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RESPONDEAT SUPERIOR AND *DILIGENTISSIMI PATERFAMILIAS* — A COMPARATIVE STUDY†

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VII. The Basis of Vicarious Liability in Philippine Law

1. *Preliminary Remarks*

We have already seen that the underlying principle of tort law in the Philippines is fault or "culpa." This principle is traceable to the Spanish Civil Code of 1899 which was the effect of the influence of the Code Napoleon and the Roman Law. Aside from this background material though, it would not be unwise to allude to certain basic legal principles which pervade the whole Philippine legal system.

The Philippines is a civil law country. Rights in the municipal law are primarily statutory, meaning, one can only enforce rights which are given him by statute. Statute in this sense, includes codes. Correlatively, he is expected to perform only those duties required of him by statutory law. Likewise, liabilities, whether civil or penal, must have a statutory basis.[153] There are no such things as common-law rights or common-law duties or obligations. An employer may be held liable for his servant's delicts or quasi-delicts only if a statute makes him so. This then is our starting premise: The vicarious liability of an employer is purely statutory.

The acts of a servant, or, in the words of the Code, an employee or household helper for which an employer may be responsible may either be civil or criminal, meaning, one may merely give rise to a civil obligation for damages, while the other may be a penal offense which may subject the offending subordinate to criminal liability and civil liability. When we talk about civil liability merely, the act falls within the pale of the civil law,

† This is the last of two parts. The first part appeared in the September 1955 issue.

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[153] See De la Cruz v. Northern Theatrical Enterprises, Inc., 50 O.G. 4225 (1954).

more particularly, the New Civil Code. When one talks about criminal liability and civil liability together, the act and its consequences are governed by the penal law, more particularly, the Revised Penal Code, subject to well-defined exceptions.

2. *General Theory of Obligations in General*

Under the general scheme of the New Civil Code of the Philippines the principle that rights and obligations are statutory is followed. The Code states that an obligation is a juridical necessity to give, to do or not to do. An obligation may arise from: law; contracts; quasi-contracts; acts or omissions punished by law; or quasi-delicts.[154] An employer may incur liability under any of these sources. A statute may require him to put a fire escape in his establishment in violation of which he stands to pay a fine and pay any damages to anyone harmed as a result of the violation. This is an obligation arising from law. He may contract with another for a breach of which he may be held liable. The obligation is contractual. He may be bound to return something to which he is not entitled and by which he is unjustly enriched. His obligation arises from quasi-contract. He may be subject to subsidiary liability for the civil liability arising from the criminal offenses of his employees. This obligation springs from acts or omissions punished by law. Lastly, for certain acts of his subordinates not encompassed within the penal law but which cause damage to another, he may be held liable under the provision on quasi-delicts.

Although the employer may incur liabilities in any of the situations provided for by law, his vicarious liability may only arise under two of these, namely: acts or omissions of his employee punished by law and his employee's quasi-delicts. If the civil obligation arises from his servant's criminal offense, then it shall be governed by the penal laws subject to certain provisions of the New Civil Code.[155] If the employee's act amounts to a quasi-delict, then the New Civil Code provisions on quasi-delicts govern his vicarious liability.[156]

Let us gather the materials. The pertinent provisions of the New Civil Code are:

Art. 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 a quasi-delict and is governed by the provisions of this Chapter.

Art. 2177. Responsibility for fault or negligence under the preceding article is entirely separate and distinct from the civil liability arising from negligence

[154] Art. 1157 CIVIL CODE OF THE PHILIPPINES (hereinafter cited as NEW CIVIL CODE).
[155] Art. 1161 *id.*
[156] Art. 1162 *id.*

under the Penal Code. But the plaintiff cannot recover damages twice for the same act or omission of the defendant.

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.

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.

The following are the pertinent provisions of the Revised Penal Code.

Art. 100. *Civil liability of a person guilty of a felony.* — Every person criminally liable for a felony is also civilly liable.

Art. 102. *Subsidiary civil liability of innkeepers, tavern keepers and proprietors of establishments.* — In default of persons criminally liable, innkeepers, tavern keepers, and 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 other 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 notify 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 of 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.

3. *The Dual Aspect of Employer's Vicarious Liability*

The same negligent act of an employee may give rise to two civil obligations if it amounts to a criminal offense: one, a civil liability arising from the negligent act as a quasi-delict, and another, a civil liability arising from criminal negligence under the Revised Penal Code. So, if the driver of a truck of a transportation company negligently runs over a child and his act amounts to criminal imprudence, there are two ways of getting at his employer: one, under article 2180 based on quasi-delict, and another, based on article 103 of the Revised Penal Code. As we shall find out later, in the first case, the employer may escape liability by proving that he exercised the diligence of a good father of a family to prevent the damage.

In the second case arising from the criminal offense, he has no defense. However, in this latter case, under article 2177 of the New Civil Code, he may not be held liable in damages twice for the same act or omission of his errant employee.

Viewed from another aspect, the same negligent act of an employee may make the employer liable to one person on the basis of quasi-delict and to another on the basis of contract. Thus, if an employee of the Manila Railroad Co., charged with the duty of hoisting signals, negligently fails to raise a danger sign upon the approach of a train and the train crashes and injures a conductor-employee of the company, many passengers, and a third person not a passenger, the liability of the company to each would have a different basis. The employer's liability to its conductor would be based on the contract of employment; to the passengers on a breach of the contract of carriage; and to the third person on quasi-delict. As to the first, the employer may probably set up the defense of fellow-servant doctrine or assumption of risk, which will, in all probability, fail because of the facts; on the second, he has no defense except perhaps the contributory negligence of any passenger; as to the third, he may set up the defense of having exercised the diligence of a good *"paterfamilias"* to prevent the damage.

Then too, the fault or negligence of the master may be actual or presumptive. Where his fault is personal, even if his servant intervenes or participates in the act, his liability falls under article 2176. His fault may be presumptive when his employee commits a negligent act in the course of his employment. The law, article 2180, raises a presumption that he is negligent and at fault either in the selection or supervision of his employee or both.

4. *The Different Theories on Basis of Vicarious Liability*

Many theories have been advanced as to the basis of an employer's vicarious liability in the civil law. Some of them are:[157]

1. Absolute presumption of fault or negligence: The basis of this theory is either *culpa* or fault *"in eligendo"* — (in selection), or *"in vigilando"* — (in vigilance or supervision) or both over the employee. Under this theory, the employer is absolutely presumed to be at fault or to be negligent either because he was careless in the choice or supervision of those working under him.

2. *Responsibilidad Inculpable*: (Responsibility without fault). This theory is based on social order and public interest. It simply means that someone must be held responsible for the resulting damage to another, and logically, the responsibility must rest on the owner or directors of establishments or enterprises, whether they be at fault or not.

3. *Representation*: This theory is premised on the fact that the employees or the subordinates when working for their principals are really representing them. Hence, under the law of agency, the said principals are the ones who should be held responsible for the tortious acts done by their agents or subordinates.[158]

4. *Benefit Theory*: The premise of this theory is: *"Quien obra por su propio interes obra por a propia riesgo"* — "He who works for his own interest works at his own risk." Since the owner, director, or employer receives the benefit of the work of his employee or subordinate, logically, he should assume the risk, if in the course of the latter's employment, of the tortious acts done for him.

5. *Presumption juris tantum of culpa*: This theory simply asserts that when damage or injury is caused by an employee or subordinate in the scope of his assigned task, there is a *prima facie* presumption of fault or negligence on the part of his employer or the owner of the enterprise. This is but a presumption *juris tantum* and may be rebutted by evidence to the contrary.

What is the theory followed in the Philippines? In a dictum, the Philippine Supreme Court answers this question thus:

. . . . the primary and direct responsibility of employers and their presumed negligence are principles calculated to protect society. Workmen and employees

[157] These theories are a rough condensation of those given by the noted Spanish jurisconsult Jose Maria Manresa in his *Commentarios Al Codigo Civil Español*. 12 MANRESA, COMMENTARIOS AL CODIGO CIVIL ESPAÑOL 560-67 (4th ed. 1931) (hereinafter cited as MANRESA).

[158] "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, pro refundicion de la del dependiente en la de quien le empla y utiliza'* (become as one personality by the merging of the person of the employee in that of him who employs and utilizes him)." Barredo v. Garcia, 73 Phil. 607, 621 (1942).

Manresa states that the basis of the Italian school is representation. He cites a decision of the *Casacion de Roma* of May 21, 1897, wherein the court laid down the rule that to them in whose name a work is performed should lie the civil liability. 12 MANRESA 656.

