Blame Game: Determining Contributory Negligence

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I. INTRODUCTION

The concept of *contributory negligence* is important in quasi-delict cases because it determines whether or not a plaintiff can recover damages.[1] Under Philippine law, if the plaintiff is guilty of contributory negligence, the amount of damages he or she can recover will be reduced.[2] Thus, the

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1. *See* Rakes v. Atlantic, Gulf and Pacific Co., 7 Phil. 359, 375 (1907).
2. An Act to Ordain and Institute the Civil Code of the Philippines [CIVIL CODE], Republic Act No. 386, art. 2179 (1950) & ROMMEL J. CASIS, ANALYSIS OF LAWS AND JURISPRUDENCE ON TORTS AND QUASI-DELICTS 254 (2012)

defendant can invoke contributory negligence on the part of the plaintiff to reduce the amount of damages he or she is liable.[3] The plaintiff himself or herself may invoke it if it is clear that he or she was negligent but would like to avoid not being able to recover damages at all, should the court find that his or her negligence was the proximate cause of his or her own injury.

And yet, despite its importance, the law does not define contributory negligence, and the jurisprudence on this concept remains to be unclear. As can be seen in the following discussion, the definitions offered by jurisprudence are simply unacceptable as they fail to distinguish contributory negligence from proximate cause.

In other cases, the Supreme Court, while mentioning a definition, fails to explain how the facts fit the definition.[4] There are cases where the Court simply ruled that a plaintiff is guilty of contributory negligence without explanation.[5] A number of questions remain unanswered by jurisprudence.

Does it necessarily follow that there is contributory negligence on the part of the plaintiff if both parties are negligent and the negligence of the defendant is found to be the proximate cause? Is it only the magnitude of the negligence that should be considered, or should it be also proven that the plaintiff's own negligence actually contributed to his or her injuries? In other words, is it sufficient that the plaintiff was negligent to make him or her liable for contributory negligence, or is it necessary that his or her negligence be "linked" to his or her injuries? If it should be linked, should it be a causal link as some cases suggest?

The answers to all these questions require the clarification of the concept of contributory negligence.

After explaining the effect and rationale for the concept of contributory negligence, this Article surveys the various jurisprudential definitions of contributory negligence, analyzes how these are applied, and evaluates their

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[hereinafter CASIS, TORTS AND QUASI-DELICTS] (citing National Power Corporation v. Heirs of Noble Casionan, 572 SCRA 71, 82 (2008) & Lambert v. Heirs of Ray Castillon, 452 SCRA 285, 293 (2005)).

3. CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 239.

4. *See, e.g.*, Philippine National Construction Corporation v. Court of Appeals, 467 SCRA 569, 584-85 (2005) & *National Power Corporation*, 572 SCRA at 81-83.

5. *See, e.g.*, Del Prado v. Manila Electric, Co., 52 Phil. 900, 905-06 (1929); Mendoza v. Soriano, 524 SCRA 260, 270 (2007); & Sabido and Lagunda v. Custodio, 17 SCRA 1088, 1091 (1966).

appropriateness. The Article then discusses the relationship between contributory negligence and the doctrines of last clear chance and assumption of risk. The Article ends with an explanation as to how contributory negligence should be determined in every case.

II. THE APPLICATION OF CONTRIBUTORY NEGLIGENCE

A. Mitigation of Damages

The Civil Code provides for the consequences of contributory negligence in two places. The first is found in Article 2179 in the chapter on quasi-delicts. It provides that

> [w]hen the plaintiff's own negligence was the immediate and proximate cause of his [or her] injury, he [or she] cannot recover damages. But *if his* [*or her*] *negligence was only contributory*, the immediate and proximate cause of the injury being the defendant's lack of due care, *the plaintiff may recover damages*, *but the courts shall mitigate the damages* to be awarded.[6]

Thus, a case for quasi-delict with contributory negligence on the part of the plaintiff has the effect of mitigating or reducing the amount of damages he or she is entitled to in case of a successful suit.[7] This Article also demonstrates the importance of determining whether the negligence of the plaintiff is the proximate cause of the injury or if it only constitutes contributory negligence. If the negligence of the plaintiff is the proximate cause, then he or she cannot recover damages; but if his or her negligence is only contributory, then he or she can still recover reduced damages.[8] To be able to apply this rule justly, the standard for determining whether the plaintiff's negligence is the proximate cause or contributory negligence must be clear. The two concepts must be clearly distinguishable.

The second time that contributory negligence is mentioned in the Civil Code is on the chapter on actual or compensatory damages where, "[i]n quasi-delicts, *the contributory negligence of the plaintiff shall reduce the damages* that he [or she] may recover."[9]

Its location in the Civil Code clarifies that only actual or compensatory damages should be affected by contributory negligence. Thus, the amount of

6. CIVIL CODE, art. 2179 (emphases supplied).

7. CASIS, TORTS AND QUASI-DELICT, *supra* note 2, at 254 (citing *National Power Corporation*, 572 SCRA at 82 & *Lambert*, 452 SCRA at 293 (2005)).

8. CIVIL CODE, art. 2179.

9. *Id.* art. 2214 (emphasis supplied).

moral, nominal, or exemplary damages should not be affected by contributory negligence.

B. Not a Bar to Recovery

Under a common law system, "if a plaintiff's own negligence, however slight, contributed to the plaintiff's injuries, the plaintiff could be barred from recovering any damages from the defendant whose negligence primarily caused the plaintiff's injuries."[10] Thus, "contributory negligence will act as a complete bar to a plaintiff's recovery."[11]

This *all-or-nothing rule* is not consistent with the concept of contributory negligence in this jurisdiction. As discussed earlier, contributory negligence under Philippine law only has the effect of reducing the amount of actual damages recoverable.

Furthermore —

> The harshness of the all-or-nothing rule of contributory negligence has been superseded by *comparative* negligence, under which the plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of the defendant, and a plaintiff's recovery is reduced in proportion to the amount of his or her negligence, which is compared to the combined negligence of all defendants.[12]

Thus, under Philippine law, the doctrine of contributory negligence is more akin to the common law doctrine of comparative negligence rather than the common law doctrine of contributory negligence. Philippine courts should, therefore, be careful in applying common law definitions and standards of contributory negligence.

