workmen's compensation evolved to remedy the evils associated with the situation in the early years of the industrial revolution when injured workingmen had to rely on damage suits to get recompense.
>
> Before workmen's compensation, an injured worker seeking damages would have to prove in a tort suit that his employer was either negligent or in bad faith, that his injury was caused by the employer and not a fellow worker, and that he was not guilty of contributory negligence. The employer could employ not only his wealth in defeating the claim for damages but a host of common law defenses available to him as well. The worker was supposed to know what he entered into when he accepted employment. As stated in the leading case of *Priestley v. Fowler* (3 M. & W. 1, 150 Reprint 1030) decided in 1837 "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself." By entering into a contract of employment, the worker was deemed to accept the risks of employment that he should discover and guard against himself.
>
> The problems associated with the application of the fellow servant rule, the assumption of risk doctrine, the principle of contributory negligence, and the many other defenses so easily raised in protracted damage suits illustrated the need for a system whereby workers had only to prove the fact of covered employment and the fact of injury arising from employment in

order to be compensated.

The need for a compensation scheme where liability is created solely by statute and made compulsory and where the element of fault — either the fault of the employer or the fault of the employee — is disregarded became obvious. Another objective was to have simplified, expeditious, inexpensive, and nonlitigious procedures so that victims of industrial accidents could more readily, if not automatically, receive compensation for work-related injuries.

Inspite of common law defenses to defeat a claim being recognized, employers' liability acts were a major step in the desired direction. However, employers' liability legislation proved inadequate. Legislative reform led to the workmen's compensation.

I cite the above familiar background because workmen's compensation represents a compromise. In return for the near certainty of receiving a sum of money fixed by law, the injured worker gives up the right to subject the employer to a tort suit for huge amounts of damages. Thus, liability not only disregards the element of fault but it is also a pre-determined amount based on the wages of the injured worker and in certain cases, the actual cost of rehabilitation. The worker does not receive the total damages for his pain and suffering which he could otherwise claim in a civil suit. The employer is required to act swiftly on compensation claims. An administrative agency supervises the program. And because the overwhelming mass of working-men are benefited by the compensation system, individual workers who may want to sue for big amounts of damages must yield to the interests of their entire working class.

The nature of the compensation principle is explained as follows:

"An appreciation of the nature of the compensation principle is essential to an understanding or the acts and the cases interpreting them."

"By the turn of the century it was apparent that the toll of industrial accidents or both the avoidable and unavoidable variety had become enormous, and government was faced with the problem of who was to pay for the human wreckage wrought by the dangers of modern industry. If the accident was avoidable and could be attributed to the carelessness of the employer, existing tort principles offered some measure of redress. Even here, however, the woeful inadequacy of the fault principle was manifest. The uncertainty of the outcome of torts litigation in court placed the employee at a substantial disadvantage. So long as liability depended on fault there could be no recovery until the finger of

blame had been pointed officially at the employer or his agents. In most cases both the facts and the law were uncertain. The witnesses, who were usually fellow workers of the victim, were torn between friendship or loyalty to their class, on the one hand, and fear of reprisal by the employer, on the other. The expense and delay of litigation often prompted the injured employee to accept a compromise settlement for a fraction of the full value of his claim. Even if suit were successfully prosecuted, a large share of the proceeds of the judgment were exacted as contingent fees by counsel. Thus, the employer against whom judgment was cast often paid a substantial damage bill, while only a part of this endured to the benefit of the injured employee or his dependents. The employee's judgment was nearly always too little and too late."

xxx xxx xxx

"Workmen's Compensation rests upon the economic principle that those persons who enjoy the product of a business — whether it be in the form of goods or services — should ultimately bear the cost of the injuries or deaths that are incident to the manufacture, preparation and distribution of the product. . . ."

xxx xxx xxx

"Under this approach the element of personal fault either disappears entirely or is subordinated to broader economic considerations. The employer absorbs the cost of accident loss only initially; it is expected that this cost will eventually pass down the stream of commerce in the form of increase price until it is spread in dilution among the ultimate consumers. So long as each competing unit in a given industry is uniformly affected, no producer can gain any substantial competitive advantage or suffer any appreciable loss by reason of the general adoption of the compensation principle."

