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

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I. INTRODUCTION

1. *The Importance of Comparative Law*

AN outstanding and distinguished legal scholar from France while in America once said that when one is immersed in his own law, in his own country, unable to see things from without, he has a psychologically unavoidable tendency to consider as natural, as necessary, as given by God, things which are simply due to historical accident or temporary social situation. He continues:

> To see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country. That is why comparative law should be one of the necessary elements in the training of all those who are to shape the law for societies in which every passing day brings new discoveries, new activities, new sources of complexity, of passion, and of hope.[1]

Comparing an idea or principle in two or more systems of law with a view to discovering its differences and likenesses in such systems, the reason for those variations,[2] its principal source, its developing vicissitudes, its final formation and acceptance, its actual operation, and how it fits in the scheme of one system or the other,[3] results in a fuller and more comprehensive knowledge of the idea or principle. New light is shed by one system upon the other. One's convictions become all the stronger and more fecund because they are less blind.[4] These being an added area of agreement, at

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[1] Lepaulle, *The Function of Comparative Law*, 35 HARV. L. REV. 839, 858 (1922).

[2] Wigmore, *Jottings on Comparative Legal Ideas and Institutions*, 6 TULANE L. REV. 48-49 (1931).

[3] Hug and Ireland, *The Progress of Comparative Law*, 6 TULANE L. REV. 68, 72 (1931).

[4] Kuhn, *The Function of the Comparative Method in Legal History and Philosophy*, 13 TULANE L. REV. 350 (1939).

...law, people will come to understand each other more — for misunderstandings are often the root cause of discord and conflict.[5]

These must be the reasons why two outstanding pillars in American jurisprudence, Kent and Story, are referred to as "comparative law jurists"[6] for to them go the distinction of first using comparative law as a tool for the decision of cases. Comparative legal study has been carried on from the days of these legal giants to the present, not only for the practical suggestions which the legislator or judge may derive from the accumulated and digested experience of other nations, but for its own sake. "It has become a branch of the new science of society, and one of the sturdiest and most fruitful branches," says Professor Smith.[7]

2. *Why the Philippine Law?*

The Philippine civil law is made the basis of comparison with the common law because of the peculiar legal system that has gradually developed in the Philippines. As early as 1905, barely six years after the transfer of sovereignty over the islands from Spain to the United States, it was said that no other country has had the world's three great legal systems, the Roman, Anglo-American and Mohammedan,[8] working side by side except in the Philippines.[9] The Mohammedan law though, was confined in its application to the native Moro inhabitants in Mindanao, the biggest island in the southern part of the archipelago; and within a short time, it was relegated to the background to be applied only with a suppletory effect.

A little less than a half century of American rule and a close relationship between the people of the Philippines and the United States, which continues until the present day, has produced a strange blending between the common law and the civil law in the Philippine legal system. This hybrid product came about when the common law crept into the basic Spanish code law through judicial interpretation or by statutory enactment.

The "New Civil Code of the Philippines" which took effect on August 30, 1950,[10] and which reflects the Filipino people's culture and is a happy blending of native customs and the occidental way of life, although being a reproduction of a major portion of the Spanish Civil Code of 1889, nevertheless contains provisions adopted from Anglo-American law.[11] The amalgam of legal principles developed through past generations has been concretized in the new code. This event in Philippine jurisprudence may be considered as a step towards the direction predicted by Lord James Bryce in 1901 when, in commenting which of the two laws, the Roman and English, would prevail over the other, he stated that neither is likely to overpower or absorb the other and forecast that "it is possible that they may draw nearer, and that out of them there may be developed, in the course of ages, a system of rules of private law which shall be practically identical as regards contracts and property and civil wrongs, possibly as regards offenses also."[12]

3. *Scope of the Subject*

Respondeat Superior and Diligentissimi paterfamilias — these Latin phrases at once bring to mind that the subject matter embraced herein is one

[5] "One's ideas of rights and duties are largely concerned with those rights and duties approved, protected and enforced by law. Hence, they are legal ideas or conceptions. As a rule, the chief legal ideas held by the shipper, traveler, and foreign investor are those of his home country. The result is that the clash in international commerce and problems are legal problems." Covin, *Louisiana's Contribution to the Solution of Some of the Problems of Pan-America*, 4 TULANE L.REV. 590-91 (1930).

[6] REUSCHLEIN, JURISPRUDENCE — ITS AMERICAN PROPHETS 51 (1951).

[7] Munroe Smith, *Elements of Law*, in VANDERBILT, STUDYING LAW 211 (1945).

[8] LOBINGIER, THE EVOLUTION OF THE CIVIL LAW 1 (1915).

[9] Lobingier, *Blending Legal Systems in the Philippines*, 21 L. Q. REV. 401-05 (1905).

"Such, then is the new jurisprudence forming in the Philippines through the blending of diverse legal systems — the Spanish preserving and continuing the law of old Rome with the garnered wisdom of its mighty jurisconsults — the American, inheriting and contributing the great principles of the English Common Law, won by the struggles of sturdy yeomen, formulated by a long line of illustrious judges, and tempered with the practical common sense of the Anglo-Saxon; and with it all perhaps a strain from those crude systems which antedate all others in the archipelago. It is a unique process — this blending of the legal systems in the Philippines, and, except possibly in the early days of Louisiana, history furnished no parallel." *Id.* at 406-07.

[10] Lara v. Del Rosario, 50 O.G. 1975 (1954). The Court of Appeals is of the same opinion. People v. Bonje, (CA) G.R. No. L-9351, Feb. 16, 1953. However, others like the Secretary of Justice, Sec. Justice Op. No. 68 (1950), and Prof. Ambrosio Padilla are of the opinion that the Code took effect one year after June 1949 or on June 30, 1950. See 1 PADILLA, CIVIL LAW 6 (1953 ed.)

[11] The Code was prepared by a Code Commission of five members created under and pursuant to Exec. Order No. 48 of the President of the Philippines dated March 20, 1947, in view of the "need for the immediate revision of all existing substantive laws of the Philippines and of codifying them in conformity with the customs, traditions and idiosyncrasies of the Filipino people and with modern trends in legislation and progressive principles of law."

The Commission, in drawing principles from the Roman Law and Anglo-American law says: "The adoption of provisions and precepts from other countries is justified on several grounds:

"(1) The Philippines, by its contacts with Western Culture for the last four centuries, is a rightful beneficiary of the Roman Law, which is a common heritage of civilization. For many generations that legal system as developed in Spain has been the chief regulator of the juridical relations among Filipinos. It is but natural and fitting, therefore, that when the young Republic of the Philippines frames its new Civil Code, the main inspiration should be the Roman Law as unfolded and adopted in Spain, France, Argentina, Germany and other civil law countries.

"(2) The selection of rules from the Anglo-American law is proper and advisable: (a) because of the elements of American culture that has been incorporated into Filipino life during the nearly half a century of democratic apprenticeship under American auspices; (b) because in the foreseable future, the economic relations between the two countries will continue; and (c) because the American and English courts have developed certain equitable rules that are not recognized in the present Civil Code." REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 3 (1948) (hereinafter cited as REPORT, CODE COMMISSION).

[12] BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 72, 122-23 (1901).

of vicarious liability. The former is the common-law doctrine while the latter is the civil law one, and more specifically, the Philippine rule. Both refer to the liability of a master or employer for the torts or quasi-delicts of their servants or employees. The former has often been regarded as a rule of absolute liability, making the master liable in every case, while the latter embodies a principle of presumptive liability, making the employer liable by virtue of his presumptive negligence.

Respondeat Superior has been translated to mean, "Let the superior respond", or, "Let the master answer". This Latin phrase has variously been referred to as a rule, a maxim, a doctrine, or a legal principle. By whatever name it is known, nothing has been so generally criticized[13] and yet so often adhered to by the courts.[14] In no branch of legal thought are the principles in such confusion,[15] the rationalizations so many and conflicting.[16] Principles of contract,[17] tort,[18] agency,[19] insurance,[20] property and procedure enter into a consideration of the problems it poses.

In its simplest form the doctrine means that the master is liable for the torts of his servants committed in the course of employment.[21] Stated otherwise, the phrase summarizes the doctrine that a master or other principal is responsible, under certain conditions, for the conduct of a servant or other agent although he did not intend or direct it.[22] Although the phrase is Latin, quite amusingly, it enunciates a doctrine peculiarly of the common law.

Diligentissimi paterfamilias or diligentissimi patris familias — such in abbreviated form is the civil law rule. Literally translated it means the "diligence of a father of family". Its extended meaning is to the effect that for the quasi-delicts of those under them, employers are liable in damages unless they prove that they exercised the diligence of a good father of a family to prevent damage.[23] Of course, certain conditions have to be met before liability attaches. These are treated of in the later part of this paper.

This paper will not deal with the entire field of vicarious liability, the scope of which is very broad. The vast expanse of the vicarious liability territory encompasses within its ambit the liability of a master or employer for the torts of his servant or employee, a principal for those of his agent, parents for those of their children, guardians for those of their wards, teachers for those of their apprentices, the state for those of its officials, and, maybe some others. The areas of non-coverage that have been roped off and which will not be discussed herein are all those mentioned except the first — that of master or employer and servant or employee.

However, even as thus delimited, the topic will still be broad and complex. Space and time limitations may not permit a detailed analysis of each component aspect of the subject. Cases where the liability of the master is made to rest upon his own personal fault, or is based on acts to which he has participated or ratified, will not be taken up.[24] Likewise, the extremely complex problems involved in "frolic and detour," on which a very excellent article by Professor Young Smith has been written, will not be covered in detail.[25] Lastly, questions where an independent contractor and not a servant is concerned will only be skimmed over. The focal point to be concentrated on is the master's liability in all its aspects and implications where he has not been personally and directly at fault and yet liability is imposed upon him.