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10. 57B AM. JUR. 2D *Negligence* § 799 (2018) (citing Wareing v. Falk, 182 Ariz. 495, 497 (Az. Ct. App. 1995) (U.S.) & Laws v. Webb, 658 A.2d 1000, 1004 (1995) (U.S.)).

11. 57B AM. JUR. 2D *Negligence* § 799 (citing Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 606 (1998) (U.S.); Massengale v. Pitts, 737 A.2d 1029, 1032 (D.C. Ct. App. 1999) (U.S.); Hapner v. State, 699 N.E.2d 1200, 1205 (Ind. Ct. App. 1998) (U.S.); Bd. of County Commissioners of Garrett Cty. v. Bell Atlantic-Maryland, Inc., 346 Md. 160, 182 (Md. Ct. App. 1997) (U.S.); & Love v. Singleton, 550 S.E.2D 549, 551 (N.C. Ct. App. 2001) (U.S.)).

12. 57B AM. JUR. 2D *Negligence* § 799 (citing Brown v. Smalls, 481 S.E.2D 444, 450-51 (S. Ct. App. 1997) (U.S.)) (emphasis supplied).

III. HOW THE COURTS DETERMINE CONTRIBUTORY NEGLIGENCE

The Civil Code does not define contributory negligence.[13] Hence, jurisprudence must provide a definition or a standard to determine its existence.

A. Jurisprudential Definitions and Standards

The Philippine Supreme Court has cited different definitions for contributory negligence. In fact, in a number of cases, the Court mentioned multiple definitions. But, upon closer scrutiny, it can be seen that there are cases where the definition cited may not actually be the standard applied by the Court in making its ruling.

1. Conduct Contributing as a Legal Cause

A number of cases define contributory negligence as "conduct on the part of the injured party, *contributing as a legal cause to the harm* [*he or she*] *has suffered*, which falls below the standard to which he [or she] is required to conform for his [or her] own protection."[14]

Tracing the lineage of cases, it can be gleaned that the definition first appeared in the case of *Valenzuela v. Court of Appeals*,[15] where the Court cites a common law source for the definition.[16] As mentioned earlier, this

13. *See* CIVIL CODE, arts. 2176–2235.

14. *See, e.g.*, Gumabon v. Philippine National Bank, 798 SCRA 103, 127–28 (2016) (citing Valenzuela v. Court of Appeals, 253 SCRA 303, 318 (1996)); Vergara v. Sonkin, 757 SCRA 442, 453 (2015) (citing Allied Banking Corporation v. Bank of the Philippine Islands, 692 SCRA 186, 201 (2013) (citing Philippine National Bank v. Cheah Chee Chong, 671 SCRA 49, 64 (2012))); *Cheah Chee Chong*, 671 SCRA at 64 (citing *Valenzuela*, 253 SCRA at 318); Sealoader Shipping Corporation v. Grand Cement Manufacturing Corporation, 638 SCRA 488, 514 (2010) (citing Philippine National Railways v. Brunty, 506 SCRA 685, 700 (2006)); Ngo Sin Sing v. Li Seng Giap & Sons, Inc., 572 SCRA 625, 635 (2008) (citing *Valenzuela*, 253 SCRA at 318); *Heirs of Noble Casionan*, 572 SCRA at 81–82 (citing Estacion v. Bernardo, 483 SCRA 222, 234 (2006)) (emphases omitted); *Philippine National Railways*, 506 SCRA at 700 (citing *Valenzuela*, 253 SCRA at 318); *Estacion*, 483 SCRA at 234 (citing *Valenzuela*, 253 SCRA at 318); & *Philippine National Construction Corporation*, 467 SCRA at 584 (citing *Valenzuela*, 253 SCRA at 318) (emphasis supplied).

15. Valenzuela v. Court of Appeals, 253 SCRA 303 (1996).

16. *Id.* at 318 (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 451 (5th ed. 1984) (citing RESTATEMENT (SECOND) OF TORTS § 463 (1965))).

may not be proper because of the difference between common law and the Philippine civil law concept of contributory negligence.

Another problem with this definition is that it identifies contributory negligence as negligence that contributes to the *legal cause* — a term that can be interpreted as the equivalent of *proximate cause*.[17] Thus, defining contributory negligence as contributing to the legal cause is confusing because it can be interpreted to mean that contributory negligence is *part of* proximate cause. How then can it be distinguished from proximate cause? As mentioned earlier, the application of Article 2179 requires that the two concepts must be clearly distinguishable.

It can be argued that in a case where this definition is initially invoked and where the injured party may have been guilty of some negligence, the courts may still be unwilling to impute negligence on the part of the injured. Perhaps the high standard is preferred by courts when they are disinclined to mitigate the amount of damages the victim is entitled to.

As earlier mentioned, the definition was first used in the case of *Valenzuela*, wherein the petitioner was severely injured when the vehicle driven by the respondent plowed into her.[18] As a defense, the respondent claimed that it was the negligence of the petitioner that led to her injury, or in the alternative, there was — at the very least — contributory negligence on her part.[19] The petitioner's negligence would have been her act of parking on a busy street in a no-parking zone.[20] It was not mentioned in the case, but it may be inferred that she was standing on the street and not on the sidewalk when the accident happened.[21] But the Court excused her from any negligence and said that she exercised "the standard reasonably dictated by the emergency."[22] Perhaps the definition was used by the Court to provide a very high standard for the application of contributory negligence. This high standard may have been motivated by the desire to allow the

17. CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 253.

18. *Valenzuela*, 253 SCRA at 309. The Court of Appeals narrated that her "left leg was severed up to the middle of her thigh, with only some skin and [muscle] connected to the rest of the body," and that she was brought to the hospital where she was found to have a "traumatic amputation, leg, left up to distal thigh (above knee)." *Id.*

19. *Id.* at 312–13.

20. *Id.* at 317.

21. *See Valenzuela*, 253 SCRA at 309.

22. *Valenzuela*, 253 SCRA at 320.

petitioner to recover fully considering the gravity of the injury she suffered as graphically narrated by the Court.