"In order that the compensation principle may operate properly and with fairness to all parties it is essential that the anticipated accident cost be predictable and that it be fixed at a figure that will not disrupt too violently the traffic in the product of the industry affected. Thus predictability and moderateness of cost are necessary from the broad economic viewpoint. . . ."

"Compensation, then, differs from the conventional damage suit in two important respects: Fault on the part of either employer or employee is eliminated; and compensation payable according to a definitely limited schedule is substituted for damages. All compensation acts alike work these two major changes, irrespective of how they may differ in other particulars."

"Compensation, when regarded from the viewpoint of employer and employee represents a compromise in which each party surrenders certain advantages in order to gain others which are of more importance both to him and to society. The employer gives up the immunity he otherwise would enjoy in cases where he is not at fault, and the employee surrenders his former right to full damages and accepts instead a more modest claim for bare essentials, represented by compensation."

"The importance of the compromise character of compensation cannot be overemphasized. The statutes vary a great deal with reference to the proper point of balance. The amount of weekly compensation payments and the length of the period during which compensation is to be paid are matters concerning which the acts differ considerably. The interpretation of any compensation statute will be influenced greatly by the court's reaction to the basic point of compromise established in the Act. If the court feels that the basic compromise unduly favors the employer, it will be tempted to restore what it regards as a proper balance by adopting an interpretation that favors the worker. In this way, a compensation act drawn in a spirit of extreme conservatism may be transformed by a sympathetic court into a fairly liberal instrument; and conversely, an act that greatly favors the laborer may be so interpreted by the courts that employers can have little reason to complain. Much of the unevenness and apparent conflict in compensation decisions throughout the various jurisdictions must be attributed to this." *(Malone & Plant, Workmen's Compensation, American Casebook Series, pp. 63-65)*.

The schedule of compensation, the rates of payments, the compensable injuries and diseases, the premiums paid by employers to the present system, the actuarial stability of the trust fund and many other interrelated parts have all been carefully studied before the integrated scheme was enacted into law. We have a system whose parts must mesh harmoniously with one another if it is to succeed. The basic theory has to be followed.

a. Employer's Liability Act.

In order to ease the burden on the employees, the Legislature had passed laws to give expeditious ways of recovering compensation for their injuries. In the Philippines, the earliest law adopted providing for employee's compensation is the Employer's Liability Act. *(Act No. 1874)*. As the title of the statute indicates, the liability was imposed directly on the employers and no contribution is obtained from the employee for a common fund. The Supreme Court explained in *Clara Cerezo vs. The Atlantic Gulf and Pacific Co.* (33 Phil. 425 [1916]), that the law was essentially a copy of the Massachusetts Employer's Li-

ability Act of 1887 which, in turn, was based on an English statute. *(43 and 44 Vict., c. 42).* The enactment of such law was meant to eliminate the hardship encountered by the employee in view of the defenses then available to the employer in tort cases, including the fellow-servant rule, contributory negligence and assumption of risk. The statute, "with certain exceptions, has placed the workman in a position as advantageous as but no better than that of the rest of the world who use the master's premises at his invitation on business." *(citing Thomas vs. Quartermaine, 18 Q.B.D., 685)*. The purpose of the statute is to protect the employee against the special defenses growing out of, and incidental to, the relation of employer and employee; and the result is to take from the employer such special defenses. *(citing Mobile ets., Ry. Co. vs. Holborn, 84 Ala. 133).*

Nevertheless, the Supreme Court ruled in *Cerezo* that the Employer's Liability Act did not remove the right of the employees to file a tort case against the employer. The purpose of the act was in no way to prejudice the existing rights of employees or to interfere with the enforcement of any right that the Act itself did not create. The law did not intend that all rights to compensation and of action against employers by injured employees or their representative must be brought under and be governed by the Act. An injured worker could still recover from the employer based on quasi-delict even if a separate remedy was provided for under the Act.