For the purpose of this paper, the phrase "vicarious liability" when used

[13] Justice Holmes says that it is against common sense. Holmes, *Agency*, 5 HARV. L. REV. 14 (1891). Pollock says that it is merely "a dogmatic statement, not an explanation." POLLOCK, TORTS 61 (1951) (hereinafter cited as POLLOCK). Prosser thinks that it is an empty phrase which seems to mean nothing more than "look to the man higher up." PROSSER, HANDBOOK OF THE LAW OF TORTS 472 (1941) (hereinafter cited as PROSSER). Laski has this acid comment: "Latin may bring us comfort but it will not solve our problems. *Respondeat Superior* is an argument which, like David, has slain its tens of thousands. Its seeming simplicity conceals in fact a veritable hornet's nest of stinging difficulties." Laski, *The Basis of Vicarious Liability*, 26 YALE L. J. 105 (1916). Baty, in his comprehensive treatise *Vicarious Liability* says:

"One may venture, not improperly, to characterize the modern doctrine of vicarious responsibility for the acts of others as a veritable upas-tree. Unknown to the classical jurisprudence of Rome, unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy, and it cannot but operate to check enterprise and to penalize commerce." BATY, VICARIOUS LIABILITY 7 (1916) (hereinafter cited as BATY).

[14] Young Smith, *Frolic and Detour*, 23 COL. L. REV. 444, 452 (1923).

[15] Laski, *supra* note 13, at 105-06.

[16] See discussion (*infra* Parts VI & VII) on various attempts to formulate a basis for the doctrine.

[17] The relationship of master and servant and the problems tied up with the question of scope of employment are contract problems.

[18] Since the doctrine involves liability not based on contract, an aspect of it is covered by tort law. Treatises on tort law which have covered the subject are those of Prosser, Winfield, Pollock, Salmond, Cooley, Burdick, and many others.

[19] Agency is said to be one of the bases of the doctrine. The Restatement of Agency, treatises on Agency such as Mechem's and Tiffany's and such case-books as Seavey's and Steffen's show that the doctrine properly belongs to said branch of law.

[20] See HOLMES, THE COMMON LAW 96 (1881): Corwin, *Social Insurance and Constitutional Limitations*, 26 YALE L. J. 431 (1917); Friedmann, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949).

[21] PROSSER 473-77; Seavey, *Speculations as to "Respondeat Superior"* in STUDIES IN AGENCY 129 (1949); TIFFANY, HANDBOOK OF THE LAW OF PRINCIPAL AND AGENT 99 (2d ed. 1924) (hereinafter cited as TIFFANY); Laski, *supra* note 14, at 444.

[22] Seavey, *id.* at 129.

[23] Tan v. Ortiz (CA) 36 O.G. 2683. See 12 MANRESA, COMMENTARIOS AL CODIGO CIVIL ESPAÑOL 631 (4th ed. 1931) (hereinafter cited as MANRESA). Bahia v. Litonjua, 30 Phil. 64 (1915).

[24] PROSSER 845-86; TIFFANY 93-98. Thus, if the master commands the servant to do an act which is itself a tort, or ratifies such an act done in his behalf, he is considered to be personally at fault and is liable. Likewise, if the master knowingly or negligently employs or retains in his employ an incompetent servant and another is injured due to such incompetency, the master is liable, his responsibility being traceable to his own fault. See 23 COL. L. REV. 716 (1923).

[25] Young Smith, note 14.

..., means a situation when the principal, be he master in the common law, or owner of an establishment or employer in the Philippine law, is being made liable for the wrongful or culpable conduct of his subordinate, be the latter a servant, employee or household helper regardless of whether the principal is at fault or not. Unless the context otherwise shows, the phrase *respondeat superior* means the common-law doctrine of vicarious liability, while the phrase *diligentissimi paterfamilias* means the Philippine rule of vicarious liability making the principal presumptively liable for the quasi-delicts of his employees and exempting him from responsibility if he proves that he exercised all the diligence of a good father of a family to prevent damage.

4. *Method of Approach and Treatment of Subject*

Any work on comparative law, it is said, means more than a comparison of the rules of one system with those of another, not just putting the rules under a subject heading side by side in parallel columns.[26] The law has to be understood in its proper setting of time, place, and person. To be fully comprehended, it should be viewed in the light of the social, economic, religious and political circumstances which gave birth to it and made it grow. But since there has to be some means of comparison, the approach should be from the historical[27] and functional standpoint.[28]

Following a suggested formula of Justice Holmes, our method in dealing with the subject is first: to state the rules in both systems in their highest generalizations by the help of jurisprudence; secondly, to trace their historical background; and finally, to consider the ends sought to be accomplished, the reasons why those ends are desired, what is given up to gain them and whether they are worth the price.[29]

Conformably with the first suggestion the first topic to be discussed will be the present state of the doctrine of vicarious liability under the common law and the Philippine law. This will be followed by a discussion of tort and quasi-delictual jurisprudence in both systems. Pursuant to the second suggestion the historical development of the doctrines in both systems will be discussed next. Then a treatment of the basis of vicarious liability will be made. To be considered after this is the application of both rules in both systems, acts of the servant or employee by said rules, and defenses, if any, available to the master or employee. The paper will end with a conclusion.

[26] Pound, *The Revival of Comparative Law*, 5 TULANE L. REV. 1, 14-15 (1930).

[27] "The legal reasoning of a period is, to some extent, the survival of the accepted principles of a bygone era. It has been aptly said that what differentiates the mental processes of the lawyer from those of the layman is his dependence upon the past." Isaacs, *How Lawyers Think*, 23 COL. L. REV. 555, 59 (1923).

[28] Pound *supra* note 26.

[29] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897).

II. THE PRESENT RULES OF VICARIOUS LIABILITY IN THE COMMON LAW AND THE PHILIPPINE LAW

S is employed by *M*, a transportation company, to drive one of its busses. *M* was very careful in his selection of *S* and extra-diligent in supervising his work. After three years of efficient service, *S* negligently runs over *P*, a pedestrian, in his usual route. Under the common-law doctrine of *respondeat superior M* is liable to *P* for the tort of *S*. His having exercised due diligence in his choice and supervision of *S* will be no defense. Under Philippine law, in view of *S*' negligence, *M* is presumed negligent. He can, however, prove, as are the facts, that he exercised all the diligence of a good father of a family to prevent damage. His care in the selection and supervision of *S* is a good defense.

The common-law rule is one of strict liability — sometimes referred to as a liability without fault. The Philippine rule is the Roman Law principle of *paterfamilias*. The mere existence of a master and servant relationship and a tortious act of the servant committed within the scope of his employment, regardless of any lack of fault on the part of the master, subjects the latter to the liability under the common law. The Philippine law, in this respect, requires fault on the part of the master to make him responsible. It may be a presumptive fault under article 2180[30] of the New Civil Code, or an actual fault under article 2176.[31] The employer is not considered at fault by imputation of or through the negligence of his employee. His responsibility is direct, personal and immediate and is based, not on the fault of his employee, but on his own fault either in the selection (*culpa in eligendo*) or supervision (*culpa in vigilando*) of the employee

[30] The pertinent portion of article 2180 reads:

"The obligation imposed by article 2176 is demandable not only for ones own acts or omissions, but also for those of persons for whom one is responsible.

"....

"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 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."

[31] "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. 2176 NEW CIVIL CODE OF THE PHILIPPINES (hereinafter cited as NEW CIVIL CODE).

or both.[32] But once he proves his exercise of due diligence in the selection and supervision, then the presumption is rebutted and his responsibility ceases.

One thing that strikes one who comes across the rules in both systems is why the Philippine law, or most of the codes in civil-law countries for that matter, allow to the employer the defense of *paterfamilias* to escape liability whereas the common law is strict and inflexible. Is the civil law more humane in considering the culpability of the master or at least leaving the door open for the court to find out and decide who shall bear the loss? Is the common law harsh in closing the door, locking it, and absolutely refusing to listen to the pleas of a young entrepreneur who stands to suffer ruin because of a single isolated negligent act of one of his employees which all the care and diligence in the world could not have guarded against? What is behind both doctrines? Or broadly, what is behind the whole tort or quasi-delictual law in both systems? It is in answer to this last question that a look, even a scant perusal, will be made on the basis of the law of torts in the common law and the Philippine law.

III. The Basis of Tort Law in the Common Law and the Philippine Law

1. *Is There a General Principle of Tort Law in Both Systems?*

Is there any general principle of tort liability in the common law? Both English and American law are not clear on this point. In England, there are two opinions: one which answers the question in the negative, and the other, in the affirmative. The first view is to the effect that there is no English law of tort. There is merely an English law of torts, that is, a list of acts and omissions which, in certain conditions, are actionable. Although the old forms of actions have been abolished, still every plaintiff must bring his case under one of the recognized heads of tort.[33]

The other English view is that there is a general principle of tort law, that it is the principle that it is wrongful to cause harm to other persons in the absence of some specific ground of privilege or excuse.[34]

It seems as if the English courts are wary in recognizing a general tort principle, the reason being very aptly put by Lord Macmillan in the House of Lords in the following admonition to his brother Lords:

[32] Cangco v. MRR, 38 Phil. 768 (1918); Bahia v. Litonjua, 30 Phil. 624 (1915); Yamada v. MRR, 33 Phil. 8 (1915); Manila v. Manila Electric Company, 33 Phil. 586 (1928); Cuison v. Norton & Harrison Co., 55 Phil. 18 (1930-; Barredo v. Garcia, 73 Phil. 607 (1942).