But the high standard notwithstanding, this has not prevented the Court from finding parties guilty of contributory negligence in a few cases.[23]

In *Philippine National Construction Corporation v. Court of Appeals*,[24] motorists were injured when their vehicle turned turtle because sugar canes that were managed by the petitioner were left on the road.[25] The Court affirmed the lower court's ruling that the driver of a vehicle was guilty of contributory negligence because he drove at an unreasonable speed.[26]

In *Estacion v. Bernardo*,[27] the respondent was injured while he "hung or stood on the left rear carrier of the [jeepney]" when the petitioner's vehicle hit the rear portion of the jeepney.[28] The Court agreed with the petitioner that the respondent's act of standing on the rear carrier of the vehicle, "exposing himself to bodily injury[,] [was] in itself negligence on his part."[29] It ruled that the lower courts erred when they failed to consider that the respondent was also guilty of contributory negligence.[30]

In *Vergara v. Sonkin*,[31] the respondents complained about water coming from the petitioner's property, which was "leaking into their bedroom through the partition wall, causing cracks, as well as damage, to the paint and the wooden parquet floor."[32] The Court agreed with the appellate court that while the proximate cause of the damage sustained by the respondents was the "act of the [petitioners] in dumping gravel and soil onto their property," the respondents were "nevertheless guilty of contributory negligence for not only failing to observe the two-meter setback rule under the National

23. *See, e.g.*, *Philippine National Construction Corporation*, 467 SCRA at 581-82, 584 & *Estacion*, 483 SCRA at 234.

24. Philippine National Construction Corporation v. Court of Appeals, 467 SCRA 569 (2005).

25. *Id.* at 574-75.

26. *Id.* at 584-85.

27. Estacion v. Bernardo, 483 SCRA 222 (2006).

28. *Id.* at 226.

29. *Id.* at 234.

30. *Id.*

31. Vergara v. Sonkin, 757 SCRA 442 (2015).

32. *Id.* at 446.

Building Code, but also for disregarding the legal easement constituted over their property."[33]

In *Ngo Sin Sing v. Li Seng Giap & Sons, Inc.*,[34] a building owned by one of the respondents was damaged as a result of an excavation made on the petitioner's lot by its contractor.[35] The Court found that the respondent's negligence must have necessarily contributed to the sagging of the building.[36] It agreed with the trial court's finding that they were "equally negligent in not providing the necessary foundation and reinforcement to accommodate or support the additional floors[.]"[37] Needless to say, agreeing with the trial court's conclusion that the respondent was equally negligent is problematic as this contradicts the ruling that the petitioner's negligence was the proximate cause. If they are equally negligent, how can one be the proximate cause and the other, only contributorily negligent?

In *Allied Banking Corporation v. Bank of the Philippine Islands*,[38] the petitioner collecting bank was found guilty of contributory negligence "when it accepted for deposit a post-dated check[,]" even if the drawee defendant bank cleared the check.[39] The Court held that the proximate cause was the negligence of the defendant in clearing the check.[40] But the Court also found contributory negligence on the part of the collecting bank because of its acceptance of the check for deposit "despite the one year postdate written on its face[,]" which was a "clear violation of established banking regulations and practices."[41]

In *Philippine National Bank v. Cheah Chee Chong*,[42] the respondent spouses were swindled when they deposited a check for a stranger who withdrew a portion of the amount before the clearing period.[43] The Court

33. *Id.* at 454-55.

34. Ngo Sin Sing v. Li Seng Giap & Sons, Inc., 572 SCRA 625 (2008).

35. *Id.* at 627.

36. *Id.* at 634.

37. *Id.* at 635.

38. Allied Banking Corporation v. Bank of the Philippine Islands, 692 SCRA 186 (2013).

39. *Id.* at 189.

40. *Id.* at 197.

41. *Id.* at 201.

42. Philippine National Bank v. Cheah Chee Chong, 671 SCRA 49 (2012).

43. *Id.* at 52-54.

found that, while the negligence of the bank was the proximate cause,[44] the respondents were guilty of contributory negligence.[45] It explained that the respondent "failed to observe caution in giving her full trust in accommodating a complete stranger and this led her and her husband to be swindled."[46]

In these cases, the Court did not explain why the identified negligent conduct *contributed as a legal cause*. But it may be pointed out that in these cases, the conduct complied with the *but for* test, such that the harm would not have occurred if not for the conduct of the injured party. The *but for* test determines whether a negligent act is the proximate cause.[47] Specifically, it must be an act "without which the result would not have occurred."[48] In all these cases, the injury suffered would not have happened without the negligence of the plaintiff. Thus, the question remains — if the negligence of the party complies with the *but for* test, why is it merely contributory negligence and not proximate cause?

2. Act Concurring with Defendant's Negligence

Contributory negligence has also been defined as "the act or omission amounting to want of ordinary care on the part of the person injured which, concurring with the defendant's negligence, is the proximate cause of the injury."[49]

This is perhaps the worst definition for contributory negligence as it defines the concept of contributory negligence to be the equivalent of proximate cause.[50]

The source of this definition in Philippine jurisprudence is *Ma-ao Sugar Central Co., Inc. v. Court of Appeals*,[51] which cites a Philippine law dictionary

44. *Id.* at 61.

45. *Id.* at 64.

46. *Id.*

47. CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 316.

48. Vda. de Bataclán, et al. v. Medina, 102 Phil. 181, 186 (1957) (citing 57A AM. JUR. 2D *Negligence* § 413).

49. Cayao-Lasam v. Ramolete, 574 SCRA 439, 459-60 (2008); *Heirs of Noble Casionan*, 572 SCRA at 82; & Ma-ao Sugar Central Co., Inc. v. Court of Appeals, 189 SCRA 88, 93 (1990) (citing FEDERICO B. MORENO, PHILIPPINE LAW DICTIONARY 210 (3d ed. 1988)). *See also Philippine National Railways*, 506 SCRA at 700.