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 care for the personal 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."[159]

It is believed that this dictum is purely obiter. If protection to society is the object of the rule why then should not the doctrine of *respondeat superior* as applied in the common law be adopted in the Philippines? Why make the injured party suffer the loss when the employer is not at fault? Where do the reasons about the employer reaping the benefit and guaranteeing his subordinate's conduct fit in when he is allowed to escape liability? To be consistent, the employer must be made liable in every case. The rule, if the bases given are to be followed, should be one of absolute liability. But under article 2180 this is not the case.

5. *The True Basis*

It is submitted that the true basis of the vicarious liability of an employer or the owner and manager of an establishment or enterprise is still that which underlies and permeates the whole tort law — fault. The persons mentioned are subject to liability because of fault — presumptive fault. This is the theory of "presumption *juris tantum* of *culpa*" expounded by Manresa. It is the theory back of article 2180. Under this article, two things are apparent:

> Firstly, that when harm is caused by the negligence of a subordinate or employee, there instantly arises a presumption of law that there was negligence on the part of the master or employer either in the selection of an employee or in supervision over him after the selection, or both; and
>
> Secondly, that the presumption is *juris tantum* and not *juris et de jure* and consequently, may be rebutted; and if the employer shows to the satisfaction of the court that in the selection and supervision he exercised the care and diligence of a good father of a family to prevent damage, the presumption is overcome and he is relieved from liability.[160]

[159] Barredo v. Garcia, *supra* note 158.

[160] Bahia v. Litonjua, 30 Phil. 624, 627 (1915). Manresa again makes the comment that the Spanish Civil Code does not follow the Italian school but is inspired more by the doctrine basing the liability of the employer upon a rebuttable presumption of fault. It therefore, he continues, does not follow theories of representation, nor interest, not because the employer is more in a position to answer for the loss and distribute it, but it follows from the breach of a duty of care and precaution to those to whom it is owed by the employer. 12 MANRESA 158. See also Tan v. Ortiz, (CA) 36 O.G. 2685 (1937).

The theory bases the responsibility of the master ultimately on his own negligence or fault and not on that of his servant.[161] Since fault is the basic principle which underlies liability, the only way to make the employer liable for his employee's quasi-delict and be consistent with this principle is to create a presumption of fault on his part. That is what article 2180 does. It raises a presumption *juris tantum* of negligence on the part of the persons made responsible under said article by virtue of this failure to exercise due care and diligence over their subordinates so as not to create an undue risk of harm to others. This is the notable peculiarity of the Philippine and Spanish law of negligence. It is, of course, in striking contrast with the common-law doctrine of *respondeat superior*. The principle of civil law vicarious liability therefore, is not the *respondeat superior* of the common law but the relationship of *paterfamilias*.[162]

A good explanation of the rule is that given by the Philippine Supreme Court in the case of *Cangco v. MRR*:

> One who places a powerful automobile in the hands of a servant whom he knows to be ignorant of the method of managing such a vehicle, is himself guilty of an act of negligence which makes him liable for all the consequences of his imprudence. The obligation to make good the damage arises at the very instant that the unskillful servant, while acting within the scope of his employment causes the injury. The liability of the master is personal and direct. But, if the master has not been guilty of any negligence whatever in the selection, and direction of the servant, he is not liable for the acts of the latter, whether done within the scope of his employment or not, if the damage done by the servant does not amount to a breach of the contract between the master and the person injured.[163]

Attention is invited to the statement made by the court that "the liability of the master is personal and direct." Such liability has been referred to also as being principal and not subsidiary.[164] The action may be brought directly against the owner and manager of the establishment or the employer without joining the employee wrong-doer. The action against the former is in itself a principal action. It is not subsidiary in the sense that it cannot be instituted till after the judgment against the author of the act or

[161] 2 CASTAN, DERECHO CIVIL ESPAÑOL, COMUN Y FORAL 59 (3d ed. 1941) (hereinafter cited as CASTAN).

[162] Cuison v. Norton Harrison Co., 55 Phil. 18 (1930). "The liability, which, under the Spanish law, is in certain cases imposed upon the employers with respect to damages occasioned by the negligence of their employees to persons to whom they are not bound by contract, is not based, as in the English Common Law, upon the principle of *respondeat superior* — if it were, the master would be liable in every case and unconditionally, — but upon the principle announced in article 1902 (now article 2176) of the Civil Code, which imposes upon all persons, who, by their fault or negligence, do injury to another, the obligation of making good the damage caused." Cangco v. MRR, 38 Phil. 768, 772 (1918). *Cf.* Tiongson v. Barredo, 40 O.G. 208 (1941).

[163] 38 Phil. 768, 772-73 (1918).

[164] 4 AMANDI, CUESTIONARIO DEL CODIGO CIVIL REFORMANDO 429-30. 12 MANRESA 560.

at least, that it is subsidiary to the principal action.[165]

Although article 2180, on its face, imposes an obligation "also for those of persons for whom one is responsible" which may tend to lead to the thought that there is a responsibility being imposed for the act of another, in reality the responsibility exacted is for one's own act or omission. This is the reason why the responsibility of the employer is personal, direct, immediate and principal.

6. *Defense of Diligence of Good Father of Family — Diligentissimi Paterfamilias*

Under article 2180, the responsibility of the persons mentioned therein shall cease when they prove that they have observed all the diligence of a good father of a family to prevent damage. Since the presumed fault or negligence of the employer is either *culpa in eligendo* (fault in selection) or *culpa in vigilando* (fault in vigilance or supervision) or both,[166] the diligence required of a good father of family consists of care in the selection of the employee and the supervision of his work.

The Code does not explain what is the diligence of a good father of a family which is sufficient to overcome the presumption of negligence under article 2180. The law shifts the burden of proof to the employer to show that he was diligent in the selection and supervision of his errant subordinate. Otherwise stated, he has to prove that he was not negligent. Here we see an encouraging sign because the Code does provide something on negligence — not diligence.

Article 1173, which is explicitly made applicable to quasi-delicts by article 2178, states that the 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 persons, of the time and of the place. It further provides that if the law or contract does not state the diligence which is to be observed in the performance, that which is expected of a good father of a family shall be required. Good father of a family! We are back to where we first started! Not necessarily. The first part does give us a lead. It says that we have to take into account the circumstances of persons, time and place. But even this is quite vague and too general.

However, the situation is not so hopeless as it seems. Judicial decisions have woven some pattern around this vexing problem which sheds light on the concept of negligence. In the case of *Picart v. Smith*, [167] the Philippine

[165] 20 LAURENT. PRINCIPLES OF FRENCH CIVIL LAW 734-35, (Spanish translation) cited in Barredo v. Garcia, 73 Phil. 607, 613 (1942).
[166] Cangco v. MRR, 38 Phil. 768, 772 (1918).
[167] 37 Phil. 809, 813 (1918). See also Tucker v. Millan, (CA) 49 O.G. 7[illegible] (1953).

Supreme Court laid down the following test for negligence, to wit:

> 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 ordinary prudent person 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 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.
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> . . . .
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> . . . . 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.

The foregoing is a starting point in questions of negligence in general. Cases where the defense of *paterfamilias* has been passed upon by the court would prove more helpful. In the case of *Lilius v. MRR*,[168] the court ruled that the defense of diligence of a good father of a family is not confined to the careful and prudent selection of subordinates or employees but includes the inspection of their work and supervision of the discharge of their duties. In this case, the defendant railroad company was held liable for the negligence of its fireman and switchman who did not faithfully comply with his duty of remaining at the crossing when defendant's train hit plaintiff's car.

In subsequent cases, the court held a shipowner liable for the negligence of its *patron*,[169] and a company for its agent's fault.[170]

Supervision has been interpreted to include, in proper cases, the making and promulgation by the employer of suitable rules and regulations and the issuance of the same to his employees, designed for the protection of persons with whom the employer has relations through his employees.[171]

In the case of *Walter A. Smith & Co. v. Cadwallader Gibson Lumber*

[168] 59 Phil. 758 (1934).
[169] Lopez v. Durelo, 52 Phil. 229 (1928).
[170] Yu Biao Sontua & Co. v. Osorio, 43 Phil. 511 (1922).
[171] *Cf.* Bahia v. Litonjua, 30 Phil. 624 (1915). In the case of Yamada v. MRR, 33 Phil. 8 (1919), defendant taxicab company was held liable even if it furnished a safe and proper car and a driver with a long and satisfactory experience to plaintiff, but there was a lack of proper supervision and instruction to said driver and it was proven that the practice of drivers of defendant company in passing through railroad crossings without precaution was known to and sanctioned by the management of the company.