[33] Salmond, Torts 15 (10th ed. 1945); Pollock 40-46. See also Williams, 7 Camb. L. J. 117-31 (1939), and Bohlen, Studies In The Law Of Torts 353-54 (1926).

[34] Winfield, *The Foundation of Liability in Tort*, 27 Col. L. Rev. 1 (1927); F. P. Walton, *Delictual Responsibility in the Modern Civil Law (More Particularly in the French Law) as Compared with the English Law of Torts*, 49 L. Q. Rev. 70 (1939).

"Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England... Arguments based on legal consistency are apt to mislead for the common law is a practical code adapted to deal with the manifold diversities of human life and as a great American judge has reminded us the 'life of the law has not been logic; it has been experience'".[35]

In the United States, the confused state of the law is much the same way. There seems to be unanimity of opinion though on the observation that there is no one general principle of tort liability. There are many vague general principles which permeate American tort law but no one single broad principle. This had led Dean Prosser to say that "A really satisfactory definition of a tort has yet to be found" and Professor Seavey to entitle one of his excellent articles as "Principles of Torts" and not "Principle of Torts" or "The Tort Principle" or the like.[36]

What then is the true basis of tort liability in the common law? What is its purpose? One answer is given by Holmes as follows:

> Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a man indemnity against certain forms of harm to person, reputation, or estate, at the hands of his neighbors, not because they are wrong, but because they are harms. The true explanation of the reference of liability to a moral standard, in the sense which has been explained, is not that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accident lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.[37]

Professor Seavey approaches the problem by giving a twofold basis grounded on a twofold concept of the law. He says that there are two basic interests of individual which the state protects — the interest in security and the interest in freedom of action. The law is the resultant derived from the competition between these two basic concepts. The modern theory is to strike a balance between these two to determine what most nearly satisfies the needs of all. In the words of Professor Seavey:

> ...The first concept requires that one who engages in activity, employs others, or controls things, should be liable for harm caused by his activities, agencies, or things, even though he is without fault. The second concept requires that a person whose conduct is not wrongful should not be required to pay for the harm it causes. In the adjustment between them, as much effect is given to each as can be granted with the least infringement of the other. As a rough generalization, it may be said that one who intentionally meddles with another, his things, or his reputation is liable in accordance with the first idea, while the conduct of one having no such intention comes with the second.[38]

[35] Read v. Lyons & Co. (1947) A. C. 156, 75 (1946). See also Salmond, Torts 17 (10th ed. 1945).

[36] Prosser 1; Seavey, *Principles of Torts*, 56 Harv. L. Rev. 72 (1942).

[37] Holmes, The Common Law 144 (1881).

[38] Seavey, *supra* note 36, at 74.

Dean Prosser says that the law of torts is concerned primarily with the adjustment of the conflicting interests of individuals to achieve a desirable result, and that it is a form of social engineering to promote greatest number which is the object of society.[39] Laski says that the true basis rests on public policy — in a social distribution of profit and loss.[40] According to Dean Pound it is the social interest in the general security;[41] while Friedmann states that its main function should be the reasonable adjustment of economic risks in society.[42]

These different rationale and divergent views of these learned men and many others only prove that there is no underlying single principle of tort liability under the common law. In fact, attempts have been made to reclassify tort law to have a clearer concept of it in order that there may be uniformity in court decisions, but it seems as if it will be a long time before this ideal will be realized.[43] The most noteworthy attempt yet made to lay down a systematic and coherent exposition of American tort law by a group of authorities on this subject is that made by the American Law Institute, in its *Restatement of Torts*, but in this too, one notices the careful avoidance of formulating a broad principle of tort law.[44]

In contrast to the common law, the civil law comes out with one underlying principle of delictual responsibility which is that there is no liability without fault. Fault or culpability is the test of liability. One has to be at fault in order to respond in damages. This principle is often referred to as the "culpability theory" of liability. It is not without its exceptions

[39] PROSSER 15-18.

[40] Laski, *supra* note 13, at 111-12.

[41] POUND, AN INTRODUCTION TO THE PHILOSOPY OF LAW 175-77 (1922).

[42] Friedmann, *supra* note 20, at 261. Other rationale offered are those by Salmond who says that the law of torts exists for the purpose of preventing men from hurting one another, whether in respect of their property, their persons, their reputations, or anything else which is theirs. The fundamental principle of this branch of the law is, according to Salmond, the maxim *alterum non laedere* — to hurt nobody by word or deed. SALMOND, TORTS 17 (10th ed. 1945). Stone says:

"The end of the law of torts consists in the production and maintenance of a harmonious balance among the conflicting forces and interests of society, and in the affording and protection of an opportunity to all the members of the community to realize the maximum of liberty which is consonant with the best interest of that society of which they are a part." Stone, *Tort Doctrine in Louisiana: The Materials for the Decision of a Case*, 17 TULANE L. REV. 159-60 (1942).

See also Radin, A *Speculative Inquiry into the Nature of Torts*, 21 TEXAS L. REV. 697 (1943), and Feezer, *Capacity to Bear Loss in Tort Cases*, 78 U. of PA. L. REV. 805 (1930).

[43] Wigmore, *The Tripartite Division of Torts*, 8 HARV. L. REV. 200 (1894); Jeremiah Smith, *Tort and Absolute Liability — Suggested Changes in Classification*, 30 HARV. L. REV. 241, 319, 409 (1917).

[44] See Green, *The Torts Restatement*, 29 ILL. L.REV. 592 (1935). Prosser laments the fact that the *Restatement* seeks to reduce the law to a definite set of black-letter rules of principles, ignoring all contrary authorities. PROSSER 24.

though. But liability based on fault is the general rule. Liability without, fault is the exception.

2. *The Concept of Fault in Both Systems*

Fault in the Common Law

What place does fault have in the common-law tort? Historically, two theories have been formulated in this regard. The Holmes view is that the law began with liability based upon actual intent and actual personal culpability. It started from a moral basis, from the thought that some one was to blame. As it grew, it began to create external standards which might subject an individual to liability though there was no fault in him.[45]

Another view, that of Dean Wigmore, is that the law began with making a man act at this peril and gradually became moralized until liability became tied up with fault.[46]

The law is still in a confused state. It has moved in cycles. First, it starts with a period of strict liability, an "immoral" period; then it is succeeded by a period of fault liability, a "moral" period, and then the pendulum swings back again.[47] The 19th century was a period of moralization; the 20th seems to be characterized by the backward swing of the pendulum — not to require fault in every case.

What is this fault often referred to? Professor Smith says that it is conduct which involves either culpable intention or culpable inadvertence.[48] Professor Isaacs opines that it involves a moral standard of conduct, "a moral basis approaching the goal of ethics."[49] The great Ames believes that it is measured by an ethical standard of reasonable conduct.[50] Dean Prosser conceives of it as a social fault, which may, but does not necessarily, coincide with personal immorality; that it has never become quite synonymous with moral blame; and that it means nothing more than a departure from a standard of conduct required of a man by society for the protection of his neighbor.[51] Professor Seavey says that the fault involved in tort law is not moral fault but legal fault; that this latter fault has little connection with personal morality or with justice to the individual; that there

[45] HOLMES, THE COMMON LAW 4, 37-38, 107-09, 115-19 (1881).

[46] Wigmore, *Responsibility for Tortious Acts Its History*, 7 HARV. L. REV. 315, 83 (1874). Wigmore's theory is considered as the generally-accepted one. See also PROSSER 19; Seavey, *supra* note 36, at 72-73.

"The modern rule is that fault is generally requisite to a tort, although in certain cases, the law acting upon considerations of public policy, imposes liability even where there is no fault." Jeremiah Smith, *supra* note 43, at 176.

[47] Isaacs, *Fault and Liability* in SELECTED ESSAYS ON THE LAW OF TORTS 235 (Harvard ed. 1924); SALMOND, TORTS 15 (10th ed. 1945).

[48] Jeremiah Smith, *supra* note 43, at 194.

[49] Isaacs, *supra* not 47, at 235.

[50] Ames, *Law and Morals*, 22 HARV. L. REV. 99 (1908).

[51] PROSSER 20-21, 427-28.

is no sure test of the ethical basis of the doctrine; and that normally, it is only where an individual departs from the standard of his place and time that his conduct is regarded as faulty.[52] Dean Pound giving it a basis in social philosophy, says that the ultimate thing in the theory of liability is justifiable reliance under the conditions of civilized society — that men must be able to assume that those with whom they deal will act in good faith and that in their activities, men will so act as not to harm their fellow-men—and that the free will of man is not the sole criterion.[53]

It would appear from the foregoing that the fault in the common-law tort does not mean moral or ethical fault; that it is not a breach of the moral law but is a departure from a standard of conduct required of the prudent man by society for the protection of its members, in their individual, social and public interests; that it is variously referred to as "legal fault" or "social fault"; that as thus understood, it may be stated as a general rule that fault must be present to incur liability. Liability without fault is the exception.

Fault in the Civil Law

As stated previously, the one underlying basis of delictual responsibility in the civil law is fault. The principle which runs through the civil codes in civil law countries is that there is no responsibility without fault.[54] Fault, not damage, makes one liable for compensation in damages.

The principle originates from the theory of *culpa* of the modern Roman Law, the Lex Aquilia, which is the reason why it is commonly known as the "culpability theory" of liability. It thus stems from natural law. The individualism of the 19th century and its concomitant economic theory of *laissez faire* helped shape and mold the fault concept in its present form.