50. *See* CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 253.

as its source.[52] In this case, an employee riding the cargo train of the petitioner was killed when the locomotive was derailed.[53] The allegation was that the victim was guilty of contributory negligence because he was not at his assigned station when the train was derailed.[54] The Court noted that such "might have been a violation of company rules but could not have directly contributed to his injury, as the petitioner [suggested]."[55] It added that it was "pure speculation to suppose that he would not have been injured if he had stayed in the front car rather than at the back and that he had been killed because he chose to ride in the caboose."[56] Thus, the Court did not find the victim guilty of contributory negligence.[57] It may be argued that in this case, the Court did not find any negligence at all on the part of the victim.[58] So there was no contributory negligence because there was no negligence at all.

Similarly in *Cayao-Lasam v. Ramolete*,[59] the patient, after going through a medical procedure performed by the petitioner, "was found to have a massive intra-abdominal hemorrhage and a ruptured uterus."[60] The Court found that no negligence can be attributed to the petitioner; the immediate cause of the accident resulting in the patient's injury was her own omission when she did not return for follow-up check-up, in defiance of petitioner's orders.[61] It held that the "immediate cause of [patient's] injury was her own act; thus, she cannot recover damages from the injury."[62] Hence, the Court found the patient's conduct as the proximate cause and not merely contributory negligence.[63] In this case, the concept of contributory negligence was irrelevant considering that only one party was found negligent. Therefore, there was no reason to determine which negligent act was proximate or merely contributory.

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51. Ma-ao Sugar Central Co., Inc. v. Court of Appeals, 189 SCRA 88 (1990).
52. *Id.* at 93 (citing MORENO, *supra* note 49, at 210).
53. *Ma-ao Sugar Central Co., Inc.*, 189 SCRA at 89-90.
54. *Id.* at 93.
55. *Id.*
56. *Id.*
57. *Id.*
58. *See Ma-ao Sugar Central Co., Inc.*, 189 SCRA at 93.
59. Cayao-Lasam v. Ramolete, 574 SCRA 439 (2008).
60. *Id.* at 444-45.
61. *Id.* at 459.
62. *Id.* at 460.
63. *Id.* at 459.

In *National Power Corporation v. Heirs of Noble Casionan*,[64] the Court also quoted the said definition,[65] but in its reasoning, it applied another standard.[66]

In *Philippine National Railways v. Brunty*,[67] a car collided with a train.[68] In ruling whether the driver of the car was guilty of contributory negligence, the Court noted that the driver was not familiar with the road, yet he drove "at a speed of 70 [kilometers per hour] and, in fact, had overtaken a vehicle a few yards before reaching the railroad track."[69] It said that the driver "should not have driven the car the way he did[,]" and, therefore, his act contributed to the collision.[70] Noticeably, the Court did not explicitly state that the driver was guilty of contributory negligence but implied it.[71]

3. Act Disregarding Warnings

A few cases also state that "to hold a person as having contributed to his [or her] injuries, it must be shown that he [or she] performed an act that brought about his [or her] injuries in disregard of warning or signs of an impending danger to health and body."[72] But in some of the cases that cite this definition, the Court applied another standard to rule on contributory negligence.[73]

64. National Power Corporation v. Heirs of Noble Casionan, 572 SCRA 71 (2008).

65. *Id.* at 82.

66. *See Heirs of Noble Casionan*, 572 SCRA at 83-85.

67. Philippine National Railways v. Brunty, 506 SCRA 685 (2006).

68. *Id.* at 689.

69. *Id.* at 700.

70. *Id.* at 700-01.

71. *See Philippine National Railways*, 506 SCRA at 701-02.

72. Dela Cruz v. Octaviano, 833 SCRA 238, 258 (2017); *Ma-ao Sugar Central Co., Inc.*, 189 SCRA at 93 (citing Ocampo v. Capistrano, Civil Case No. 47067-R (CA 1980) (unreported)); *Philippine National Railways*, 506 SCRA at 700; *Estacion*, 483 SCRA at 235; & Añonuevo v. Court of Appeals, 441 SCRA 24, 44 (2004).

73. *See Añonuevo*, 441 SCRA at 44-45; *Ma-ao Sugar Central Co., Inc.*, 189 SCRA at 93; *Philippine National Railways*, 506 SCRA at 700; & *Estacion*, 483 SCRA at 234-35.

One problem about this definition is that it is not clear how "an act *that brought about* [the] injuries"[74] is different from proximate cause. Furthermore, the application of this definition is limited to cases where there are warning or signs of impending danger. This danger may come from the circumstances or brought about by the negligence of the defendant. If it is the latter, this means the negligence of the plaintiff comes after the negligence of the defendant. Should this be the case, then the application of this definition can come into conflict with the doctrine of last clear chance, which would have made the subsequent negligence of the plaintiff the proximate cause and not simply contributory negligence.

The case where the Court appeared to have applied this definition is in *National Power Corporation*.[75] In this case, the respondents' son was electrocuted when the tip of the bamboo pole that he was carrying touched one of the dangling high tension wires of the petitioner.[76] The Court found no contributory negligence on the part of the victim.[77] The Court held that along the trail where the incident happened, "there were no warning signs to inform passersby of the impending danger to their lives should they accidentally touch the high tension wires."[78] Therefore, he cannot be considered to have disregarded the warning signs as there were none.

But curiously, the Court also said that the trail where the victim was electrocuted "was regularly used by members of the community."[79] If that were the case, the victim should have been familiar with the danger. In one case, the Court ruled that "[t]he presence of warning signs could not have completely prevented the accident [because] the only purpose of said signs was to inform and warn the public of the presence of [the danger]."[80] In that

74. *Dela Cruz*, 833 SCRA at 258 (emphasis supplied); *Ma-ao Sugar Central Co.*, 189 SCRA at 93 (citing *Ocampo*, Civil Case No. 47067-R (unreported)) (emphasis supplied); *Philippine National Railways*, 506 SCRA at 700 (emphasis supplied); *Estacion*, 483 SCRA at 235 (emphasis supplied); & *Añonuevo*, 441 SCRA at 44 (emphasis supplied).

75. *Heirs of Noble Casionan*, 572 SCRA at 82.

76. *Id.* at 75-76.

77. *Id.* at 80.

78. *Id.* at 83.