Co.,[172] in an action for damages for the demolition of plaintiff's wharf struck by defendant's vessel due to the negligence of defendant's captain, the court absolved defendant from liability when it upheld the defense of *paterfamilias* set up. Said the court:

> The evidence shows that Captain Lasa at the time the plaintiff's wharf collapsed was a duly licensed captain, authorized to navigate and direct a vessel of any tonnage, and that the appellee contracted his services because of his reputation as a captain, according to F. C. Cadwallader. This being so, we are of the opinion that the presumption of liability against the defendant has been overcome by the exercise of the care and diligence of a good father of a family in selecting Captain Lasa, in accordance with the doctrines laid down by the court in the cases cited above, and the defendant is therefore absolved from all liability.

In the case of *Bahia v. Litonjua*,[173] the facts showed that defendant Leynes rented a car from the International Garage of Manila for his use in going to a town fiesta. Through the negligence of the chauffeur, the car hit plaintiff's daughter killing her. The cause of the mishap was a defective steering gear. Leynes defended himself on the ground that he had exercised the diligence of a good father of a family to prevent damage. In sustaining this defense the court held:

> As to selection, the defendant has clearly shown that he exercised the care and diligence of a good father of a family. He obtained the machine from a reputable garage and it was, so far as appeared, in good condition. The workmen were likewise selected from a standard garage, were duly licensed by the Government in their particular calling, and apparently thoroughly competent. The machine had been used but a few hours when the accident occured and it is clear from the evidence that the defendant had no notice, either actual or constructive, of the defective condition of the steering gear.

Each case must therefore be viewed in the light of its environmental facts and circumstances depending on place, time and person.

Going back to article 2180 it states that upon proof of the exercise of the diligence of a good father of a family to prevent damage, the responsibility of the persons mentioned therein "shall cease". The use of the phrase "shall cease" is misleading. It implies that responsibility has begun. The very word "cease" connotes a beginning. A thing cannot cease which has not begun. Literally, the provision would mean that the responsibility of the employer has at one time or other set in; and that upon proof of the defense of *paterfamilias* it "shall cease". But such is not the case.

One who has exercised all the diligence of a good father of a family to prevent damage to others in the conduct of his affairs through employees

[172] 55 Phil. 517, 526 (1930). See also Marquez v. Castillo, 68 Phil. 568 (1939), where it was held that the fact that the servant was duly licensed was a good defense.

[173] 30 Phil. 624, 626-27 (1915). See also Cerf v. Medel, 33 Phil. 37 (1915).

and subordinates has, to all legal intents and purposes, never been at fault. Never, even for one single moment, has he been, or is he, responsible for the quasi-delicts of his employees. It is therefore not accurate to say that proof of diligence and care in the selection and control of the servant relieves the master from liability for the latter's acts — on the contrary, that proof shows that the responsibility has never existed.[174]

What the law simply means is that upon proof of damage caused through the quasi-delict of an employee or a household helper, there is created a disputable presumption that the employer was negligent in failing to exercise all the precautionary measures required of a good *paterfamilias* to prevent damage. In an actual suit brought against an employer for the quasi-delict of his employee, upon proof of the facts constituting the quasi-delict, the relationship of employer and employee and the resulting damage as a result of the quasi-delict, there is a *prima facie* case for the plaintiff. He does not have to prove the fault or negligence of the employer. If the case were to end there, judgment would be rendered for the plaintiff. However, if the facts were that the employer exercised the diligence of a good *paterfamilias* to prevent damage and he proves this defense, he will not be held liable. This is when his responsibility "shall cease."

It will be worthwhile to note that article 2180 in its latter part provides that the diligence which must be exercised must be "to prevent damage." The law does not state "to prevent *the* damage." The absence of the word *the* is significant. The English translations of article 1903 of the Civil Code of Spain, such as those of Justice F. C. Fisher and Prof. Arturo M. Tolentino, use the phrase "to prevent the damage." The use of the word *the* is of paramount importance because under the wording of the law as it is now, the employer or persons referred to are expected and required to observe all the diligence and care with a view to preventing damage or harm to anybody without singling any person or group of persons. Had the word *the* been retained it would mean that the employer is expected to foresee the very damage for which he is being held responsible. It would be unduly harsh to require of him this extraordinary power to divine what is to happen in the future. His duty to observe diligence and care is to the public in general and not to a particular person. The necessary precaution which he must observe must be geared towards preventing damage to the general public. The wording of the law is indeed apt and accurate.

7. *Defense of Paterfamilias Not Available in Crime and Contract*

We have previously stated that a single negligent act if amounting to a crime may give rise to two separate civil liabilities. The New Civil Code recognizes this in article 2177.

[174] Cangco v. MRR, 38 Phil. 768, 772 (1918).

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.

We have likewise dwelt upon the difference between quasi-delict and criminal negligence. We have also discussed the vicarious liability of an employer as based on the quasi-delict of his employee. We shall now proceed to consider such liability when it arises from the employee's negligent criminal act.

Employers, persons and corporations engaged in any kind of industry are subsidiarily liable under article 103 of the Revised Penal Code, for the felonies committed by their servants, workmen, apprentices, or employees in the discharge of their duties. The basis of a suit against an employer brought under this article is the criminal act itself considered as a crime. A judgment convicting the negligent employee is a prerequisite to recovery against the employer. The liability of the employer is only subsidiary, not direct and immediate as under quasi-delict, and is enforceable only if the guilty employee is insolvent.[175]

In actual practice, a certified copy of the judgment of conviction of the employee would be the best proof of the conviction; while the writ of execution directed against the convicted employee's properties and the sheriff's return therein unsatisfied would be the best proof of the insolvency of the employee.

The felony must be committed in the discharge of the duties of the employee in order to make the employer subsidiarily liable. So, in a case where, at the time of the accident of which the defendant's chauffeur was convicted, defendant master did not know that his chauffeur had taken the car, the accident did not occur in the course of the performance of the duties for which the chauffeur was hired; and the master is therefore not subsidiarily liable under article 103.[176]

The persons sought to be charged with liability under the same article should be engaged in any kind of industry to make them fall within the purview of said provision. Thus, a hospital, not being conducted for profit, is not engaged in industry within the meaning of the article and is therefore not liable subsidiarily for the negligent acts of its nurses.[177] Likewise, the owner of an automobile who uses it for private purposes merely and not for business or industry does not fall within the provision.[178] However, a person who owns a truck and uses it in the transportation of his own

[175] Yumul v. Juliano, 72 Phil. 94 (1941). See also Diana v. Batangas Trans. Co., 49 O.G. 2238 (1953); Alcantara v. Surro, 49 O.G. 2769 (1953).
[176] Marquez v. Castillo, 68 Phil. 568 (1939).
[177] Clemente v. Foreign Mission Sisters, (CA) 38 O.G. 1594 (1939).
[178] Steinmetz v. Valdez, 72 Phil. 92 (1941).

products is engaged in industry within the meaning of the law and is therefore subsidiarily liable for the criminal acts of his chauffeur.[179]

Where all the requisites mentioned in the law are present, subsidiary liability of the employer attaches regardless of his having exercised all the diligence of a good *paterfamilias* to prevent damage. This defense is not available to the employer because his liability is based on the negligence as a crime and not as a quasi-delict. It being a crime, the Revised Penal Code applies; and under the said Code there is no such defense. This rule is so well settled in Philippine jurisprudence that no further elucidation of the same need be made.

We have previously shown that there is a difference between the fault or negligence which causes the breach in an already existing obligation, which we termed *"culpa contractual"* and the fault or negligence which gives rise to an obligation where none existed before, which we termed *"culpa aquiliana"* or *"culpa extra-contractual"* or as it is now known by its name in the New Civil Code, "quasi-delict". One of the fundamental differences between the two is the availability to an employer of the defense of *paterfamilias* in quasi-delict and the non-availability of the same in contract. This means that, when a breach of a contractual obligation is due to an employee's fault or negligence, the fact that the employer exercised all the conceivable diligence of the best *paterfamilias* to prevent damage will not help him any.[180] It is no defense in such a case.

To warrant recovery in a breach of contract, what need be proven is the existence of the contract itself and its non-performance. Negligence is not necessary to recovery. This is so because the bond that gives rise to the obligation is the contract itself. The obligation is already there. The negligence does not give rise to the obligation in the same manner that it does in quasi-delict. If negligence is not a prerequisite to recovery, then it is immaterial whether the employer has observed the diligence of a good father of a family to prevent damage. Whether he did or not will not discharge him from liability.