The principle is expressed in specific provisions in most modern codes, notably, those of: Argentina, Brazil, China, Cuba, France, Germany, Japan, Louisiana, Mexico, Philippines, Spain and Switzerland.[55]

It is significant that "fault" or "culpa" is not defined in any of the codes. It is said that this should be so because the concept should be fluid enough to embrace new situations[56] and adapt itself to the march of time and progress. Some definitions though have been attempted of it. Toullier defines fault as that which one commits in doing a thing which one does not have the right to do. Laurent speaks of it as *"un fait illicite"* which he describes as all that which one does not have a right to do. Planiol and Ripert, after saying that it seems impossible to formulate a general definition useful enough for practical purposes, go on to state that one is in fault when one does not do that which one ought to do. Colin and Capitant state that what the term signifies is that a person has not conducted himself as he ought to have done; to arrive at this, one asks how this person ought to have behaved and one answers that his behavior is compared with that of

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[52] Seavey, *supra* note 21, at 136-140.

[53] POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188-190 (1922).

[54] 2 CASTAN, DERECHO CIVIL ESPAÑOL, COMUN Y FORAL 58 (3d ed. 1941) (hereinafter cited as CASTAN); 1 SANCHEZ ROMAN, ESTUDIOS DE DERECHO CIVIL 585-91 (2d. 1899) (hereinafter cited as SANCHEZ ROMAN); 12 MANRESA 550-60; 1 POTHIER, TREATISE ON THE LAW OF OBLIGATIONS *116-22 (Evan's transl., 3d Am. Ed. 1853) 164-65 (hereinafter cited as POTHIER); Harris, *Liability Without Fault*, 6 TULANE L. REV. 337, 66 (1932); Stone, *supra* note 42, at 159; 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).

A loose translation of Castan shows that culpability is the underlying theory of Spanish delictual liability. He says: "Under Spanish law, the modern theories of objective responsibility, which substitute the point of view of personal fault for the external point of view of simple causation, and the risk theory, which makes one liable for the mere fact of creating a risk of harm to another without fault, have not found acceptance. It is true that under the Employer's Liability Act and some articles of the Civil Code, e.g. article 1905 relating to damage caused by animals, there is liability without fault or negligence but the general theory underlying tort law is still fault or negligence." *Ibid.* at 58-59.

See also Surveyer, *A Comparison of Delictual Responsibility in Law in the Countries Governed by a Code*, 8 TULANE L. REV. 53 (1933); F. P. Walton, *supra* note 34; and Miller, *The Master-Servant Concept and Judge-Made Law*, 1 LOYOLA L. REV. 25 (1941).

[55] Civil Code of Argentina art. 1143. "Any person performing an act, which through his fault or negligence causes damage to another, is obliged to repay the damage. This obligation is governed by the same provisions to which the offenses of the civil law are subject."

Civil Code of Brazil art. 159. "Whoever, by voluntary act or omission, negligence, or imprudence violates a right, or causes prejudice to another, is obliged to repair the damage."

Chinese Civil Code art. 184. "A person who willfully or negligently, unlawfully injures a right of another is bound to compensate him for any damage arising therefrom."

Code of Napoleon art. 1832. "Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage."

Art. 1383. "Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence. [Translation by Professor T. von Mehren]".

Civil Code of Cuba art. 1902. "Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done."

German Civil Code "One, who designedly or negligently injures life, body, health, freedom, the property or any right of another is bound to indemnify the other for the injury arising therefrom.

Japanese Civil Code art. 109. "A person who intentionally or negligently has infringed upon the rights of another person is liable for the resultant damages."

Louisiana Civil Code art. 2315. "Every act of man that causes damage to another, obliges him by whose fault it happened to repair it..."

NEW CIVIL CODE art. 2176. see note 31.

Civil Code of Spain art. 1902 is the same as that of Cuba.

Swiss Federal Code of Obligations art. 41. "Every person who causes damage to another in an unlawful manner, be it willfully or be it negligently or imprudently, is liable for compensation."

"Every person who, *contra bonos mores*, willfully causes damage to another is also liable for compensation."

[56] Stone, *supra* note 42, at 204.

a prudent and diligent person under the circumstances.[57]

Bertrand del-Greuille explains the fault concept thus:

> Every individual is the guarantor of his act (*fait*); this is one of the first principles of society; from which it follows that if such act causes damage to another, the person through whose fault (*faute*) it was caused must make reparation therefore.... the law cannot strike a balance between him who errs and him who suffers. Whenever the law finds that a citizen has suffered a loss, it inquires whether it was possible for the author thereof not to have caused the loss, and if the law finds that he was thoughtless or imprudent, it must hold him liable to make good the wrong he has committed.[58]

Fault in the Philippine Law

In the Philippines, culpability is still the basic underlying philosophy behind quasi-delictual liability. Under article 2176 of the new Code, which is but a reproduction of article 1902 of the Spanish Civil Code of 1889, which latter Code was in force until the present Code took effect, 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 is called a quasi-delict if there is no pre-existing contractual relation between the parties. The old Code did not carry the term "quasi-delict." The choice of the term is explained by the Code Commission thus:

> A question of nomenclature confronted the Commission. After a careful deliberation, it was agreed to use the term 'quasi-delict' for those obligations which do not arise from law, contracts, quasi-contracts or criminal offenses. They are known in Spanish legal treaties as *'culpa-aquiliana,' 'culpa-extra-contractual'* or *'causi-delitos'*. The phrase *'culpa extra-contractual'* or its translation 'extra-contractual fault' was eliminated because it did not exclude quasi-contractual or penal obligations. 'Aquilian fault' might have been selected but it was thought inadvisable to refer to so ancient a law as the *'Lex Aquilia'*. So 'quasi-delicts' was chosen, which more nearly corresponds to the Roman Law

[57] *Id.* at 204-06.

[58] *Official Communication to the Tribunal*, reproduced in VON MEHREN, A PROBLEM IN THE LAW OF TORTS 124 (Multilith (1953).

Further on the French concept, Tarrible, in discussing the project before the Legislature says:

> "Any act (*fait*) whatsoever of a person, says the project, which causes damage to another renders him through whose fault (*faute*) it was caused liable for the reparation thereof.
>
> "Further, a person is liable not only for damage caused by his act, but also for the damage caused by his negligence or imprudence.
>
> "This provision, which guarantees the preservation of property-rights of whatsoever nature, is full of wisdom. When damage is done through the fault (*faute*) of a person, if one weighs the interest of the person who suffers with that of the guilty or imprudent person who caused it, a sudden cry of justice arises and answers that such damage be made good by its author.
>
> "....
>
> "The damage, in order that it be the subject of reparation, must be the effect of a fault or an act of imprudence; if it cannot be traced to such a cause, it is but the working of fate, whereof each must bear the consequences; but if there has been fault or imprudence, however slight their contribution to the injury caused, reparation is due." *Id.* at 126.

classification of obligations, and is in harmony with the nature of this kind of liability.

The Commission also thought of the possibility of adopting the word 'tort' from Anglo-American law. But 'tort' under that system is much broader than the Spanish-Philippine concept of obligations arising from non-contractual negligence. 'Tort' in Anglo-American jurisprudence includes not only negligence, but also intentional criminal acts, such as assault and battery, false imprisonment and deceit. In the general plan of the Philippine legal system, intentional and malicious acts are governed by the Penal Code, although certain exceptions are made in the Project.[59]

Culpa and Dolo Distinguished

What is the scope and meaning of the term "fault" as used in the new Code? To answer this question one must have to go back to the old Code. *Culpa* is the Spanish and Roman term for fault. Spanish and Philippine law distinguish between *culpa* and *dolo*. *Culpa* is a voluntary act or omission which, without willful intent, causes damage to another through lack of due diligence or neglect or mere inattention. *Dolo* however, includes an intent to do harm or injury. In other words, the purpose of the voluntary act of omission in *culpa* is not willfully to cause injury or harm to the other party, while in *dolo* there is such an intent and purpose. Intent to harm therfore, is what distinguishes one from the other. This distinction depends on the will of the actor rather than on his own intelligence.

Culpa Criminal and Culpa Aquiliana Distinguished

The distinction between the two concepts is important because under the criminal law and the fault or negligence embraced within the term quasi-delict. The former has often been identified as *"culpa criminal"* while the latter is *"culpa-aquiliana."* A detailed analysis of the difference between the two would be proper in another paper. Suffice it to state hereunder their main differences:

1. As to nature of right violated: In *culpa aquiliana*, the right violated is a private right; in *culpa criminal* it is a public right. The former affects the public interest and is a wrong against the state.
2. As to nature of redress: In the first, since the right violated is an individual's, the redress is in the form of damages given to him. In the second, because the right violated is the state's, the redress is either a fine or imprisonment. The Penal Code punishes and corrects the criminal act while the Civil Code is to compensate the wronged person for the harm he suffers.
3. As to compromise and waiver: The civil liability of the tortfeasor in *culpa aquiliana* may be waived or compromised; whereas the criminal liability in *culpa criminal* may not be compromised.
4. As to procedure and evidence: As a necessary corollary to the nature of

[59] REPORT, CODE COMMISSION 161-62. According to Pothier, *quasi delicta* are acts by which a person causes damage to another, without malignity, but by some excusable imprudence. 1 POTHIER, *116.

one right violated in *culpa aquiliana* the action is brought in the name of the injured party as plaintiff; while in the criminal act it is prosecuted on behalf of the state. Instances where the civil action is deemed instituted together with the criminal action are to be excepted. The *quantum* of proof necessary in the civil action is merely preponderance of evidence while in the criminal case, it is proof beyond reasonable doubt.

5. As to defense available: In *culpa aquiliana*, the employer when sued for the quasi-delict of his employee has the defense of having exercised due diligence of a good *paterfamilias* to prevent the damage; while in *culpa criminal* he has no such defense.