79. *Id.*

80. Phil. Long Distance Telephone Co., Inc. v. Court of Appeals, 178 SCRA 94, 105 (1989).

case, the injured party already knew of the presence of said danger and was, therefore, held responsible for his own injuries.[81]

4. Causal Link

A few cases require that "to prove contributory negligence, it is still necessary to establish a causal link, although not proximate, between the negligence of the party and the succeeding injury."[82] This means that contributory negligence causes but is not the proximate cause of the injury. But it is not clear what kind of cause it is.[83] One possibility is that it is a remote cause,[84] but there is no jurisprudential support for this.

In *Fuentes v. National Labor Relations Commission*,[85] the petitioner was dismissed for gross negligence by her employer.[86] She argued that there was contributory negligence on the part of her employer.[87] The Court disagreed and held that the petitioner could not invoke her employer's alleged contributory negligence "as there was no direct causal connection between the negligence of the [employer] ... and the loss complained of."[88] But a direct causal connection implies proximate causation. Is the Court applying the standard for proximate cause to establish mere contributory negligence? Or is the Court saying there can be a causal connection even though such cause is not the proximate cause? This case, therefore, raises more questions than it answers.

In *Dela Cruz v. Octaviano*,[89] the Court ruled that "the causal link between the alleged negligence of the tricycle driver and respondent Renato was not established."[90] It appears that, in this case, Renato rode at the back

81. *Id.*

82. *Dela Cruz*, 833 SCRA at 258; *Philippine National Railways*, 506 SCRA at 700; & *Añonuevo*, 441 SCRA at 44. *See also* Fuentes v. National Labor Relations Commission, 166 SCRA 752, 757 (1988).

83. CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 257.

84. *Id.* at 257-58. A remote cause is "a cause which would have been a proximate cause, had there been no efficient intervening cause after it and prior to the injury." *Id.* at 307.

85. Fuentes v. National Labor Relations Commission, 166 SCRA 752 (1988).

86. *Id.* at 755.

87. *Id.* at 756.

88. *Id.* at 757.

89. Dela Cruz v. Octaviano, 833 SCRA 238 (2017).

90. *Id.* at 259.

of the tricycle in violation of a municipal ordinance.[91] Perhaps the Court meant there was no causal link between the negligence of the tricycle driver and the injury of the respondent.[92] But the facts would seem to suggest that he may not have been injured at all if he were not riding where he was because there was no showing that the passengers inside the side car were injured at all.[93] Hence, there was a causal connection between his negligent act and his injury.

In *Añonuevo v. Court of Appeals*,[94] a car collided with a bicycle, causing serious injuries to the cyclist and necessitating him to undergo four operations.[95] The driver of the car claimed that the cyclist was guilty of negligence for failing to comply with a municipal ordinance requiring safety gadgets.[96] The Court disagreed stating that "it is hard to imagine that the same result would not have occurred even if [the] ... bicycle had been equipped with safety equipment."[97] It noted that the driver admitted having seen the cyclist "from ... 10 meters away[;] thus[,] he could no longer claim not having been sufficiently warned either by headlights or safety horns."[98] Furthermore, the fact that the driver was "recklessly speeding as he made the turn likewise [led the Court] to believe that even if [the] ... bicycle had been equipped with the proper brakes, the cyclist would not have had the opportunity to brake in time to avoid the speeding car."[99]

In these cases where the non-proximate causal link was cited, the nature of the said causal link was never defined. At best, the definition implies that there must be some connection between the negligent act and the injury. Thus, it is not enough that the plaintiff simply be guilty of negligence for the doctrine of contributory negligence to apply. The nature of the plaintiff's negligence must be such that is connected to his injury.

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91. *Id.* at 246 & 258.

92. *See Dela Cruz*, 833 SCRA at 258-59.

93. *Id.* at 243.

94. Añonuevo v. Court of Appeals, 441 SCRA 24 (2004).

95. *Id.* at 29.

96. *Id.* at 31.

97. *Id.* at 45.

98. *Id.*

99. *Id.*

B. Contributory Negligence Versus Last Clear Chance

Another issue in determining the existence of contributory negligence is the fact that it is in conflict with the concept of the doctrine of last clear chance.

Under the doctrine of last clear chance, "the negligence of the plaintiff does not preclude a recovery for the negligence of the defendant where it appears that the defendant, by exercising reasonable care and prudence, might have avoided injurious consequences to the plaintiff notwithstanding the plaintiff's negligence." [100] Furthermore, "[t]he doctrine necessarily assumes negligence on the part of the defendant and contributory negligence on the part of the plaintiff, and does not apply except upon that assumption." [101] But the effect of the last clear chance doctrine is incompatible with the doctrine of contributory negligence under Article 2179.

This was explained in *Phoenix Construction, Inc. v. Intermediate Appellate Court*.[102] In this case, the Court stated that

> [t]he last clear chance doctrine of the common law was imported into our jurisdiction by *Picart* [*v.*] *Smith*[,] but it is a matter for debate whether, or to what extent, it has found its way into the Civil Code of the Philippines. The historical function of that doctrine in the common law was to mitigate the harshness of another common law doctrine or rule — that of contributory negligence. The common law rule of contributory negligence prevented any recovery at all by a plaintiff who was also negligent, even if the plaintiff's negligence was relatively minor as compared with the wrongful act or omission of the defendant. The common law notion of last clear chance permitted courts to grant recovery to a plaintiff who had also been negligent[,] provided that the defendant had the last clear chance to avoid the casualty and failed to do so. Accordingly, it is difficult to see what role, if any, the common law last clear chance doctrine has to play in a jurisdiction where the common law concept of contributory negligence as an absolute bar to recovery by the plaintiff, has itself been rejected, as it has been in Article 2179 of the Civil Code of the Philippines.[103]

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100. *Allied Banking Corporation*, 692 SCRA at 196 (citing Bustamante v. Court of Appeals, 193 SCRA 603, 611 (1991)).

101. *Id.* at 196-97 (citing J. CEZAR S. SANGCO, PHILIPPINE LAW ON TORTS AND DAMAGES 77 (1993 ed.)).