An elucidating rationalization of the difference between the two rules is given by the Philippine Supreme Court thus:

> ....If the negligence of servants or agents could be invoked as a means of discharging liability arising from contract, the anomalous result would be that persons acting through the medium of agents or servants in the performance of their contracts, would be in a better position than those acting in person. If one delivers a valuable watch to a watchmaker who contracts to repair it, and the bailee, by a personal negligent act causes its destruction, he is un-

[179] Telleria v. Garcia, (CA) 40 O.G. (12s) 115 (1940).
[180] Diana v. Batangas Trans. Co., 49 O.G. 2238 (1953); Barredo v. Garcia, 73 Phil. 607, 621 (1942); Cociaco v. Luzon Brokerage Co., 39 O.G. 1302 (1941); Yumul v. Pampanga Bus Co., 72 Phil. 94 (1941); Arambulo v. Manila Electric Co., 55 Phil. 75 (1930); Manila v. Manila Electric Co., 52 Phil. 586 (1928).

questionably liable. Would it be logical to free him from his liability for the breach of his contract, which involves the duty to exercise due care in the preservation of the watch, if he shows that it was his servant whose negligence caused the injury? If such a theory could be accepted, juridical persons can of necessity act through agents or servants, and it would no doubt be true in most instances that reasonable care had been taken in the selection and direction of such servants.[181]

This is a principle which is basic in Philippine tort law and which has consistently been adhered to by the courts.[182]

VIII. The Parties Involved

1. *In the Common Law*

Although the source of the master's liability in *respondeat superior* is the tort of the servant, still the principles involved are more of agency rather than tort. The reason appears to be the relationship of principal and agent, more accurately, of master and servant. The relationship of master and servant is a fluid concept. It is not capable of exact definition. Its importance may be gleaned from the fact that it is one aspect of the common law which is classified as a distinct tributary of the law. That is why we often hear of the law of "Master and Servant."

The Philippine legal system does not have a distinct classification or sub-division of the law as that of "Master and Servant" as such. Some facets of the relationship between employer and employee may be covered by the provisions of the New Civil Code on Agency, or lease of services or contracts in general. Liabilities of the employer to third persons for the quasi-delicts of his employee are governed by the code provisions on quasi-delicts. Those arising from his subordinate's crimes are regulated under the Revised Penal Code.

Coming back to the common law, since we said that there is a principle of agency involved, it would be worthwhile to proceed along that line. Agency, as defined in the Restatement, is the relationship which results from the manifestation of consent by one person to another that the other act on his behalf and subject to his control, and consent by the other so to act

[181] Cangco v. MRR, 38 Phil. 768, 772 (1918).

[182] *Ibid.*; San Pedro Bus Line v. Navarro, 4 ATENEO L.J. 335 (1954); Castro v. Acro Taxicab Co., 46 O.G. 2023 (1948); Barredo v. Garcia, 73 Phil. 607, 621 (1942); Smith v. Cadwallader Gibson Lumber Co., 55 Phil. 517 (1930); Del Prado v. Manila Electric Co., 52 Phil. 900 (1929); Lasam v. Smith, 45 Phil. 657 (1923); Robles v. Manila Electric Co., 41 Phil. 881 (1921); De Guia v. Manila Electric Co., 40 Phil. 706 (1920); MRR v. Compañia Transatlantica, 38 Phil. 875 (1918); Rakes v. Atlantic Gulf & Pacific Co., 7 Phil. 359 (1907).

The one for whom action is to be taken is the principal. The other who is to act is the agent.[183]

A master is a principal who employs another to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is a person employed by a master to perform service in his affairs and whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master.[184] The English law is much of the same concept.[185]

Master is a species of principal; servant a species of agent. But agent is wider in scope than servant. All servants are in some respects the agents of their masters, but not all agents are servants.

Servant should also be distinguished from independent contractors. An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking.[186] Although the "right to control" seems to be the basic difference between the two, still there are many variable factors which enter into the solution of a particular problem that no fixed rule can be laid down to govern same. Among the many considerations which are taken into account are: the extent to which the employer may give orders as to the details of the work; the employer's business or occupation; the custom of the community; whether the employer supplies the tools of employment; length of employment; method of payment; right of the employer to terminate the employment; who has the chance of profit and who bears the loss; the intention of the parties;[187] and many more. These factors are mainly questions of fact which are left for the determination of the jury. It is hornbook law that an employer is liable for the torts of his servant but not for those of his independent contractor — subject, as always, to a few exceptions.

[183] RESTATEMENT, AGENCY § 1 (1933).

[184] *Id.* §§ 2 (1) & (2); 220 (1). See also MECHEM, OUTLINES OF THE LAW OF AGENCY 12-13 (1952) (hereinafter cited as MECHEM.)

[185] "A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or, as it has been put, 'retains the power of controlling the work.'" POLLOCK, TORTS 62 (1951).

"A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer in respect of the manner in which his work is to be done." *Id.* at 62-63. See also SALMOND, TORTS 15(10th ed. 1945); BATT, THE LAW OF MASTER AND SERVANT 5-7 (4th ed. 1950).

[186] RESTATEMENT, AGENCY § 2 (3) (1933).

[187] *Id.* § 2 (2); PROSSER, HANDBOOK OF THE LAW OF TORTS 471-75 (1951) (hereinafter cited as PROSSER); TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT 101-04 (2d ed. 1924) (hereinafter cited as TIFFANY).

2. *In the Philippine Law*

The counterpart of the common-law master in Philippine law is the owner and manager of an establishment or enterprise, or an employer, whether he be engaged in business or industry or not. The counterpart of servant is the employee or household helper.

It is interesting to note that the New Civil Code does not use the term servant. The old Code did not, likewise. Maybe it is because the legal significance of the term is so far removed from reality. Domestic servants in the Philippines are a common and accepted phenomenon in the social structure. We believe however that this should not be so. The earlier they are raised to the next rung of the ladder of social life, the better for all the people as a whole.

In American law though, the common meaning of the term is closed to its legal concept. Captains of vessels are regarded as a superior class of servants while domestic servants are a vanishing, if not a vanished, class.

A significant change in the old Code has been introduced by the present one. The ambit of vicarious liability has been widened to include within its broad sweep employees and household helpers under the employ of employers even though the latter are not engaged in business or industry.[188] Under the old Code, only the owners or directors of an establishment or business are liable. So under the regime of the said Code, a law professor could not be proceeded against for the negligent acts of his chauffeur. Under the present Code, he may be.

Another point of difference between the two codes in this respect, which is more apparent than real, is the use of the phrase "owners and managers" — in the present Code in lieu of the old one, "owners or directors". The change which is confusing is not so much the substitution of the word "directors" by "manager" — because the Spanish original of the Code uses the term *"directors"* which, under present commercial conditions in the Philippines means managers — but the use of the word "and" instead of "or".

Under the present provision, must one be an owner *and* at the same time a manager of an enterprise in order to fall within the purview of article 2180? It is of common knowledge that the ownership of most enterprises

[188] The old code provides in article 1903 (4): "Owners or directors of an establishment or business are equally liable for any damages caused by their employees while engaged in the branch of the service in which employed, or on the occasion of the performance of their duties."

The corresponding provision in the present code is par. 4 of article 2176. However, a new paragraph, the fifth paragraph has been added. The provision reads: "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."

is divorced from the management thereof. To interpret the provision literally would mean that one must be owner and manager at the same time to be liable. This would not be consistent with the spirit and intention behind the New Civil Code because, as was just stated, the inclusion of paragraph 5, referring to employers not engaged in business, clearly shows an intention to widen the scope of the rule and not restrict it. But can the manager of a corporation, alone, be held to answer for the quasi-delicts of his employees? We think not. He, himself, in contemplation of law is an agent of the corporation. The use of the word "and" is indeed unfortunate. But since the Philippine Supreme Court has not had an opportunity to pass upon the question one can only conjecture on how the court will rule on the matter.

Another observation which may be made is that since moral culpability is the ultimate basis of the employer's liability how can corporations or other juridical entities, which have no will with which to deliberate nor soul to save, be held liable? Certainly, they cannot be guilty of moral fault. Under the common law, this problem is not present because culpability does not enter into the rule of *respondeat superior;* and the reports abound with thousands of cases brought each year against corporations and judgments obtained against them.[189] Under Philippine law, although it is true that a corporation can not itself commit an act, much less, a culpable act, yet article 2180 is clear and broad enough to include juridical entities.

It is merely therefore, a matter of statutory liability. By special statutes in both systems of law, whether common or civil, corporations or juridical bodies such as partnerships or associations are being made liable for certain criminal offenses. If by fiction of law a corporation may be held to answer for a criminal offense, when the fundamental requirement of a crime (*mens rea*) is absent, with more reason may it be held liable in damage on tort although moral culpability is generally required of the latter. The long-continued and unquestioned practice of suing corporations for the quasi-delicts of their employees followed by the Philippine Bar and sanctioned by the Supreme Court would make of this observation a purely moot and academic one.