b. Workmen's Compensation Act (Act 3428)

The Workmen's Compensation Act — the law that was repealed by the Labor Code — provided for a similar scheme of employees' compensation. Just like the liability under the Employees' Liability Act, the remedy under the Workmen's Compensation Act was not exclusive. The Supreme Court explained in *Floresca vs. Philex Mining Company* (136 SCRA 141 [1985], cited in *Ysmael Maritime Corporation vs. Hon. Celso Avelino, June 30, 1987),* that the worker can still recover damages based on Article 2176 of the Civil Code. The issue came about because of Section 5 of the Act which provides that:

> "SEC. 5. *Exclusive right to compensation.* — The rights and remedies granted by this Act to an employee by reason of a personal injury entitling him to compensation shall exclude all other rights and remedies accruing to the employee, his personal representatives, dependents or nearest kin against the employer under the Civil Code and other laws because of said injury x x x."

Despite such provision, the Supreme Court ruled that the remedy under the Workmen's Compensation Act was not exclusive.

The Supreme Court emphasized that an injured party has a choice of either to recover from the employer the fixed amounts set by the Workmen's Compensation Act or to prosecute an ordinary civil action against the tortfeasor for higher damages but he cannot pursue both courses of action. (*citing Pacana vs. Cebu Autobus Company*, 32 SCRA 442). However, if the choice of the first remedy was based on ignorance or a mistake of fact the choice is nullified because it was not an intelligent choice.

The advantage of the Act over the Civil Code was that there was a presumption of compensability and that the claimant had no duty to show causation. So long as the employee can prove that the injury or disease arose in the course of employment, the legal presumption was that the claim fell within the provisions of the law.

c. Labor Code (Presidential Decree No. 626)

The same rule on non-exclusivity of remedy applies under the employees' compensation provision of the present law, the Labor Code. Article 173 of the Labor Code is substantially the same as Section 5 of the Workmen's Compensation Act. The injured employee or his heirs can recover from the employer under the Civil Code or under the Labor Code. Recovery under one law bars recovery under the other unless the choice was not an intelligent choice.

It should be noted, however, that the present scheme is quite different from the scheme under the Employer's Liability Act and the Workmen's Compensation Act. The nature of the law and its purpose was explained by the Supreme Court in *Sarmiento vs. Employees' Compensation Commission* (161 SCRA 312 [1988]):

> "We cannot give serious consideration to the petitioner's attach against the constitutionality of the new law on employee's compensation. It must be noted that the petitioner filed his claim under the provisions of this same law. It was only when his claim was rejected that he now questions the constitutionality of this law on appeal by *certiorari*."
>
> "The Court has recognized the validity of the present law and has granted and rejected claims according to its provisions. We find in it no infringement of the worker's constitutional rights. It is now settled jurisprudence *(see Sulit vs. Employees' Compensation Commission, 98 SCRA 483; Armena vs. Employees' Compensation Commission, 122 SCRA 851; Erese vs. Employees' Compensation Commission, 138 SCRA 192; De Jesus vs. Employees' Compensation Commission, 142 SCRA 92)* that the new law discarded the concepts of "presumption of compensability" and "aggravation" to restore what the law believes is a sensible

equilibrium between the employer's obligation to pay workmen's compensation and the employees' rights to receive reparation for work-connected death or disability."

In the case of *De Jesus vs. Employees' Compensation, (supra)*, this Court explained the new scheme of employees' compensation as follows:

"The new law establishes a state insurance fund built up by the contributions of employers based on the salaries of their employees. The injured worker does not have to litigate his right to compensation. No employer opposes his claim. There is no notice of injury nor requirement of controversion. The sick worker simply files a claim with a new neutral Employees' Compensation Commission which then determines on the basis of the employee's supporting papers and medical evidence whether or not compensation may be paid. The payment of benefits is more prompt. The cost of administration is low. The amount of death benefits has also been doubled."

"On the other hand, the employer's duty is only to pay the regular monthly premiums to the scheme. It does not look for insurance companies to meet sudden demands for compensation payments or set up its own funds to meet these contingencies. It does not have to defend itself from spuriously documented or long past claims."