The distinction between the two concepts is important because under the peculiar scheme of the Philippine legal system, an owner of an enterprise or an employer may be visited with vicarious liability through two sources: one through the Civil Code and the other through the Penal Code. His responsibility under one is different from that in the other.

Culpa Contractual and Culpa Aquiliana Distinguished

Likewise, a distinction should be made between a quasi-delict and the fault or negligence which amounts to a breach of a contractual obligation. This latter fault is known as *"culpa contractual"* or contractual fault. Article 2176 gives the fundamental difference between the two when it requires of a quasi-delict that there be no pre-existing contractual relation between the parties. The quoted article shows that a quasi-delict, as a source of obligations, has an individuality all its own. Of itself it can give rise to a new relationship, a tie, a true obligation between two or more than two parties who were not bound by any tie before. Such a distinction is very well explained by the Philippine Supreme Court as follows:

"Every legal obligation must of necessity be extra-contractual or contractual. Extra-contractual obligation has its source in the breach or omission of those mutual duties which arise from those relations, other than contractual, or certain members of society to others, generally embraced in the concept of *status*. The legal rights of each member of society constitute the measure of the corresponding legal duties, mainly negative in character, which the existence of those rights imposes upon all other members of society. The breach of these general duties whether due to willful intent or to mere inattention, if productive of injury, gives rise to an obligation to indemnify the injured party. The fundamental distinction between obligations of this character and those which arise from contract, rests upon the fact that in cases of non-contractual obligations it is the wrongful or negligent act or omission itself which creates the *vinculum juris*, whereas in contractual relations the *vinculum* exists independently of the breach of the voluntary duty assumed by the parties when entering into the contractual relation."[60]

[60] Cangco v. MRR, 38 Phil. 768, 75 (1918). For discussion on how the French courts have arrived at the same result by judicial fiat see VON MEHREN, *op. cit. supra* note 58, at 6-7.

Culpa contractual is governed by the provisions of the present Code on obligations and contracts in general while *culpa aquiliana* is governed by the provisions of the same Code on quasi-delicts. The distinction between these two is also important, more so with respect to the vicarious liability of an employer, because in *culpa contractual* the defense of a good *paterfamilias* is not available to him.

In a case that came up under the old code, the Philippine Supreme Court, in a sweeping *dictum*, defined the scope of the term *culpa*. It said:

Article 1902 [now article 2176 of the Code] of the Civil Code declares that any person who by an act or omission characterized by fault or negligence, causes damage to another shall be liable for the damages so done. Ignoring so much of this article as relates to liability for negligence, we take the rule to be that a person is liable for damage done to another by any culpable act; and by 'culpable act' we mean any act which is blame-worthy when judged by accepted legal standards. The idea thus expressed is undoubtedly broad enough to include any rational conception of liability for the tortious acts likely to be developed in any society.[61]

The definition thus given of "culpable act" may be construed to include even acts characterized by the presence of *dolo*. These latter acts are likewise "blameworthy" when judged by accepted legal standards. Thus, under article 1902 of the old code, a civil action for damages will lie for death caused not by negligence but by a deliberate act with intent to kill. However, if subsequent to the filing of the civil action or during its pendency a criminal charge for homicide were to be filed, the civil action is suspended.

Happily enough, with the enactment of the present code, the meaning of *"culpa"* has been clarified and its scope confined to its true limits. In a strict sense it should not encompass acts done with a deliberate intent to do harm.

If intent to do wrong is not included in the concept of *culpa* what of intentional wrongs? Will no liability be imposed on him who causes damage with a deliberate intent to cause it? These wrongs are not governed by the provisions of the Code on quasi-delicts but by the Penal Code and the pertinent provisions of the Code on human relations.[62]

Morality in the Tort Concept

How much is the influence of morality and ethical principle on the tort concept in the civil law? Amos and Walton in commenting on the French tort concept, say this:

There is no doubt that in the traditional view responsibility involves the idea that the wrongdoer has done something which deserves moral reprobation. He

[61] Daywalt v. Corporation de PP. Agustinos Recoletos, 39 Phil. 587 (1919). See also Gilchrist v. Cuddy, 29 Phil. 542 (1915).

[62] "Civil obligations arising from criminal offenses shall be governed by the penal laws, subject to the provisions of article 2177, and of the pertinent provisions of Chapter 2, Preliminary Title, on Human Relations, and of Title XVIII of this Book, regulating damages." Art. 1161 NEW CIVIL CODE.

is deserving of blame, and in blame there is a moral reference. His will is regarded as being the moral cause of the damage suffered, and his will, as manifested in his conduct, is blameworthy. The term culpa in the Roman law implied moral reprobation. The language of the old French writers shows plainly that they meant the same thing.[62]

This attitude must have been carried over into the Spanish Civil Code of 1889 by the drafters thereof, for the Philippine Supreme Court, in a case arising under the said Code, gives the tort concept a moral tint. Thus:

> The Legislature which adopted our Civil Code has elected to limit extra-contractual liability with certain well-defined exceptions — to cases in which moral culpability can be directly imputed to the persons to be charged. This moral responsibility may consist in having failed to exercise due care in the selection and control of persons who, by reason of their status, occupy a position of dependency with respect to the person made liable for their conduct.[64]

But the present Civil Code has gone farther. It has new provisions which go beyond the sphere of wrongs defined by positive law. These are collected under Chapter 2 of the Preliminary Title of the Code entitled "Human Relations." The article which concerns us most is article 21 which provides that "any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage." This provision was inserted in the code, according to the Code Commission, because there were countless gaps under the old law which left so many victims of moral wrongs helpless even though they had actually suffered material and moral injury. This article seeks to fill the gaps. The Commission gives its own example to illustrate the purview of the provision:

> *'A'* seduces in the nineteen-year old daughter of *'X'*. A promise of marriage either has not been made, or can not be proved. The girl becomes pregnant. Under the present laws, there is no crime, as the girl is above eighteen years of age. Neither can any civil action for breach of promise of marriage be filed. Therefore, though the girl and her family have suffered incalculable moral damage, she and her parents cannot bring any action for damages. But under the proposed article, she and her parents would have such a right of action.[65]

In answer to the possible objection that the provision would destroy the dividing line between morality anl law, the Commission says:

> ....the answer is that, in the last analysis, every good law draws its breath of life from morals, from those principles which are written with words of fire in the conscience of man. If this premise is admitted, then the proposed rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all wrongs which cause damage. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its ancient moorings, one can not but feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules, thus imparting to every legal system superlative attributes.
>
> Furthermore, there is no belief of more baneful consequences upon the social order than that a person may with impunity cause damage to his fellow-men so long as he does not break any law of State, though he may be defying the most sacred postulates of morality. What is more, the victim loses faith in the ability of the government to afford him protection or relief.[66]

It should be borne in mind that not every actionable wrong should be committed with fault to allow recovery against the wrongdoer. The New Civil Code has instances of liability without fault. Thus article 2183 makes the possessor of an animal or the user thereof responsible for the damage which is may cause, even if it may escape or be lost. Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods are made liable, under article 2187, for damage caused by any harmful substances used although there is no privity of contract with the consumer. Article 2189 makes local governments liable in damages for harm caused by defects in their public works. Articles 2190 and 2191 hold the owner of a building liable for damages resulting from its collapse or for the explosion of machinery, excessive smoke and obnoxious emanations. Likewise, many provisions on nuisance subject the person responsible therefor to its abatement and for damages caused by same.

In summation, it may be laid down as a general rule that the basis of Philippine tort law is still *culpa*—fault. Intentional wrongs which fall within the pale of the criminal law are governed in their civil liability aspect by the Revised Penal Code. Those which are beyond the reach of the penal law subject the perpetrator thereof to liability under the new provisions of the New Civil Code. Permeating the whole structure of the tort concept are ethical norms and principles. The law has been moralized to an appreciable extent. The culpability theory is not without exceptions. There are instances of liability without fault in the New Civil Code, such as, the

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[62] AMOS AND WALTON, INTRODUCTION TO FRENCH LAW 248 (1935). Harris in his *Liability Without Fault*, gives the concept a limited ethical and religious content. He says:

"The doctrine of fault responsibility must be properly respected, because as much as any legal idea that may be conceived, it is bound up intimately with the traditional aspects of the cultures of the western world; it is the law's way of taking account of traditional religion with its concept of personal salvation and traditional ethics." *Supra* note 54, at 366.

Stone however, disagrees with this concept of Harris and says that ethics and religion may play a greater role in the make-up of fault but they are not the sole constituents of fault. He states that the standards of fault are derived not only from the Civil Code itself, the Constitution, the statutes of the state [he is talking here about Louisiana], the multitude of municipal ordinances and regulations which set out proper modes of conduct to be followed by men. Likewise, judicial decisions, according to him, should enter into the concept. Lastly, he cites article 21 of the Louisiana Code which mentions equity, natural law and reason, and usages as applicable in the absence of state. Stone, *supra* note 42, at 207-15.

[64] Cangco v. MRR, 38 Phil. 767, 776 (1918).

[65] REPORT, CODE COMMISSION 40.

[66] *Id.* at 40-41.

liability of the possessor of an animal, manufacturer of foodstuffs and other articles, local governments and their public works, proprietors of buildings and nuisances.

IV. History Development of the Rules of Vicarious Liability in Both Systems

Why a historical background:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. (O.W. Holmes, Jr.)
>
> We live in a word of change. If a body were in existence adequate for the civilization of today, it could not meet the demands of the civilization of tomorrow. Society is inconstant, and to the extent of such inconstancy, there can be no constancy in law.