It should likewise be noted that the change introduced in article 2180, paragraph 5, has not been carried over into the Revised Penal Code. It results that even if employers not engaged in business are made liable for the quasi-delicts of their employees or household helpers they cannot be held subsidiarily liable for the criminal negligence of the latter. Owners and managers of establishments or enterprises are therefore discriminated against in that a subsidiary liability is imposed upon them by the Revised Penal Code for the crimes of their employees. Lastly, no definitions is made

[189] 2 WARREN, NEGLIGENCE 157 (1941).

in the New Civil Code of the owner and manager, employer, employee or houshold helper. No such definition was likewise made in the old Code. It may be safely assumed that the legislator means it thus to be. As is the usual way with codes, each term is used in its widest concept to allow the courts enough room to suit the law to the particular facts and circumstances of each case and be able to keep it attuned to the march of time and progress. The experience of the Philippine Supreme Court in the last fifty years under the old Code is an optimistic indication that the absence of any definition of the persons mentioned in article 2180 will not be an obstacle in the resolution of problems that might come before the court under said provision of law. This optimistic note stems not from any settled judicial pronouncement on the matter but amusingly enough from the fact that there is a total dearth of jurisprudence on this point — which implies that the terms, as they are, are sufficiently clear enough without the aid of judicial interpretation.

IX. Acts of the Servant or Employee Covered by the Rules of Vicarious Liability in Both Systems

1. *In The Common Law*

Having determined who is the master, servant, agent and independent contractor, the next field of inquiry is the consideration of the acts of the servant for which the master is liable.

The general rule, as previously stated, is that the master's vicarious liability extends to the tortious acts of his servant committed within the "scope of the employment". This latter phrase, which has been variously rephrased as "scope of authority" or "course of employment" of other similar words, has been referred to by Professor Seavey as being merely "an elastic phrase . . . which may be used to include all which the court wishes to put into it",[190] and by Dean Prosser as "a highly indefinite phrase, which . . . . . is no more than a bare formula to cover the uncommanded acts of the servant for which it is found to be expedient to charge the master with liability."[191]

However vague the concept may be there have been guideposts around it to indicate its true meaning. The word "employment" means the subject matter as to which the master and servant relationship exists. The phrase "scope of employment" means the extent of this subject matter and denotes the field of action within which one is a servant.[192]

[190] Seavey, *Speculations as to "Respondeat Superior,"* in Studies in Agency 155 (1949).
[191] Prosser 475-76.
[192] Restatement, Agency § 228 n. (a) (1933).

In general, the servant's conduct is within the scope of employment if it is of the same general nature as that authorized, or is incidental to the conduct authorized, occurs substantially within a period which is not unreasonably disconnected from the authorized period and in a locality not unreasonably distant from the authorized area, and is actuated, at least in part, by a purpose to serve the master.[193] In slightly modified form, Tiffany refers to this rule as the "motivation-deviation" test.[194] In determining whether or not the conduct of the servant, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, some matters to be considered are: the frequency of servant's act; the time, place and purpose of the act; the previous relations between the master and the servant; the extent to which the business of the master is apportioned between different servants; whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; whether or not the master has reason to expect that such an act will be done; the similarity in quality of the act done to the act authorized; whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; the extent of departure from the normal method of accomplishing an authorized result; and whether or not the act is seriously criminal.[195]

In the introductory statement, it is stated that this paper will not cover the subject of "frolic and detour". A few words on it though will be of some help. The phrase and the law woven around it stems from the classic and famous ruling of Baron Burke in 1834 to the effect that a master is not liable for the torts of his servant who is not at all on his master's business, but is "going on a frolic of his own."[196] "From that day until the present time judges and lawyers have been wrestling with the problem of what is a frolic and what is a detour" — so says Professor Smith in his scholarly article on the subject itself: Frolic and Detour (*supra*). Various tests have been proposed as a solution to the perplexing problems involved in the principle which are beyond the scope of this paper.

We have said that under Philippine law, employers engaged in an industry are subsidiarily liable for the civil liability arising from the crimes of their servants, workmen or employees in the discharge of their duties. The common law does not have such a sweeping principle. The reason may be traced to the difference between the common law and the Philippine law on the civil liability arising from one's crime. Under the Philippine system, one criminally liable is also civilly liable. The common law has no such rule. Under it, criminal liability, of itself, does not give rise

[193] *Id.* § 228-236.
[194] Tiffany 106-07.
[195] Restatement, Agency § 229 (2) (1933).
[196] Joel v. Norison, 6 C & P 501, 503 (1834).

to civil liability.[197] The civil responsibility has to be founded on a breach of duty to the person harmed — not the breach of the criminal law.

Under the early common law, the master was not responsible for the "willful" or "intentional" torts of his servant. The basis of the decisions seems to be the "implied command" theory of vicarious liability which, if applied to the servant's wilful or intentional wrongdoing, would not hold the master liable because it could not be implied that he ever authorized such conduct. This old rule is giving way to the modern view of extending the master's responsibility for such conduct of his servant.[198]

Instances where the master may be held liable are acts of his servant amounting to assault and battery, or malicious prosecution, or illegal arrest or false imprisonment, or defamation, or misrepresentation, where the employment is of a kind likely to lead to such torts, or to furnish an opportunity and incentive for them, and the servant is motivated at least in part by a desire to serve the master.[199]

This then is the difference between the two systems regarding the intentional wrongs of the servant: Under the common law, responsibility is visited upon the master within the framework of the doctrine of *respondeat superior*, while under the Philippine law, it is based, not upon the relationship of *paterfamilias* set forth under article 2180 of the New Civil Code but under the provisions of the Revised Penal Code which expressly makes the employer subsidiarily liable for the crimes of his servants, employees or workmen.

2. *In The Philippine Law*

Professor Neuner, in making a general comparison of the common law and the French and German law on the subject of scope of employment has made the observation that if one were to judge from the enormous amount of litigation on the question of "within the scope of employment" the common-law device is not a happy one. He adds that the French and the Germans have been able to solve the problem. The French provisions in this respect is "in the exercise of the functions for which they have been employed"; while the German is for acts done "in the performance of the servant's work." The explanation given is that the French and German appellate courts have given their concepts a very broad meaning and have left their application to the lower courts which have to decide the question of fact. The German Supreme Court does not require more than that there be a connection between the servant's tort and the work incumbent upon him to do, while the French Supreme Court has gone still further by stating that the master is liable even for torts committed *"a l'occasion du travail."*[200]

[197] Lowndes, *Civil Liability and Private Action*, 27 HARV. L. REV. 317 (1914); PROSSER 205-206; Friedman, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 262 (1949).

[198] "The willfulness of the servant no longer forms a barrier to liability. This is true both in the cases where the servant is expected to use force and uses it, and in the cases where he has been specifically directed not to use force." Seavey, *supra* note 190, at 156.

[199] PROSSER 479.

How true the observation just made is with respect to the Philippine law, considering that it follows the civil-law concept, is hard to say. On this phase of the law there is again a sad lack of Philippine jurisprudence. The reason must be that in actual cases that have reached the courts, counsel for the defendants have often, if not always, relied upon the defense of a good *paterfamilias* rather than fall back upon a doubtful defense using as a shield the "scope of employment" doctrine. Unless the facts are so clear that there is no relationship of employer and employee, such as where the defendant's truck is driven by a stranger,[201] or the subordinate's conduct is obviously not in the service or on the occasion of his functions, defense lawyers would rather lean on the defense of the employer's having exercised the diligence of a good father of a family to prevent damage.

The common law, on the other hand, has built on the problem of "scope of employment" a mass of material. The area that has been cultivated by judicial decisions is this precise one involving conduct of the servant within or without the "scope of employment." This was to be expected because the rule is one of strict liability on the master. The best possible avenue of escape for him is in the doubtful field revolving around the principle of "scope of employment." Defense lawyers, it may be safely assumed, concentrated their line of fire on this area, thus resulting in a wealth of jurisprudence on the subject.

Back to the Philippine law, we again reproduce, for convenience, the pertinent portions of article 2180, paragraphs 4 and 5:

> . . .
>
> 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 enterprise.

The fifth paragraph is a new one. The old provision, as it stood before the present Code took effect, read:

[200] Neuner, *Respondeat Superior in the Light of Comparative Law*, 4 LA. L. REV. 1, 34 (1941). It is to be noted that the French law on the master's vicarious liability is one of strict liability and is similar to the common law rule of *respondeat superior*. The German law states the civil law of *paterfamilias*.