102. Phoenix Construction, Inc. v. Intermediate Appellate Court, 148 SCRA 353 (1987).

103. *Id.* at 368-69 (citing Picart v. Smith, 37 Phil. 809 (1918); KEETON, ET AL., *supra* note 16, at 464; *Rakes*, 7 Phil. at 370 & 374; Malcolm M. MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225, 1125 & 1242 (1940); &

The Court affirmed this position in *Tiu v. Arriesgado*,[104] where it said that

> it is difficult to see what role, if any, the common law of last clear chance doctrine has to play in a jurisdiction where the common law concept of contributory negligence as an absolute bar to recovery by the plaintiff, has itself been rejected, as it has been in Article 2179 of the Civil Code.[105]

Thus, in this jurisdiction, the courts should not apply both concepts in the same case. Nevertheless, there have been instances where the Court digresses from this imperative.

In *Allied Banking Corporation*, the Court found that the respondent's negligence was the proximate cause apparently on the basis of last clear chance,[106] yet it found the petitioner guilty of contributory negligence.[107] It explained that "[a]pportionment of damages between parties who are both negligent was followed in subsequent cases involving banking transactions notwithstanding the [C]ourt's finding that one of them had the last clear opportunity to avoid the occurrence of the loss."[108]

Similarly, in *Bank of America NT & SA v. Philippine Racing Club*,[109] and in *Philippine Bank of Commerce v. Court of Appeals*,[110] the Court found both petitioner banks liable under the doctrine of last clear chance, but it also found the respondent account holders guilty of contributory negligence.[111]

In *Philippine National Bank v. F.F. Cruz and Co., Inc.*,[112] the trial court found the respondent's negligence as the proximate cause of the injury on the basis of the last clear chance doctrine.[113] This ruling was never reversed

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Fleming James, Jr., *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704, 704 & 708 (1938)).

104. Tiu v. Arriesgado, 437 SCRA 426 (2004).

105. *Id.* at 444 (citing *Phoenix Construction, Inc.*, 148 SCRA at 369).

106. *Allied Banking* Corporation, 692 SCRA at 197.

107. *Id.* at 199.

108. *Id.*

109. Bank of America NT & SA v. Philippine Racing Club, 594 SCRA 301 (2009).

110. Philippine Bank of Commerce v. Court of Appeals, 269 SCRA 695 (1997).

111. *Bank of America NT & SA*, 594 SCRA at 313-16 & *Philippine Bank of Commerce*, 269 SCRA at 707-08 & 710-11.

112. Philippine National Bank v. F.F. Cruz and Co., Inc., 654 SCRA 333 (2011).

113. *Id.* at 336-37.

by the appellate court and Supreme Court, yet both courts found the petitioner to be guilty only of contributory negligence.[114]

In *McKee v. Intermediate Appellate Court*,[115] the Court even used contributory negligence to define last clear chance.[116] It said that

> [l]ast clear chance is a doctrine in the law of torts which states that the contributory negligence of the party injured will not defeat the claim for damages if it is shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the negligence of the injured party. In such cases, the person who had the last clear chance to avoid the mishap is considered in law solely responsible for the consequences thereof.[117]

Considering that the original purpose of the last clear chance doctrine is to overcome the bar to the claim for damages of a negligent plaintiff — and such bar does not exist in this jurisdiction — the relationship between such doctrine and this jurisdiction's concept of contributory negligence should be clarified.

As explained briefly below, the doctrine of last clear chance may be used as a test for proximate causation.[118] Thus, said doctrine and contributory negligence can be applied by the courts in the same case if the former is used only as the test for proximate causation.

C. Similarity with the Doctrine of Assumption of Risk

Another issue in determining the existence of *contributory negligence* is its similarity with the concept of *assumption of risk*.

In *Abrogar v. Cosmos Bottling Company, Inc.*,[119] the Court explained that

> [t]he doctrine of assumption of risk means that one who voluntarily exposes [himself or herself] to an obvious, known[,] and appreciated danger assumes the risk of injury that may result therefrom. It rests on the fact that the person injured has *consented* to relieve the defendant of an obligation of conduct toward him and to take his [or her] chance of injury from a

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114. *Id.* at 337 & 339.

115. McKee v. Intermediate Appellate Court, 211 SCRA 517 (1992).

116. *Id.* at 542-43.

117. *Id.*

118. *See generally* Rommel J. Casis, *Rationalizing Blame: Determining the Proximate Cause in Cases for Quasi-Delict*, IBP J., Volume No. 39, Issue Nos. 1 & 2, at 114-22 [hereinafter Casis, *Proximate Cause*].

119. Abrogar v. Cosmos Bottling Company, Inc., 820 SCRA 301 (2017).

> known risk, and whether the former has exercised proper caution or not is immaterial. In other words, it is based on voluntary consent, express or implied, to accept danger of a known and appreciated risk; *it may sometimes include acceptance of risk arising from the defendant's negligence*, but one does not ordinarily assume risk of any negligence which he [or she] does not know and appreciate. As a defense in negligence cases, therefore, the doctrine requires the concurrence of three elements, namely: (1) the plaintiff must know that the risk is present; (2) he [or she] must further understand its nature; and (3) his [or her] choice to incur it must be free and voluntary. According to [William Lloyd] Prosser[,] '[k]nowledge of the risk is the watchword of assumption of risk.'[120]

Thus, the negligence of the plaintiff may also fall under the defense of assumption of risk. By voluntarily exposing himself or herself to risk of injury, it may be said that he or she is also being negligent. Similarly, if the negligence of the defendant is the proximate cause, is it not that this assumption of risk by the plaintiff may also constitute contributory negligence?

However, the negligence of the plaintiff cannot be both contributory negligence and assumption of risk because the effect of the latter is to bar the plaintiff from recovering, whereas the former only requires that the amount of damages be mitigated.

Thus, the doctrine of assumption of risk should only apply if the negligence of the plaintiff is deemed the proximate cause of the accident.

IV. TWO-STEP PROCESS FOR DETERMINING CONTRIBUTORY NEGLIGENCE

The process for determining contributory negligence essentially requires a two-step process. First, the court must determine if both plaintiff and defendant are negligent. Second, the court then determines the nature of the negligent acts.