Even if only to follow blindly the counsel of Justice Holmes in the light of the realistic appraisal of Justice Cardozo that the law is inconstant, we should consult the past to find out the true meaning and import of the rules of vicarious liability under the Common Law and the Civil Law.[67] But to trace in great detail the historical development of each rule in the two systems would virtually mean comparing the historical development of both systems themselves. This the writer has preferred not to do. Firstly, it would unduly lengthen this paper. Secondly, the field has already been covered in a scholarly comparative sketch by Professor Arthur von Mehren on the historical development of the Civil Law and the Common Law.[68] Instead, only marked changes in the growth of the rule during any period or era sufficient to indicate towards what direction the law tended to go, will be mentioned.

1. *Historical Development In the Common Law*

The genesis of employer's liability is a debated episode of legal history.[69] According to one view, the early law started with strict liability for the acts of one's servants, slaves, or animals and inanimate objects. Later, the course of legal development was in the direction of a relaxation of the earlier rule. Those who uphold this view are Brunner in Germany, Sir John Salmond in England, and Dean Wigmore in the United States.

The other view, the opposite of the first, states that the law started with no conception of vicarious liability for servants or liability for chattels. The course of legal development was in the direction of establishing and strengthening such liability. This view was sponsored by a minority school in Germany, Sir Glanville Williams in England, and by Mr. Justice Holmes in the United States.[70]

One point of agreement among these divergent views is that the original principle of liability for harm had its root in the passion for revenge. Another area of agreement is that the origin of the modern doctrines of *respondeat superior* is mixed. The two main sources that contributed to its growth were the early Roman Law and the Germanic or Teutonic Law. Both sources had a common ground for liability — the desire for revenge.[71]

So keen was the desire for revenge on the part of early man that the law allowed it to be wreaked on animals and even on inanimate objects if a human being was not available.[72] The first idea of compensation to the injured person or his kin came about when the law allowed it in the interests of peace and to prevent blood feuds, which usually continued until one family was exterminated.[73] As time went on, the master could relieve himself of liability for harms committed by freemen in his household by surrendering them on the courts. If he did not, he was liable.[74]

Vengeance on the servant wrongdoer was the object of the law — not indemnity from the master. Payment by the master was merely a privilege in case he wanted to buy the vengeance off. What had been the privilege of buying off vengeance by agreement, of paying the damage instead of surrendering the body of the offender, ripened into a general custom. Gradually, the wrongs for which the master could be held liable increased.[75]

In England, by the end of the 13th century, the civil liability of the master still continued without regard to whether he consented or commanded the harmful act but in so far as penal results were concerned he could exonerate himself by pleading his lack of command or consent to the act.[76]

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[67] Holmes, *op. cit. supra* not 20, at 1; Cardozo, *Paradoxes of Legal Science* 10-11 (1928); Cardozo, Selected Writings 257 (1947). The usual footnotes were omitted to make the quotations neat).

[68] Von Mehren, A Comparative Sketch Of The Historical Development Of The Civil And The Common Law (Multilith 1953).

[69] Pollock & Maitland, History Of English Law 528-29 (2d ed. 1899).

[70] Salmond, Jurisprudence 411-12 (10th ed. 1947).

[71] 8 Holdsworth, History Of English Law 473-76 (1937) (hereinafter cited as Holdsworth). See also Holmes, *op. cit. supra* note 20, at 16-20, and Wigmore, *supra* note 46, at 315-31.

Pollock however says that the Roman Law had little to do with vicarious liability. Pollock, Book Review, 1916 L. Q. Rev. 226. Baty, *supra* note 13, is of the same same opinion.

[72] Jenks, *On Negligence and Deceit in the Law of Torts*, 26 L. Q. REV. 159-60 (1910).

[73] Wigmore, *supra* note 46, at 315-17. Lea, Superstition And Force 18 (4th ed. 1894).

[74] Holdsworth 50-51; Harris, *supra* note 54, at 343-45; Holmes, The Common Law 9-13 (1881); Wigmore, *supra* note 46, at 330-31.

[75] Holmes, *id.* at 10; Wigmore, *ibid.*

[76] Wigmore, *id* at 334-36.

During the period beginning with Edward I's time (1300) the command or consent test was extended to civil responsibility. Only when the master gave a command before the deed or his consent, before or after the deed, would he be liable.[77] This command test gave birth to the doctrine of particular command, meaning, that the act which caused the wrong must be the very act commanded by the master.[78] With the coming of the industrial revolution and the ushering of an era of industrial progress for England those who did the master's work were not always at his beck and call. Thus was born another class of servants who bore the name agent or factor. The courts modified the command test to suit these people — thus giving birth to the rule of implied command.[79]

The test now became what may be termed the rule of Implied Command. At the same time, phrasings of the test were made: "Whoever employes another is answerable"; "acting in the execution of authority"; "acting for the master's benefit"; — all reflecting a general effort to re-state the rule on a rational basis.[80]

By the beginning of the 19th century, during Lord Kenyon's time, the command test gradually gave way to the "scope of employment" theory.[81] It began to be plainly seen that the liability did not depend on agency at all. This development helped the judges to see that the rule rested ultimately on grounds of public policy.

But how did the present rule come about? The prevailing view of legal historians is that the modern law is attributed to Lord Chief Justice Holt.[82] In the latter part of the seventeenth century there were decisions of the Court of Admiralty applying doctrines drawn from the Roman Law holding the master and owner of a ship liable to the shipper and passenger for the delicts of the crew.[83] After the Great Rebellion, the Common Law absorbed the greater part of the commercial jurisdiction formerly exercised by the Admiralty Court. This enlarged commercial jurisdiction of the Common Law Courts coupled with the expansion and change in all branches of commerce and industry formed excellent material and background for the formulation by Lord Holt of the principle whereby the scope of the master's liability is measured by the authority implicit in the nature of the business.[84]

[77] *Id.* at 383-92.
[78] *Id.* at 392-99.
[79] *Id.* at 394 n. 11.
[80] *Id.* at 399-405.
[81] FIFOOT, ENGLISH LAW AND ITS BACKGROUND 178-80 (1930); 8 HOLDSWORTH 474; Laski, *supra* note 13, at 106.
"....the doctrine of the employer's responsibility was due to no considered theory of civil liability, and to no survival of early mediaeval notions, but was derived from an inconsiderate use of precedents and a blind reliance on the slightest word of an eminent judge; and from the mistaken notion that his flights of imagination in picturing highway accidents were actual decided cases." BATY 29.
"Why Holt, J. put his seal of approval on the doctrine of vicarious liability is still a riddle. From whence came the rule and a complete exposition of its pedigree are problems as yet unanswered." Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L. J. 584 (1929).
[82] See HOLMES, *op cit, supra* note 20, at 15-17 for the Roman Law principles on this point.
[83] CARDOZO, *Paradoxes of Legal Science* 20-21 in SELECTED WRITINGS 263; 8 HOLDSWORTH 473-75.

2. *Historical Development in Philippine Law*

As a backdrop to the study of the development of the Philippine law of vicarious liability it might be helpful to trace in brief the history of the country and the people where the doctrine was nurtured.

Before the discovery of the Islands by Spain, the inhabitants were grouped under tribes with their own peculiar primitive tribal laws. The law was fragmentary, unorganized, localized and diverse. Much of it was unwritten although traces of written law among the various tribes have been discovered. One of these is the Code of Calantiao promulgated in 1433 by the chief of that name in the island of Panay.

A historic landmark in Philippine history is the discovery of the Islands by Magellan on March 16, 1521 on behalf of the Spanish Crown. Such an event ushered in a change in the early political, social, economic, cultural and religious life of the people. The inhabitants were Christianized. The tribes slowly and imperceptibly disappeared because they were governed under a centralized government. The primitive laws gave way to the Spanish law.

From the time that a colonial government was set up by Spain in the Islands up to and until the formal ratification of the Treaty of Paris on December 10, 1898 when sovereignty was transferred to the United States, it was Spanish law that was in force thereat. Not all of the Spanish laws were appicable to the Philippines. Only those whose application were extended to them by Royal Decres, Ordinances and *Leyes* were applied by the courts. After the change of sovereignty, all laws deemed political in nature and which were inconsistent with the principles of the American political and constitutional law were demed abrogated and superseded.

However, such municipal laws as governed the relations of the people with each other, those concerning their properties, which regulated local institutions and provided for the punishment of crimes, were in force. The Spanish codes and most laws then in force were continued in effect. Among them was the Civil Code and the Penal Code.

Most historians and writers on Philippine political law would describe the stages of development of the law as follows: the first stage, which is on December 10, 1898, when the Treaty of Paris was signed and the sove-

[84] Romualdez, *A Rough Survey of the Pre-Historic Legislation of the Philippines*, 1 PHIL. L. J. 149, 58 (1914).

reigny over the Philippines passed from Spain to the United States; the second stage, on November 15, 1935, which marked the beginning of the Commonwealth Government — a sort of transition period preparatory to the granting of independence; and the final stage, on July 4, 1946, when the Republic of the Philippines was formally inaugurated.

For the purpose of this paper this scheme will not be followed because, as above stated, the change of sovereignty did not affect the Civil Code. What is important is August 30, 1950 when the present Civil Code took effect.

Within the very short time that the American flag flew side by side with the Filipino flag, a remarkable change was wrought in the social, economic, cultural and political life of the people. An educational system was established which reduced illiteracy at an incredible pace. The face of the country changed too. Sleek highways traversed the islands from end to end. Radios became a household item. Law students used to enjoy a movie in Manila at the same time that a New York businessman was sitting in on the same one at Broadway. *Collegialas* at local exclusive convent schools in Quezon City used to hum the latest hits of Bing Crosby at the same time that Radcliffe girls were singing them to their Harvard boy friends. But the greatest and most inestimable legacy of the American people to their Filipino friends was in the art of self-government whereby the Filipinos have imbibed freely of the nectar of freedom and democracy and which has won for their "pearl of the Orient seas" the title "show window of democracy in the Far East."