[201] Duquillo v. Bayot, 67 Phil. 131 (1938).

Owners or directors of an establishment or business are equally liable for any damages caused by their employees while engaged in the branch of the service in which employed, or on the occasion of the performance of their duties.[202]

Viewed from the point of view of the principal or the person who is being held liable, the two paragraphs of article 2180 when compared with each other show that the fifth has a wider scope than the fourth. It includes all employers, whether they be engaged in a business or industry or not. The mere fact that there is an employer and employee relationship, the other requisites being present, is sufficient to impose liability upon the employer. The fourth paragraph has a narrower scope because it is restricted in its operation to owners and managers of an establishment or enterprise.

The same paragraphs of the same article when viewed from another aspect, that of the area of the employee's conduct, show that the fourth appears to be broader. The area of risk to the owner of an establishment under paragraph four includes the tortious conduct of the employee committed not only "in the service of the branches" of his employment but also "on the occasion of their functions". Paragraph five refers merely to acts "within the scope of their (the employee's or household helper's) assigned tasks." It is submitted that acts committed by employees "on the occasion of their functions" may not fall "within the scope of their assigned tasks". The latter is included in the former, but not vice-versa. This interpretation would be more in consonance with the spirit of the whole article.

Many employers who, under the old Code, were not made liable for the negligent conduct of their employees, are now made so by paragraph five. Most everyone who has an employee, including the housewife who has a household helper, come within the purview of this paragraph. If a more careful supervision and superintendence is the purpose of the provision then these employers should only be made liable for the wrongful conduct of their employees within the scope of their assigned tasks and not beyond

[202] The Spanish text of the Civil Code of Spain of 1889 in force in the Philippines before the present Code took effect in 1950 controls over the English translation. Paragraph four reads:

"*Lo son igualmente los dueños o directores de un establecimiento o empresa respecto de los perjuicios causados por sus dependientes en el servicio de los ramos en que tuvieran empleados, o con ocasion de funciones.*"

[203] Thus, under the old code, in the case of *Johnson v. David*, 5 Phil. 663 (1906), the owner of a carriage which injured a pedestrian while driven by his driver and when the owner was not riding the conveyance, was held not liable for the negligent act of his driver. In a later case, *Chapman v. Underwood*, 27 Phil. 374 (1914), which involved an injury to a person because of the negligence of defendant's chauffeur in driving defendant's car while said defendant was in said car, the court held that the defendant employer was not liable because he was merely a private employer and did not fall within the provision of article 1903 (4) which referred merely to owners of establishments or enterprises.

because it is only within that area that they can better supervise them.

It is quite perplexing why paragraph four speaks of "establishment or enterprise" without mentioning whether same should be for business or industry while paragraph five speaks of "business or industry". Literally, an establishment or enterprise does not necessarily mean that it is engaged in business or industry. However, when the two paragraphs are construed together, the meaning that paragraph five lends to paragraph four is that the establishment or enterprise should be for business or industry. This is the construction put by the courts upon the old provision (article 1903 par. 4) when it stood alone.

The term "industry" has been defined as:

> . . . any department or branch of art, occupation or business; especially, one which employs much labor and capital and is a distinct branch of trade; as the sugar industry.[204]

One might probably wonder too why paragraph four uses the words "in the branch of the service in which employed". This slight excursion in semantics may be explained by the fact that the phrase in the present Code is a literal translation of the Spanish text of the old Code which run, "en el servicio de los ramos en que tuvieran empleados".

In the case of *Cerezo v. Atlantic, Gulf & Pacific Co.*,[205] the deceased was employed by defendant company as a laborer to lay pipes in trenches. His work was at the west end of the tunnel where the gas pipes were laid but he went to the east end to answer a call of nature. The tunnel, about 3 to 4 feet deep, caved in and the employee died of suffocation. The Philippine Supreme Court in absolving the defendant company from liability held that the employee's death was not within the scope of the employment of the latter. It said that the deceased was at a place where he had no right to be; that his work did not call him there; and that he was there for a purpose of his own, not in connection with his work.

In the celebrated case of *Cuevo v. Barredo*,[206] which involved the Philippine Employer's Liability Act but which nevertheless helps cast some light on the subject under discussion, the facts showed that the foreman of defendant employer, upon seeing a log belonging to the latter being carried away by the strong current of a river, warned his laborers to recover it lest they be made to pay for it. The deceased laborer, who knew how to swim, jumped in obedience to the order and was drowned. It was held that the act of the foreman, though negligent, was within the scope of his duties of superintendence over the laborer and thus made his employer liable in damages to the heirs of the deceased.

[204] Telleria v. Garcia, (CA) 40 O.G. 115 (1940).
[205] 33 Phil. 425 (1916).
[206] 65 Phil. 290 (1938).

X. Conclusion

1. *Summation of the Rules of Vicarious Liability in Both Systems*

Before we attempt to draw any conclusion it would be well to clear the ground first and make a brief survey of what has been covered.

The common-law rule is often referred to as the doctrine of *respondeat superior*. It holds the master liable for the tortious conduct of his servant committed within the scope of the latter's employment. The master's responsibility is a vicarious liability in its truest sense because he is made liable regardless of whether he is at fault or not.

The modern basis of the rule seems to be public policy more particularly the entrepreneur theory, which takes into account the present progress made in the commercial and industrial world and visits liability upon the master because he can better bear the burden than the injured stranger and is in a better position to protect himself from the liability by insurance or spread and distribute the loss by increased prices in his goods or services.

The acts of the servant for which the master is held liable are those within "the scope of employment". It is in this particular area where the problems and difficulties come in. Hence, no definite rule has, as yet, been evolved to test whether an act is within or without the scope of employment. Each case is to be judged under its own facts.

Once the relationship of master and servant is established and it is shown that the servant's act is tortious, results in harm to the plaintiff, and is within the scope of employment, the rule applies and the master is liable. His liability and that of his servant is joint and solidary. He may however recover from the servant whatever he has paid. In actual practice, he does not do so, more specially when there is an insurance coverage.

The employer or owner and manager of an establishment or enterprise under Philippine law may be held liable for the wrongful acts of his employee or servant either under the civil law or under the criminal law. His civil law liability is governed by the New Civil Code; while his civil liability arising from a crime, which is a subsidiary liability, is governed principally by the Revised Penal Code.

Under the New Civil Code, the subordinate's act must amount to a quasi-delict, which is the fault or negligence of one who causes damage to another by his act or omission, there being no pre-existing contractual relation between the wrongdoer and the one who suffers harm. With respect to the owners and managers of an establishment or enterprise or employers who are engaged in business or industry, the quasi-delicts of their employees

for which they may be held liable are those committed in the service of the branches in which the latter are employed or on the occasion of their functions. Other employers not falling within this group are liable for the damages caused by their employees or household helpers acting within the scope of their assigned tasks. However, the principal, in any of these cases, is not liable if he proves that he has observed all the diligence of a good father of a family to prevent damage.

The subsidiary liability of the principal under the Revised Penal Code is imposed if the subordinate's act amounts to a crime and he is convicted and is found insolvent. The principal's liability is subsidiary; not direct and immediate as under the New Civil Code. However, under the Revised Penal Code, the defense of having exercised all the diligence of a good *paterfamilias* can not be availed of by the principal. Principal here, includes employers, persons and corporations engaged in any kind of industry. The criminal acts for which they are held subsidiarily responsible must be felonies, not misdemeanors. Said acts must be committed in the discharge of the duties of the subordinate, be he a servant, workman, apprentice or employee.

2. *The Future of Respondeat Superior in the Common Law*

Aside from the philosophical and doctrinal criticisms levelled against the doctrine, which have been mentioned earlier, there have been objections based on more practical considerations.

The criticism has been made that the operation of the rule subjects the employer to a heavier burden than is laid upon him in most systems of jurisprudence, as in the Philippines for instance.[207] It is unjust in that the employer is subjected to liability even in cases where he is not at fault. The answer to this is that the added burden is an added cost to the operation of a business or enterprise. "The price of action is liability for harm caused by it."[208] This is not the only case of liability without fault in the law. Cases involving trespass under a mistake as to ownership or consent, straying animals, the undertaking of extra hazardous activities and some aspects of defamation are instances of liability without fault.[209] Workmen's Compensation and Employer's Liability Acts are precisely based on the same principle as *respondeat superior*.