"The new law applies the social security principle in the handling of workmen's compensation. The Commission administers and settles claims from a fund under its exclusive control. The employer does not intervene in the compensation process and it has no control, as in the past, over payment of benefits. The open-ended Table of Occupational Diseases requires no proof of causation. A covered claimant suffering from an occupational disease is automatically paid benefits."

"Since there is no employer opposing or fighting a claim for compensation, the rules on presumption of compensability and controversion cease to have importance. The lopsided situation of an employer versus one employee, which called for equalization through the various rules and concepts favoring the claimant, is now absent." *(At pp. 99-100)*.

The petitioner's challenge is really against the desirability of the new law. These is no serious attempt to assail it on constitutional grounds.

The wisdom of the present scheme of workmen's compensation is a matter that should be addressed to the President and Congress, not to this Court. Whether or not the former workmen's

compensation program with its presumptions, controversions, adversarial procedures, and levels of payment is preferable to the present scheme must be decided by the political departments. The present law was enacted in the belief that it better complies with the mandate on social justice and is more advantageous to the greater number of working men and women. Until Congress and the President decide to improve or amend the law, our duty is to apply it.

Under the present law, a compensable illness means any illness accepted as an occupational disease and listed by the Employees' Compensation Commission, or any illness caused by employment subject to proof by the employee that the risk of contracting the same is increased by working conditions. *(Bonifacio vs. Government Service Insurance System, 146 SCRA 276)*.

2. CHAPTER 2.

A. DEFINITION AND TEST OF NEGLIGENCE (p. 25)

(a) The definition of negligence in *Layugan v. Intermediate Appellate Court (167 SCRA 363 [1988])* was cited in *Philippine Bank of Commerce v. Court of Appeals (269 SCRA 695, 703)* and in *(Raynera v. Hiceta, 306 SCRA 102, 108 [1999]). [Chapter 2 A]*

(b) The Supreme Court explained in *Equitable Leasing Corporation v. Lucita Suyon, et al., (No. 143360, September 5, 2002)* the possibility of concurrence of two separate sources of obligation in negligence cases. The court ruled that in negligence cases, the aggrieved party may sue the negligent party under (1) Article 100 of the Revised Penal Code, for civil liability *ex delicto*; or (2) under Article 2176 of the Civil Code, for civil liability *ex quasi delicto*. These two causes of action (ex delicto or ex quasi delicto) may be availed of, subject to the caveat that the offended party cannot recover twice for the same act or omission or under both causes of action. Since these two civil liabilities are distinct and independent of each other, the failure to recover in one will not necessarily preclude recovery in the other.

C. RES IPSA LOQUITUR (p. 116)

Res ipsa loquitur holds a defendant liable where the thing which caused the injury complained of is shown to be under the latter's management and the accident is such that, in the ordinary course of things, cannot be expected to happen if those who have its management or control use proper care. It affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. It is not a rule of substantive law and, as such,

it does not create an independent ground of liability. Instead, it is regarded as a mode of proof, or a mere procedural convenience since it furnishes a substitute for, and relieves the plaintiff of, the burden of producing specific proof of negligence. The maxim simply places on the defendant the burden of going forward with the proof. Resort to the doctrine, however, may be allowed only when (a) the event is of a kind which does not ordinarily occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant's duty to the plaintiff. Thus, it is not applicable when an unexplained accident may be attributable to one of several causes, for some of which the defendant could not be responsible. (*FGU Insurance Corporation v. G.P. Sarmiento Trucking Corporation, G.R. No. 141910, August 6, 2002).*

3. CHAPTER 10.

JOINT AND SEVERAL LIABILITY OF EMPLOYER

The Supreme Court's ruling that the liability of the employer and the employee are joint and several is contrary to the opinion of Justice Capistrano, a member of the Code Commission. Justice Capistrano explained in *Co Tian v. Teodoro Bugarin, et al. (CA G.R. No. 23674-R, April 28, 1962, 2 CAR2s 290, 297-298)* that the injured may sue either the employer (under Article 2180) and the employee (under Article 2176 itself). He can also so both of them "but if he sues both of them, the judgment should be for the recovery against either of them (not jointly and severally) provided that if recovery is had from the owner, he is entitled to recover what he has paid from the driver." Justice Capistrano distinguished Article 2180 from Article 2184.