120. *Id.* at 355-56 (citing McGeary v. Reed, 105 Ohio App. 111, 116-17 (Ohio Ct. App. 1957) (U.S.)); Bull Steamship Lines v. Fisher, 196 Md. 519, 524 (Md.) (U.S.); Turpin v. Shoemaker, 427 S.W.2d 485, 489 (1968) (U.S.); KEETON, ET AL., *supra* note 16, at 487; & KEETON, ET AL., *supra* note 16, at 487 (citing Cincinnati, New Orleans & Texas Pacific Railway Co. v. Thompson, 236 F. 1, 9 (6th Cir. 1916) (U.S.))) (emphasis supplied).

A. Establishing the Negligence of Both Parties

Determining whether there is contributory negligence only makes sense if both the plaintiff and defendant are negligent.[121] If only the defendant or the plaintiff is negligent, then there is no point in determining contributory negligence on the part of the plaintiff.

Therefore, as a preliminary matter, the negligence of both parties must be established. There are a number of ways to do this, the simplest being the application of Article 1173, which defines negligence, as follows —

> 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. When negligence shows bad faith, the provisions of Articles 1171 and 2201, paragraph 2, shall apply.[122]

Courts must first establish the negligence of both parties before inquiring whether the negligence of the plaintiff is contributory.

Although both parties should be negligent, the determination of either party's negligence should be independent of the determination of the other party's negligence.[123] Each party must be evaluated based on the standard of diligence required of it.[124]

B. Applying the Test for Proximate Causation

If both plaintiff and defendant were negligent, the next step is to determine whose negligence is the proximate cause. For this, the courts may simply use the tests for proximate causation.[125]

There are two possible results:

(1) The negligence of the plaintiff is a proximate cause; or

(2) The negligence of the plaintiff is not a proximate cause.

1. Plaintiff's Negligence is a Proximate Cause

Based on jurisprudence, the proximate cause is one where the injury would not have occurred without it.[126] But the fact that the plaintiff's negligence is

121. *See* CARMELO V. SISON, TORTS AND DAMAGES 359 (2013).

122. CIVIL CODE, art.1173, para. 1.

123. *Picart*, 37 Phil. at 813.

124. *Id.*

125. *See* Casis, *Proximate Cause*, *supra* note 118, at 114-22.

the proximate cause does not necessarily mean it is the sole proximate cause. Case law allows for negligent acts of two different actors to constitute the proximate cause although each separately constitutes a proximate cause.[127]

Continuing from the first of the two possible results aforementioned, if the plaintiff's negligence is indeed *a* proximate cause, there are two scenarios:

(a) The plaintiff's negligence is a proximate cause, but the defendant's negligence is not a proximate cause; or

(b) The plaintiff's negligence is a proximate cause, and the defendant's negligence is also a proximate cause.

In scenario (a), Article 2179 prescribes that the plaintiff is barred from recovery.[128] Under scenario (b), there are two options on the part of the courts:

(i) The plaintiff is barred from recovery based on Article 2179;[129] or

(ii) The plaintiff may recover because the negligence of the defendant is graver than that of the plaintiff.

The first option should be chosen by the court if it finds that the nature or gravity of the negligence of the plaintiff is equal or greater than that of the defendant. The second option should be chosen if the negligence of the plaintiff is less than or not as grave as that of the defendant.

Jurisprudence teaches that in the case of two negligent parties, the negligence of one may outweigh the negligence of the other based on certain considerations.[130] For example, between a negligent bank and a negligent account holder, courts would invariably consider the negligence of the bank graver because of the diligence required of banks.[131]

126. *Vda. de Bataclán, et al.*, 102 Phil. at 186 (citing 57A AM. JUR. 2D *Negligence* § 413).

127. Far Eastern Shipping Company v. Court of Appeals, 297 SCRA 30, 83 (1998).

128. *See* CIVIL CODE, art. 2179.

129. *Id.*

130. *See, e.g.*, Bank of the Phil. Islands v. Court of Appeals, 216 SCRA 51, 76-77 (1992) & *Allied Banking Corporation*, 692 SCRA at 196-97.

131. *See Philippine Bank of Commerce*, 269 SCRA at 708-09 (citing Metropolitan Bank and Trust Company v. Court of Appeals, 237 SCRA 761, 767 (1994); Bank of the Phil. Islands v. Court of Appeals, 326 SCRA 641, 657 (2000); & *Bank of America NT & SA*, 594 SCRA at 309 (citing Samsung Construction Company Philippines, Inc. v. Far East Bank and Trust Company, Inc., 436 SCRA 402, 421 (2004)).

Notwithstanding the fact that the injury would not have occurred without the negligence of the account holder, the Court considered the negligence of banks graver in nature.[132] While the language of the Court in such cases is to classify the negligence of the account holder as being only *contributory* and never *proximate*,[133] the fact of the matter is that nature of the negligence of the plaintiff complies with the test for proximate cause.[134] But perhaps as a matter of policy or some form of moral calculation, the Court does not consider such negligence of the plaintiff as sufficient to justify being totally barred from recovery.

Needless to say, what constitutes a less grave or graver form of negligence is discretionary on the part of the courts.[135] But this is nothing new and has been the practice of courts since time immemorial.

If the court finds that it could not make a determination as to which negligent act is graver, it may choose to apply the doctrine of last clear chance. On the assumption that the negligent acts of the plaintiff and defendant either started or ended at different times, the court can determine that the negligent act that is later in time as the proximate cause. If this is the negligence of the defendant, then the negligence of the plaintiff is contributory negligence. If the last clear chance points to the plaintiff's negligence as the proximate cause, then he or she is barred from recovery.

This procedure also clarifies that there are cases where the negligence of the plaintiff passes the test for proximate cause, but by reason of policy or exercise of discretion, the court chooses to characterize such negligence only as contributory.[136]

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132. *See Philippine Bank of Commerce*, 269 SCRA at 709-10 & *Bank of America NT & SA*, 594 SCRA at 313-14.

133. *See, e.g.*, *Philippine Bank of Commerce*, 269 SCRA at 710 & *Bank of America NT & SA*, 594 SCRA at 316.

134. *See* CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 316. The *but for* test determines if the negligent act is the proximate cause. If the resulting harm would not have occurred without the act of the injured party, it is considered a proximate cause. CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 316 (citing *Vda. de Bataclán, et al.*, 102 Phil. at 186).