To the charge that the master is not the "cause" of the harm — why make him liable? Professor Seavey answers that although he may not be

[207] Burdick, *Is Law the Expression of Class Selfishness?*, 25 HARV. L. REV. 349, 371 (1912).
[208] Seavey, *supra* note 190, at 144.
[209] Harris, *Liability Without Fault*, 6 TUL. L. REV. 337, 366 (1932); Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911); Takayanagi, *Liability Without Fault in the Modern Civil and Common Law*, 16 ILL. L. REV. 163, 268 (1921), 17 ILL L.REV. 185, 416 (1922-23); PROSSER 428-31; Seavey, *supra* note 190, at 140-45.

the direct and immediate cause yet, he is still the legal cause of the harm. In many instances, harm is caused by an instrumentality given to the servant by the master. Here, it may be said that the master has caused, in a reasonably direct sense, the resulting harm.[210] Then, too, by the application of the rule which requires that the servant's conduct must be within the scope of employment, the link of "causation" between the master and the harm is maintained.

It may also be said that the rule is unfair to the small entrepreneur. To make him liable might be the ruin of his entire business. In such a case, the doctrine would just shift the burden from one who cannot bear it to another who likewise is in the same financial status as the other. One does not accomplish anything by doing that. In actual experience, this is not so. The entrepreneur may secure insurance to absorb the risk. He can spread the cost of buying the protection through his business. Usually, injured persons are not covered by insurance. And if they are, they are not in such a better position as the entrepreneur who has his business through which to distribute the burden.

But then it might be said that if it is the public which must ultimately pay why not have state insurance take care of such losses? The fund may be raised by taxation or an assessment on industry. This suggestion is not novel. As early as 1881, Holmes posed the same question and answered it by saying that such an insurance can be better and more cheaply accomplished by private enterprise. He adds: "State interference is an evil where it cannot be shown to be good."[211] Writing in 1934, Professor Seavey says that he heartily subscribes to Holmes' theory.[212] The further observation has been made that this might be branded as being socialistic. Besides, it would be impractical because it might tend towards minimizing prevention of accidents. Under the present rule, since the master is being made strictly liable, he endeavors to keep his accident costs low.[213]

[210] Seavey, *id.* at 132.
[211] HOLMES, THE COMMON LAW 96 (1881).
[212] Seavey, *supra* note 190, at 151 n. 41.
[213] MECHEM 244. Bentham too is opposed to insurance by the state. He says:

"But all kinds of insurance are exposed to great abuse from fraud or negligence; fraud on the part of those who feign or exaggerate losses for the sake of obtaining indemnities not due; negligence on the part of the assurers in not taking proper precautions, or on the part of the assured, who use less diligence in protecting themselves against losses which are certain to be made up.

"In a system of satisfactions at the public expense we have, then to fear —

"1st. A secret connivance between the party pretending to be injured and the author of the pretended offense to obtain an indemnity not due.

"2nd. Too great security on the part of the individuals, who, not having the same consequences to fear, will no longer make the same efforts for the prevention of offenses." Bentham, *Principles of the Penal Code, Part II*, in READING IN JURISPRUDENCE AND LEGAL PHILOSOPHY 276-77 (Cohen & Cohen ed. 1951).

On the same topic, it would be worthwhile to mention the trend in Britain. A comprehensive system of social insurance has been attempted with the enactment of legislation, the most important of which are the National Insurance Act of 1944; the National Insurance (Industrial Injuries) Act of 1946; the National Health Service Act of 1946; and the Law Reform (Personal Injuries) Act of 1948. Among them, these acts provide a comprehensive system of minimum grants, insuring everybody, regardless of personal and financial status, against the major vicissitudes of modern life, and providing a bare minimum subsistence, but no more.[214] But even under these acts, the employer is not insulated from liability. He is still liable, subject to certain deductions to be made under the pertinent Acts involved. In view of the comparatively recent enactment of the Acts in Britain it can not yet be determined what effect they have had on the English doctrine of *respondeat superior*. Certainly, the trend there regarding state insurance is opposite to that advocated by Holmes, Seavey and Mechem.

Some suggestions have been made to make the doctrine a more just, fair and expedient rule. One advocates the adoption of a single basis or rationale of the doctrine, same as is done by the Legislature in Workmen's Compensation Acts. If such were done, business and industry may better adapt itself to the law in the same manner that they have done so in the case of such Acts. Some new types of insurance have sprung up because of such Acts. This would happen in *respondeat superior* if its rationale were uniform among the courts. Such a single basis will furthermore simplify the solution of problems involved in "frolic and detour".[215]

Another suggestion is that the approach to the solution of a problem under the rule must be from the administration of risk concept. The compensation to the injured must be considered in its relation to the capacity of the master, to whom the loss is allocated, to bear it. Only when that capacity is measured can the scope of the liability be intelligently determined.[216]

The last one is that a study should be made on whether the present rule is conducive to economic and industrial progress. Such an attempt has, as yet, not been made.[217]

What is the future of *respondeat superior* in the common law? In English law, it seems as if the trend is for the state to bear the shock of the loss, in view of the progressive social insurance now undertaken by the state. Although the loss absorbed is only partial the master is still made to pay for the difference in the insurance benefits received from his com-

[214] Friedman, *supra* note 197.
[215] See Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929).
[216] James, *Accident Liability Reconsidered, The Impact of Liability Insurance*, 57 YALE L. J. 549-51 (1948).
[217] Douglas, *supra* note 215.

mon-law tort liability. In American law, the trend is towards increasing the scope and vigor of the doctrine. The prophesy has been made that "the courts will tend more and more to impose liability upon the one who employs others to do work for him." . . . . that we are likely to revert to the primitive rule by which liability for harm, at least of certain types, is not dependent upon either legal or moral fault," and "that until we have an entirely changed form of political organization, the principles of *respondeat superior* will not disappear."[218]

3. *The Future of the Rule of Paterfamilias in Philippine Law*

A general criticism, made not only against the rule of *paterfamilias* with respect to an employer's vicarious liability but also against the whole theory of liability based on fault in general, is that the French Code, which is the mother of all other codes, is based on an individualistic philosophy.[219] It is said to bear the influence of the Stoic philosophy. It was drafted in an era when the liberty of the individual was uppermost in the minds of men. The French Revolution gave birth to this extreme feeling of individualism and contributed in so small measure in not making a father, or teacher, or guardian liable for the negligence of the son, pupil or ward unless the former was at fault. This was carried over to the Spanish Civil Code of 1889 and this latter, to the Civil Code of the Philippines of 1949. We are now living, it is said, in a different age, with a different legal philosophy. Law should be an instrument of social control. Its end should be social order through social enginering. It is not merely the balancing of the interest of an individual as against the interest of another individual. It is the adjusting of the interest of the individual in the light of the interest of another individual, the social interests, and the public interest.[220]

The answer to this objection is that although it is true that the principle of fault enunciated in the French Code was an individualistic philosophy, the Spanish Code of 1889 adopted such principle not because it had such a philosophical basis but because of other considerations. When the Spanish Civil Code was being drafted, the Code Napoleon had already been in force for about eighty years. The Spanish codifiers were cognizant of the current topics of the age — of individualism and the social function theory of society. To strike a balance between these two philosophies was one of the problems of the Code Committee.[221] The fact that the Philippine legislature carried over into the new Code the provision of the Spanish

[218] Seavey, *supra* note 190, at 158-159. See also MECHEM 237.
[219] Duguit, *Les Transformations Generales de Droit Depuis le Code Napoleon in* 1 CONTINENTAL LEGAL HISTORY SERIES 65-78, 287-89 (1912).
[220] See POUND, THE SPIRIT OF THE COMMON LAW (1921); POUND, INTERPRETATIONS OF LEGAL HISTORY (1923); POUND, SOCIAL CONTROL THROUGH LAW (1942). Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).
[221] 1 SANCHEZ ROMAN, ESTUDIOS DE DERECHO CIVIL 590-91 (2d. ed. 1899).

Code on employer's liability would seem to show that the rule of *paterfamilias* is not inconsistent with the modern theories of jurisprudence and legal philosophy.

The observation might also be made that the French Code was enacted in an economic era which is certainly different from ours now. The drafters of the Code were said to be only very dimly aware of the coming industrial revolution.[222] The atom, jet plane, radio, television, big corporation, labor union and many other things have wrought a radical change in the social and economic life of the people. So others say, let us change the old rule of *paterfamilias* for the modern rule of *respondeat superior*.

The answer to this is that even the old French provision followed the doctrine of strict liability. The master did not have the defense of *paterfamilias*. So it is not outdated in this respect. With respect to the Spanish Code, when it was being discussed, there were already such renowned jurisconsults as Loening[223] who, as early as 1878, advocated that under special circumstances, liability should be imposed irrespective of fault. Loening was then already talking about large-scale enterprises which could absorb the loss arising from their servants' faults. The provision giving to the employer the defense of *paterfamilias* was inserted in the Spanish Code, notwithstanding the provision to the contrary in the French Code, under a full awareness of prevailing economic and legal theories not so radically dissimilar from the modern ones.