He explained that in passive solidarity under the first paragraph of Article 2184, either or both solidary debtors may be sued by the aggrieved party (Article 1216, Civil Code). In case the aggrieved party sues only the driver and judgment is rendered in his favor but remains unsatisfied because of insolvency of the driver, he may sue the owner in order to recover against him as the other solidary debtor. In such case, if recovery is had from the owner, he may sue the driver for reimbursement of one-half of the amount which is the driver's share of the obligation as solidary debtor (Art. 1217, Civil Code). If, on the other hand, he sues and recover only from the owner, the latter may sue the driver for reimbursement of one-half of what he has paid to

the aggrieved party, the other half being his co-owner's share of the solidary obligation. In case the aggrieved party sues both the owner and driver, a solidary judgment should be rendered against them, with the proviso that if recovery is had from the owner, he should be reimbursed one-half of the amount by the owner.

4. CHAPTER 12.

PROVISIONS OF THE CONSUMER ACT ON MISLABELED CONSUMER PRODUCTS

"Art. 85."*Mislabeled Food*. — A food shall also be deemed mislabeled:

a) if its labeling or advertising is false or misleading in any way;

b) if it is offered for sale under the name of another food;

c) if it is an imitation of another food, unless its label bears in type of uniform size and prominence, the word — "imitation" and, immediately thereafter, the name of the food imitated;

d) its containers is so made, formed, or filled as to be misleading;

e) if in package form unless it bears a label conforming to the requirements of this Act: *Provided*, That reasonable variation on the requirements of labeling shall be permitted and exemptions as to small packages shall be established by the regulations prescribed by the concerned department of health;

f) if any word, statement or other information required by or under authority of this Act to appear on the principal display panel of the label or labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices in the labeling and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

g) if it purports to be or is represented as a food for which a definition or standard of identity has been prescribed unless:

1) it conforms to such definition and standard; and

2) its label bears the name of the food specified in the definition or standards, and insofar as may be required by such regulations, the common names of optional ingredients other than spices, flavoring and coloring, present in

such food;

h) if it purports to be or represented as:

1) a food for which a standard of quality has been prescribed by regulations as provided in this Act and its quality fall below such standard, unless its label bears in such manner and form as such regulations specify, a statement that it falls below such standard; or

2) a food for which a standard or standards or fill of container have been prescribed by regulations as provided by this Act and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard;

i) if it is not subject to the provisions of paragraph (g) of this Article unless its label bears:

1) the common or usual name of the food, if there be any; and

2) in case it is manufactured or processed from two or more ingredients, the common or usual name of such ingredient; except the spices, flavorings and colorings other than those sold as such, may be designated as spices, flavorings and colorings without naming each: *Provided*, That to the extent that compliance with the requirement of clause (2) of this paragraph is impracticable or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the concerned department of health;

j) if it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin or mineral or other dietary properties as the concerned department determines to be, or by regulations prescribed as necessary in order fully to inform purchasers as its value for such uses;

k) if it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling, stating that fact: *Provided*, That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the concerned department. The provisions of this paragraph or paragraphs (g) and (i) with respect to the artificial coloring shall not apply in the case of butter, cheese or ice cream.

Art. 87. *Additional Labeling Requirements for Cosmetics.* — The following additional requirements may be required for

cosmetics:

a) expiry or expiration date;

b) whether or not it may be an irritant;

c) precautions or contra-indications; and

d) such other labeling requirements as the concerned department may deem necessary and reasonable.