135. *Id.* at 118.

136. *See, e.g.*, *Philippine National Construction*, 467 SCRA at 584-85; *Estacion*, 483 SCRA at 234-35; *Vergara*, 757 SCRA at 454-55; *Ngo Sin Sing*, 572 SCRA at 34; *Allied Banking Corporation*, 692 SCRA at 201; & *Cheah Chee Chong*, 671 SCRA at 64.

In summary, if the plaintiff's negligence is deemed to be a proximate cause of the injury, the plaintiff may only recover if:

(1) The defendant's negligence is also a proximate cause and the negligence of the defendant is graver than that of the plaintiff's; or

(2) The negligence of the defendant is later in time than that of the plaintiff, applying the doctrine of last clear chance.

2. Plaintiff's Negligence is not a Proximate Cause

If the negligence of the plaintiff cannot be considered the proximate cause under the tests, then the courts can rule that the plaintiff's negligence is merely contributory.

But finding that the negligence of the plaintiff is not the proximate cause should not necessarily mean that he or she is guilty of contributory negligence. To be liable for such, his or her negligence must contribute to his or her injury.[137] In turn, there must be a connection between the plaintiff's negligence and the injury suffered.[138]

In *Rakes v. Atlantic, Gulf and Pacific Co.*,[139] referring to the plaintiff, the Court said —

> Where he contributes to the principal occurrence, as one of its determining factors, he [cannot] recover. Where, in conjunction with the occurrence, *he contributes only to his own injury*, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence.[140]

Thus, after determining that the defendant's negligence is the proximate cause of the injury, there must then be a determination of whether or not the negligence of the plaintiff contributed to the damage he suffered.

For example, assume that, in a collision between a car and a motorcycle, the court found that the negligence of the driver of the car was the proximate cause. But if the motorcycle rider failed to put on his helmet, then he is guilty of contributory negligence if he suffered head injuries. The

137. *See Rakes*, 7 Phil. at 375 & *Heirs of Noble Casionan*, 572 SCRA at 82 (citing Syki v. Begasa, 414 SCRA 237, 244 (2003)).

138. *See Dela Cruz*, 833 SCRA at 258; *Philippine National Railways*, 506 SCRA at 700; *Añonuevo*, 441 SCRA at 44; & *Fuentes*, 166 SCRA at 757.

139. Rakes v. Atlantic, Gulf and Pacific Co., 7 Phil. 359 (1907).

140. *Id.* at 375 (emphasis supplied).

absence of a helmet did not contribute to the collision, but it did contribute to the damage he suffered. On the other hand, if his negligence consisted in violating the rule requiring motorcycles to be registered, he is not guilty of contributory negligence. Whether his motorcycle was registered or had the necessary stickers is in no way connected to the injury.

Thus, in cases where the plaintiff's negligence is not the proximate cause, such negligence will be considered as contributory negligence only if it is connected to the injury.

V. CONCLUSION

The foregoing discussion involving current jurisprudence underscores the need for a more accurate definition of contributory negligence. Although the procedure outlined in the preceding section corresponds to the currently flawed definitions offered, an accurate definition is necessary to reflect reality.

The absence of a clear definition for contributory negligence renders it an empty concept — one which allows the courts to reinvent its meaning in every case. The uncertainty in the concept has given the courts plenary, if not, arbitrary authority to determine the existence of contributory negligence. Without clear boundaries defining the concept, the possibility of unjust or unreasonable rulings continuously looms as a possibility.

Contributory negligence may simply be defined as negligence on the part of the plaintiff that is connected to his or her injury but, on the basis of *fairness*, does not rise to the degree to which he or she should be completely barred from recovering.

It would have been far simpler to define contributory negligence as negligence on the part of the plaintiff, which does not amount to the proximate cause of the injury. Unfortunately, although this definition follows the Civil Code, the current state of jurisprudence does not support this definition. Currently, jurisprudence does not clearly differentiate the two concepts. In many cases, the negligence of both plaintiff and defendant would pass the jurisprudential tests for proximate causation. So what is the Court's basis for choosing the defendant's negligence as the proximate cause and the plaintiff's negligence as contributory negligence? Perhaps it is simple *fairness*. Given the circumstances, would it be fair to bar the negligent plaintiff from recovering? Or would it be fair to require the defendant to pay full damages to negligent plaintiff? The Court has held that "[t]he underlying precept on contributory negligence is that a plaintiff who is partly responsible for his [or her] own injury should not be entitled to recover damages in full but must bear the consequences of his [or her]

own negligence."[141] Thus, "the defendant must [ ] be held liable only for the damages actually caused by his [or her] negligence."[142]

On the question of determining who to blame, perhaps it is time to abandon the fiction that the courts can determine the *actual* cause of an injury. Perhaps it is time to admit that in cases of quasi-delicts, the determination of proximate cause and contributory negligence is essentially a policy question[143] and not a factual consideration. In other words, a negligent act is the proximate cause for the law says that, given a set of facts, such act is the proximate cause and not necessarily because such act, in fact, caused the injury. Perhaps it is time to admit that what the courts are determining is not the actual cause but merely the cause by operation of law. Courts after all do not have supernatural powers to divine the true cause of events; they can only define the meaning of legal concepts and apply them to a given set of facts. The courts are not a source of absolute truth but merely, to the extent it is humanly possible, administrators of just rulings in questions of liability for harm.

When the courts say that the defendant's negligence is the proximate cause, it is not necessarily saying that such negligence caused the injury, which the plaintiff's negligence merely contributed to. In many cases, if the standard applied to the defendant were applied to the plaintiff, they would be found equally responsible. In reality, the courts are simply weighing whether it would be *fair* to completely bar the plaintiff from recovering damages because his or her negligence contributed to his or her injury.

141. *Heirs of Noble Casionan*, 572 SCRA at 82 (citing *Syki*, 414 SCRA at 244).

142. *Syki*, 414 SCRA at 244 (citing SANGCO, *supra* note 101, at 55).

143. *See* CASIS, TORTS AND QUASI-DELICTS, *supra* note 2, at 291.