It is in such a background that the present "Civil Code of the Philippines" was approved by the Philippine Congress as Republic Act No. 386. This Code repeals the prior one, the Civil Code of Spain of 1889. It is true that the Code Commission drew freely from the progressive laws of other countries and the common law to keep abreast with modern legislation but the provisions of the Code on the vicarious liability of owners of enterprises and employers is still the same old one with the exception of a new paragraph and some minor changes to be discussed in a subsequent section. ,

The Spanish Influence

Even until now, as was the consistent practice of the courts and the Bar since 1900, Spanish jurisprudence and the writings of Spanish jurisconsults have been cited in briefs and court decisions in resolving problems arising under codes and laws of Spanish origin. It would be worthwhile therefore to take a hasty look at Spanish law.

The period of codification of Spanish law was in the 19th century. Being a close neighbor to France which had adopted the Code Napoleon in 1804, it was not at all surprising that she would start making a code of her own. In fact, even before the Code Napoleon, through the influence of the institutes of Justinian, the Spaniards were already attempting to make a scientific reclassification of their laws.[85] Such compilations as the *Fuero Real, Fuero Juzgo, Neuva Recopilacion, Compilacion de la Leyes de los Indios, Codigo de las Siete Partidas, Leyes de Toro* and many others were but attempts towards that objective.[86]

Glowing tributes have been paid to the Spanish Civil Code. Judge Lobingier says of it:

> Its real and historic basis, even more than that of the *Siete Patridas*, is the Roman law of the Golden Age and it comprehends the subjects of Persons, Property and Obligations in the same order and with much of the same phraseology as the Institutes of Justinian... Doubtless the Spanish codifiers profited much from the Code Napoleon, but we have it on the authority of the eminent French jurist Leve, that the Spanish Code is the Superior.[87]

The French Influence

Regardless of what Leve said, it cannot be denied that the French Code had a profound influence upon the Spanish Code. The French revolution did have repercussions in Spain.[88] Having been in force since 1804, the Code Napoleon could not but be used as a model or even as a formal guide to the Spanish effort at codification. An excellent example would be the culpability theory of liability of the French Code as enunciated in articles 1382 and 1383.

> Art. 1382. Any act by which a person causes damage to another makes the person by whose fault the damage occurred liable to make reparation for such damage.
>
> Art. 1383. Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence.

The Spanish Code Provides:

> Art. 1903. Any person who by an act or omission causes damage to another by his fault or negligence shall be liable for the damage so done.

A cursory reading of the three articles will show that there is no difference in concept and meaning between the French and the Spanish, except that the later one just puts into one sentence what was stated in the first two. Likewise, the provisions on vicarious liability are much of the same tenor except for the master and servant relationship where the French Code follows the common law *respondeat superior* while the Spanish Code follows the rules of *paterfamilias*.

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[85] C. S. WALTON, THE CIVIL LAW IN SPAIN AND SPANISH-AMERICA 22-23 (1900).

[86] 1 CONTINENTAL LEGAL HISTORY SERIES 627-32 (1912).

[87] Lobingier, *A Spanish Object Lesson in Code-Making*, 16 YALE L. J. 411 15 (1917).

[88] 1 CONTENENTAL LEGAL HISTORY SERIES 585-86 (1912).

So much of the Spanish Code. From the preceding paragraph it may be seen that, at least as to the concept of delictual liability, the Spanish Code draws from the French Code certain concepts and principles. Now the latter.

The Code Napoleon is regarded as the culmination of the hopes and the realization of the dreams which often inspired the jurists before it.[89] Not only that, even the man after whom it is named considered it as his greatest achievement, greater still than the battles he had won.

He says of it at St. Helen while in exile:

> My true glory is not in having won forty battles. Waterloo will blot out the memory of those victories. But nothing can blot out my Civil Code. That will live eternally.[90]

Prior attempts to codify the laws of France which started as early as the days of Louis XI and the jurist Dumoulin during the middle of the 16th century until Napoleon became First Consul have all failed. From the time the first draft of the Code was made until it was finally enacted into law it had to worm itself through a tortuous maze of complicated legislative machinery. It encountered serious difficulties and obstacles. Some say that if it were not for the zeal, vigor, enthusiasm, and determination of Napoleon it would not have been able to surmount the obstacles. What Napoleon lacked in legal knowledge, he made up for his personal qualities of leadership and vigor. He was able to accomplish what the old monarchy and the revolution had been wanting to do but could not do.[91]

But the Code is not without its critics. The statement is made that the scope and arrangement might have been original but its contents are mostly a compendium of Roman Law, French laws then in force, custom and works of French jurisconsults like Pothier and Domat.[92] In fact, Pothier's *Traite des Obligationes* published in 1761 has been referred to as an advance commentary upon the Code.[93]

A philosophical criticism is made by Leon Duguit. He says that the Code reposes upon a purely individualistic conception of law and upon the metaphysical conception of subjective right. This latter concept stems from the Stoic philosophy of individualism — that the state exists only to protect and legalize the inherent rights of man. This is no longer the theory now, he says. The modern theory is that law is founded on a purely realistic social conception — that of social function. He says further that the Code rests upon two social ideals handed down from the Revolution — the idea of liberty and that of equality. Hence its extreme regard for the individual and his free will. A bitter remark is when he says that it is a "capitalist code", drafted with the intention of protecting the propertied class and giving too little space to the modern ideas of the protection of the weak and of social solidarity.[94]

There have been many projects to revise the civil code. Until now work on them is going on. None of them have been successful thus far and it is predicted that an extensive legislative revision does not appear likely within the forseeable future.[95]

[89] *Id.* at 279.
[90] Lobingier, *Napoleon and His Code*, 32 HARV. L. REV. 114, 33 (1918).
[91] CONTINENTAL LEGAL HISTORY SERIES 279-84 (1912).
[92] Lobingier, *supra* note 90, at 119-21.
[93] CONTINENTAL LEGAL HISTORY SERIES 270 (1912).

The Roman Influence

The Roman Law interests us because it is the main source of both the French and Spanish Codes. Only that part of it which concerns the development of the principle of delictual responsibility will be dealt with.

In the early Roman Law, for acts which are now regarded as crimes but which then were merely personal wrongs, the wronged person had to exact satisfaction as he could from the wrongdoer. Death or harm by violence gave rise to the blood-feud between families or kindreds. However, as society became organized, the practice of personal retribution was frowned upon and the claim of the injured was submitted either to the king or the assembly of the people for the fixing of a blood-price, or compensation in money, in place of the right to limb for limb or life for life.[96] It would appear under this primitive stage of the law that liability is imposed upon the actor merely because of the infliction of damage upon another.

However, with the passage of the Twelve Tables, the idea of fault crept into the law. Although no general rule is laid down by the Tables such as that found in modern codes that fault is an essential ingredient to liability, there are traces of it in this early law.[97] The Lex Aquilia which was published some time later (467 A.U.C.) is said to be the basis of the modern Roman Law of delictual liability based on *culpa* or fault. Under this later law, a person is liable for damage to property if it is due to his *culpa* (fault), and he is in *culpa* if he has not observed the conduct which, under the particular circumstances, would have been observed by a diligent *paterfamilias*.[98] The standard is, however, an objective and average one and sometimes requires a higher, sometimes a lower, degree of care and effort depending on the circumstances.[99]

[94] Duguit, *Les Transformations Generales de Droit Prive Depuis le Code Napoleon* in 1 CONTINENTAL LEGAL HISTORY SERIES 65-78, 287-89 (1912). (1912).
[95] VON MEHREN, *op. cit. supra* note 68, at 21.
[96] F. P. WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 216-19 (4th ed. 1920).
[97] *Id.* at 220-41.
[98] GRUEBER, THE LEX AQUILIA 183, 222-23 (1886).
[99] *Id.* at 223-24.

V. The Basis of Vicarious Liability in Both Systems — A General Statement

That this branch of the law is in a sad state of confusion is admitted.[100] The failure to have a common basis or rationale is what causes much disagreement and doubt on the subject of vicarious liability. If some common understanding can be reached as to what is the justification for the rule, there will be greater uniformity in its application or a lessened area of disagreement.[101] The law can then better play its role because of the certainty created by a more or less fixed standard.[102]

The search for a true basis though has continued unabated since Lord Holt first announced the modern doctrine of *respondeat superior* in 1709. However, until now, all these attempts to explain the basis of the rule, whether historically or rationally, have been ineffectual.[103] It will be our purpose here to plod roughshod into this mound of rationalizations. It is hoped that those who make the trip with us will emerge the less confused, if not the wiser.

But first, a general statement of the rule in both systems. *Respondeat Superior,* which is the common-law rule, in its true sense, makes the master liable for the torts of his servant committed within the scope of employment, even where no fault, legal or moral, is attributable to the master. This doctrine, at one time referred to as the Germanic rule — from the early Teotunic law, is now commonly known as a rule of strict liability, or of liability without fault, or of causation liability.[104]

The rule in the civil law law system, often referred to in Philippine law as the rule of *diligentissimi paterfamilias,* has for its main theme the principle that the master is liable only when he is at fault. It is but an offshoot of the principle of *culpa* liability and is traceable to the Roman Law.[105] As previously stated, the master, be he an owner of an establishment or an employer, may escape liability if and when he proves that he has exercised all the diligence of a good *paterfamilias* (father of a family) to prevent damage.