The common-law rule of *respondeat superior* has worked well in England and the United States. It has kept up with the progress of both countries. Why not change the old Roman Law doctrine of *paterfamilias* in the Philippine Code with this progressive rule? To answer this question, it should first be determined whether the new doctrine will harmonize with the social, economic and even cultural needs of the people. It is to be noted that the United States and England are highly industrialized whereas the Philippines is primarily agricultural. The former countries have a highly developed economy; that of the Philippines is under-developed. The great strides made by the former in the economic and scientific fields and the indispensable role of the corporation in their commercial world have placed them in a stage of achievement which may yet be long in coming to the Philippines. Because of the difference in the economy, the social structure too exhibits marked differences. Should a rule which is suitable to the first two countries be made to govern the relations of a people living under different economic and social conditions? It is submitted that it would be advisable not to do so, especially so when one considers that the civil law rule has been the law for quite some time in the Philippines.

[222] VON MEHREN, A PROBLEM IN THE LAW OF TORTS 119 (Multilith 1953); Takayanagi, *supra* note 209, at 167-68.
[223] 12 MANRESA 654.

It is precisely on economic grounds that the retention of the doctrine of *paterfamilias* in the present Code may be anchored. The chief problem of the Philippine Republic is economic. Economic development will be facilitated by industrialization. New industries should be encouraged. It is with this end in view that the Government has eased restrictions on import control in the case of productive and dollar-producing items and has granted tax exemptions to new industries. The enforcement of the rule of *respondeat superior* in the country will saddle industry and business with an additional burden.

It is the young industries which profit most from the rule of *paterfamilias*.[224] Old and established enterprises can bear the brunt of losses occasioned by their neglectful employees. An infant business will crumble with the first crushing blow of a tort loss. Care and prudence will be the insulation against such risk of loss. To this extent, the present rule in the Philippines is more conducive to an early industrialization of the country and the eventful improvement of its economy.

A disadvantage to the plaintiff is the difficulty of refuting claims and proof of the employer to the effect that he exercised all the diligence of a good *paterfamilias* to prevent damage. Usually, the proof is always within the exclusive possession and control of the employer. Although access to the same may be had through the processes of discovery and by the use of the *subpoena duces tecum* the difficulties entailed in such a procedure are almost painfully insurmountable. Does this situation militate against the position of the plaintiff? Maybe. But he has a weapon to overcome the same. He may file a criminal case against the negligent employee and bring the case under the Penal Code where the defense of *paterfamilias* is not available to the employer.

In the ultimate analysis therefore, the problem would be reduced to a mere question of proof. To evade the obstacle of having the ground of *paterfamilias* used as a defense against his claim the plaintiff will proceed under the Revised Penal Code. But to convict the errant employee in a

[224] Seavey, *supra* note 190, at 136-37 n. 15.
However, it all depends on how the courts will react under the social and economic conditions prevailing during one particular era. Neuner says that the tendency of the German Supreme Court has been toward the imposition of stricter liability. It has imposed a standard of care in the selection of servants which has been increasingly higher and higher. If all employers were to comply with these requirements as judiciously defined, a servant who once committed a tort would find it extremely difficult to find another employment. An unexpected consequence of this continual raising of the standard of care was the unfair advantage which was gained by large enterprises over small employers. The larger businesses, through their efficient bureau of appointment or personnel, are capable of substantiating the defense of a careful selection with facts, while the little employer, who acts in a more haphazard way, is rarely in a position to do this. The resulting preference of the large employer has been criticized by legal writers, and even by the Supreme Court. Neuner, *supra* note 200, at 7-8.

criminal case, proof beyond reasonable doubt is required. Whereas, if the action were brought under the New Civil Code, only a preponderance of evidence is necessary. But here, the defense will lie. In other words, if the plaintiff goes one step further than the civil proceeding, if he furnishes that *quantum* of proof sufficient to convict in the criminal proceeding, then he is sure of having a judgment against the employer if the servant is insolvent. If he follows the circuitous process of the criminal law then the end result would be as if the doctrine of *respondeat superior* under the common law were applied. The Philippine rule is harsher to the servant because he will have to suffer the penalties that go with criminal conviction.

Since the New Civil Code of the Philippines is comparatively recent, it may be reasoned out that the continuance of the doctrine of *paterfamilias* from the old Code is a matter of legislative policy. It cannot even be said that Article 1903 of the old Code has been reproduced in Article 2180 of the new one by inadvertence. Paragraph five has been added to the new provision and minor changes of phraseology have been made in paragraph four. This indicates that the rule of *paterfamilias* in respect to the liability of owners and managers of establishments or enterprises or employers for the quasi-delicts of their employees shall remain in Philippine law for quite some time.

4. *A Suggested Rule*

Though the rules in both systems seem to work, yet it cannot be said that they do not work occasional hardship now and then to some parties. Courts records in the countries which follow the common-law rule will surely show many masters who have been visited with responsibility and who were not able to shift the burden because they had no insurance coverage and were ruined by the first loss. Philippine experience is replete with instances of persons who have suffered damages through the negligent conduct of employees and who were not able to recover anything, because, as usual, the employee was insolvent and the employer went scot free through the usual escape hatch — *paterfamilias*. Or if the injured preferred to go *via* the Penal Code, he was faced with having a money judgment against the employer at the price of putting the servant in jail. Experience has shown that the Filipino is loathe to exact such a pound of flesh upon a fellow-being.

Is there no middle ground? Modern French thinkers like Duguit and Demogue have come out with an application of the theory of *"solidarite social"* by advocating the idea of dividing the loss where the damage is due to nobody's fault, either by leaving the matter to the discretion of the court in each particular case, or by formulating legal rules as to how the loss

is to be divided for each particular class of cases.[225]

The Chinese Civil Code which follows the civil law theory of liability based on fault, provides that, even through the employer may be entirely free of fault, the court may still consider the relative economic conditions of the injured party and the employer, and, when justice requires, award the whole or a part of the damages. In other words, the civil liability of the employer is individualized in the same manner as punishment in the criminal law is individualized.[226]

It is believed that this principle of divided responsibility and division of the loss would be the happy compromise between the strict harshness against the master of the common-law rule and the partiality and liberality towards the employer of the Philippine law. It is not the former modified by the latter. Nor is it one limited by the other. It is the two rules together in one. It has a greater chance of being born and reared in Philippine jurisprudence because the legal climate here is conducive to the growth of such hybrids. If such an eventuality shall come to pass, then it shall be an added luster to the distinction accorded to the Philippines of being the only country except the state of Louisiana wherein the common law and the Roman Law have met and worked together hand in hand in the quest for justice itself.

[225] See Takayanagi, *supra* note 209, at 439.
"Divided responsibility causes each to have an interest in order to avoid harm, a part of the consequences of which he will bear. At the same time, in all the cases where the exact conditions, culpable or fortuitous, in which the harm produced cannot be determined, we arrive at an acceptable solution, as well for the author as for the victim; the responsibility being divided between them will be more easy to support." Demogue, *Fault, Risk and Apportionment of Loss*, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 262 (Cohen & Cohen ed. 1951), also in 13 ILL. L. REV. 310 (1918).

[226] Wu, *Two Forms of Tortious Liability in the Modern Chinese Law*, 6 TUL. L. REV. 267, 270 (1932).

SOME VEXATIOUS QUESTIONS IN THE LAW OF SUCCESSION

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I. THE FORMULA: *ISRAI*

ONE of the most difficult subjects today in the law course is the subject of "Wills and Succession." Aside from purely academic points, a seemingly insurmountable barrier in the comprehension of the law lies in the proper solution of problems.

In testamentary succession, one effective formula I use (for class purposes) in solving problems is —

I S R A I

Meaning —

I — Institution
S — Substitution
R — Representation
A — Accretion
I — Intestacy

Meaning furthermore: Apply "Institution," if proper. If this cannot be done, apply "Substitution," if this is proper. If this cannot be done, apply "Representation," if proper. If not, apply "Accretion," etc.

Illustration

Problem. *T*, a testator, died without any compulsory heir, after instituting three friends, *A*, *B*, *C*, as his heirs. The estate of ₱30,000 is about to be distributed. *B* and *C* are capacitated and are willing to accept, but *A* had *predeceased* *T*. *A*'s share is claimed by the following:

(a) *S* — a sister of *T*, who was not given anything in the will, and who says she is "intestate heir."

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