Art. 88. *Special Labeling Requirements for Cosmetics.* — A cosmetic shall be deemed mislabeled:

a) if its labeling or advertising is false or misleading in any way;

b) if in package form unless it bears a label conforming to the requirements of labeling provided for in this Act or under existing regulations: *Provided*, That reasonable variations shall be permitted, and exemptions as to small packages shall be established by regulations prescribed by the concerned department;

c) if any word, statement or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness, as compared with other words, statements, designs or devices in the labeling, and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

d) if its container is so made, formed or filled as to be misleading; or

e) if its label does not state the common or usual name of its ingredients.

Art. 89. *Mislabeled Drugs and Devices.* — A drug or device shall be deemed to be mislabeled:

a) if its labeling is false or misleading in any way;

b) if its in package form unless it bears a label conforming to the requirements of this Act or the regulations promulgated therefor: *Provided*, That reasonable variations shall be permitted and exemptions as to small packages shall be established by regulations prescribed by the concerned department.

c) if any word, statement or other information required by or under authority of this Act to appear on the principal display panel of the label or labeling is not prominently placed thereon with such conspicuousness as compared with other words, statements, designs or devices in the labeling and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use;

d) if it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha-eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marijuana, morphine, opium, paraldehyde, peyote or sulfonmethane, or any chemical derivative of such substance, which derivative has been designated by the concerned department after investigation, and by regulations as habit forming; unless its label bears the name and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement:

"Warning-May be habit forming";

e) its labeling does not bear:

1) adequate directions for use; and

2) such adequate warning against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the concerned department may promulgate regulations exempting such drug or device from such requirement;

f) if it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: *Provided*, That the method of packing may be modified with the consent of the concerned department;

g) if it has been found by the concerned department to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the concerned department, shall by regulations, require as necessary for the protection of the public health;

h) 1) if it is a drug and its container is so made, formed or filled as to be misleading; or

2) if it is an imitation of another drug; or

3) if it is dangerous to health when used in the dosage, or with the frequency of duration prescribed, recommended or suggested in the labeling thereof;

j) if it is, purports to be or is represented as a drug composed wholly or partly of insulin or of any kind of penicillin, streptomycin, chlortetracycline, chloramphenicol, bacitracin, or any other antibiotic drug, or any derivative thereof, unless:

1) it is from a batch with respect to which a certificate of

release has been issued pursuant to regulations of the concerned department; and

2) such certificate of release is in effect with respect to such drug: *Provided*, That this paragraph shall not apply to any drug or class of drugs exempted by regulations promulgated under Authority of this Act.

Art. 91. *Mislabeled Hazardous Substances*. — Hazardous substances shall be deemed mislabeled when:

a) having been intended or packaged in a form suitable for use in households, especially for children, the packaging or labeling of which is in violation of the special packaging regulations issued by the concerned department;

b) such substance fails to bear a label;

1) which states conspicuously:

(i) the name and the place of business of the manufacturer, packer, distributor or seller;

(ii) the common or usual name or the chemical name, if there be no common or usual name, of the hazardous substance or of each component which contributes substantially to the harmfulness of the substance, unless the concerned department by regulation permits or requires the use of the recognized generic name;

(iii) the signal word "danger" on substances which are extremely flammable, corrosive or highly toxic;

(iv) the signal word "warning" or "caution" with a bright red or orange color with a black symbol on all other hazardous substances;

(v) a clear statement as to the possible injury it may cause if used improperly;

(vi) precautionary measures describing the action to be followed or avoided;

(vii) instructions when necessary or appropriate for first-aid treatment;

(viii) the word "poison" for any hazardous substance which is defined as highly toxic;

(ix) instructions for handling and storage of packages which require special care in handling and storage; and

(x) the statement "keep out of the reach of children", or its practical equivalent, if the article is not intended for use by children and is not a banned hazardous substance, with adequate directions for the protection of children from the hazard involved. The aforementioned signal words, affirmative statements, description of precautionary measures, necessary instructions or other words or statements may be in English language or its equivalent in Filipino; and

(xi) on which any statement required under clause 1) of this paragraph is located prominently in bright red and orange color with a black symbol in contrast typography, layout or color with the other printed matters on the label."

SUBJECT INDEX

References are to pages