Attention is invited to the fact that there are certain civil-law countries which follow the common-law doctrine — at least, in this one aspect of the law. These are France, Italy, Portugal and Holland. They follow the theory of strict liability together with the United States and England and other common law countries. On the other hand, the *culpa* liability theory or rule of *paterfamilias,* is followed in Austria, Germany, Japan, Spain, Switzerland, most of the South American countries and in the Philippines.[106]

The adherence of the code countries just referred to, to the common-law doctrine of *respondeat superior* notwithstanding, we shall discuss in the following pages, the rule from the common law and civil law viewpoint — to be consistent with our original approach of making both systems as the basis of comparison.

VI. The Basis of Respondeat Superior in the Common Law

Many reasons and arguments, some logical, others historical and a few, philosophical, together with their criticisms of each other, have been given as a basis for the doctrine of *respondeat superior.* Each seeks to impose liability on the master because of any of these: the master profits from his servant's acts, therefore he should be made to pay for the latter's wrong; he is by fiction, deemed to have impliedly commanded the servant's torts; business is a dangerous business and he who engages in it should bear the ordinary perils incident to it; the master is more likely financially able to bear the burden than his servant, so make him pay; policy dictates that between two people who suffer, he who enabled the servant to commit the wrong should be made to bear the loss and not the stranger; if we make the master pay he'll be more careful in selecting and supervising his servants, so make him pay; he is more in a position to bear the burden and distribute the loss to the poor public, us; he is the one who has set the servant in motion or has given a car or truck or an instrumentality which causes the injury, so hold him liable; it is difficult to point out who caused damage but it is easy to tell whose servant it is; it is human to sympathize with the poor careful pedestrian who is hit by a negligent driver of the Blue and White Taxi Co., so hold the company liable; there will be more progress because there is certainty in the doctrine, that the master is always liable, and a man who knows this will adapt his business to the doctrine; the master selects the servant and controls him, he should be made to suffer — not the injured person; and finally, it is a great concession to have servants, so let us have them but make the master pay for their misdeeds! We shall now proceed to discuss these propositions in detail and duly acknowledge their learned sources.

1. *The Profit, Benefit or Interest Theory*

The master employs a servant because he expects to derive advantage, profit and benefit, from the servant's acts. Since he obtains the benefits of

[100] Laski, *supra* note 13, at 105-06; see also Young Smith, *supra* note 14; Takayanagi, *supra* note 54.

[101] Young Smith, *id.* at 463. Smith further says:

"If judges had been thinking of *respondeat superior* as a means of spreading or distributing inevitable losses incident to business and industry, this doctrine, like workmen's compensation, might have been more limited in its application and more drastic in the cases where it was applied." *Id.* at 459.

[102] Seavey, *supra* note 21, at 145.

[103] Prosser 472-73; Laski, *supra* note 13, at 105-06.

[104] Takayanagi, *supra* note 54, at 290 n. 134.

[105] "The causation theory of liability is one that says that the causation of damage in itself, apart from any other element, such as culpa, extra-hazardousness of conduct, etc., should give rise to civil liability." *Id.* at 418.

[106] *Id.* at 289-91.

servant's services, he should also undertake the responsibility for any detriment to others caused by such employment. Just as a man cannot share profits without being responsible for losses in a business venture or have a leonine partnership, so a master must accept the responsibilities as well as the advantages of delegated work.[107]

One who pursues one's own interest must bear the incidental risks of such pursuit. The possibility of one's servant causing harm upon another in furtherance of one's interest and within the scope of the employment is one of such risks.[108] Those who support this theory are Bohlen, Batt, R. Merkel, Unger, Raymond, Gibbs, Best, Bruns, and Wright.[109]

2. *The Theory of Agency or Implied Command*

This theory is best expressed by the Latin maxim: *"Qui facit per alium facit per se"*, which means "Who does it by another does it by himself." Its foremost exponent is Dean Wigmore, who, after tracing painstakingly the history of the doctrine, arrived at the following conclusion:

> This is not the place to offer to do what no one has yet succeeded in doing, — to phrase the feeling of justice which every man has in the more or less limited responsibility for agent's torts; but it is worth while noting that the Command or Authority principle may prove to be, theoretically as well as historically, the true support of the rule of responsibility for agent's torts.[110]

No theory has been subjected to more biting criticism than this. Like a pack of hounds, Wigmore's critics rushed to have their pick. Taking the lead was Holmes who said that the theory was opposed to common sense.[111] Laski says of it: "like most of its kind that antique legend is simply a stumbling block in the pathway of juristic progress."[112] Further: "The fiction of implied authority is no more than a barbarous relic of individualistic interpretation."[113] Finally, he says: "We do not therefore attempt the definition of the doctrine of implied authority for the simple reason that definition is impossible. We give up the doctrine."[114]

The vulnerability of the theory seems to be that it is only applicable to authorized acts, not to acts that, although done by the servant in the course of employment, are specifically unauthorized or even forbidden. An example of this latter case is a servant, who, in deliberate violation of the master's instructions not to run a horse at a gallop, does so and injures another.

[107] BOHLEN, *op. cit. supra* note 33, at 65; BATT, THE LAW OF MASTER AND SERVANT 252 (4th ed. 1950).
[108] Takayanagi, *supra* note 54, at 429-30.
[109] See also Seavey, supra note 21, at 146-47; MECHEN, OUTLINES OF THE LAW OF AGENCY 239 (1952) (hereinafter cited as MECHEM); BATY 148.
[110] Wigmore, *supra* note 46, at 140.
[111] Wigmore, *Agency*, 4 HARV. L. REV. 345; 5 HARV. L. REV. 14 (1891).
[112] Laski, *supra* note 13, at 107.
[113] *Id.* at 122.
[114] *Id.* at 116.

Under the law as it is now, the master is still liable.[115] Others who support the doctrine together with Wigmore are: Blackston, Maitland, Blackburn and Glenlee.[116]

3. *The Danger or Peril Theory*

This theory is based on the premise that a person who is allowed to endanger another's interest for his own benefit, must be held absolutely liable for damage arising from such perilous situation. It is a somewhat milder form of the doctrine of extra-hazardous enterprise. The theory states that it is a specially dangerous thing to embark in business, for it involves a profound responsibility, like keeping a wild animal, though not so extensive. It involves an obligation not to insure, but to insure reasonable care.[117] Under this theory, the master is considered as an insurer of the public against the torts and wrongs of his servant.[118]

An analogy may be made from Workmen's Compensation Acts. These Acts were enacted to give protection against the added risk thrust on the workman by his job. *Respondeat superior* was invented to protect against the added risk thrust on the public by the job.[119] Those who uphold this theory are: Pollock, Leening, Fifoot, J. Grove and Mechem.[120]

4. *The Satisfaction or Deep Pocket Theory*

The phrase "deep pocket" is peculiarly Baty's. He says that the real reason for an employer's vicarious liability, after rejecting and criticizing eight others, is that the damages are taken from a deep pocket. He hastens to add however, that, during his age (1916) it was not a very propitious time to withstand a dogma based on such a principle.[121]

[115] "Wigmore's theory further will not fit the facts. The master cannot be said to have implicitly commanded, who has expressly forbidden. Yet he is just as fully liable for the effects of his servant's disobedience." BATY 149. See also SPENS AND YOUNGER, EMPLOYER AND EMPLOYEE 6 (1887); POLLOCK 61.
[116] BATY 148.
[117] *Id.* at 149.
[118] FIFOOT, *op. cit. supra* note 81, at 178-80. Lord Cranworth in Barton's Hill Coal Co. v. Reed, 3 Macq. 226 (1858) states:
"The master is considered as bound to guarantee third persons against all hurt arising from the carelessness of himself or of those acting under his orders in the course of business."
[119] "It was definitely not the idea of workmen's compensation just to protect workmen as a class; the idea was to protect them from the extreme risks resulting from their exposure to dangerous machinery in their own hands or those of irresponsible co-workers... If workmen as a class had suffered primarily from fallen arches, fatigue, tuberculosis, indigestion and old age, workmen's compensation would have been thought of. On the contrary it was created to give protection against the added risk thrust on the workman by his job; likewise, it could be argued, *respondeat superior* was invented to give protection against the added risk thrust on the public by the job." MECHEM 242.
[120] See citations in notes 118 & 119 and also BATY 148.
[121] *Id.* at 154. Pollock, reviewing Baty's book, says that Baty does not comment on the legal and economic history in the middle of the 19th century. He should have noticed, Pollock continues, what insurance plays on the doctrine. Pollock, Book Review, 1916 L. Q. REV. 226.

the employer should pay because he's got a "long purse" into which to dip his hand; he's made liable because he has the money to pay. It is felt, probably with justice, that a man who is able to make compensation for the hurtful results of his activities should not be enabled to escape from the duty of doing so by delegating the exercise of these activities to servants or agents from whom no redress can be obtained. Such delegation confers upon impecunious persons means and opportunities of mischief which would otherwise be confined to those who are financially competent. It disturbs the correspondence which would otherwise exist between the capacity of doing harm and the capacity of paying for it. It is requisite for the efficacy of civil justice that this delegation of powers and functions should be permitted only on the condition that he who delegates them shall remain answerable for the acts of his servants, as he would be for his own.[122] Sharing this view with Baty, are Maitland, Salmond and J. Willes.[123]

5. *The Theory of Social Duty or Public Policy*

The earliest exponent of this theory is Lord Holt who said that it is more reasonable that a master should suffer for the cheats of his servants than strangers or tradesman because it is he who puts a trust and confidence in the deceiver and gives a credit to him. This doctrine is an extension of a rule of natural justice stated by Blackstone that: "No man shall be allowed to make any advantage of his own wrong."[124]

In 1842, Chief Justice Shaw of the Supreme Judicial Court of Massachusetts stated the rule as follows:

> "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another, and if he does not, and another thereby sustains damage, he shall answer for it. If done by a servant, in the course of his employment, and acting within the scope of his authority, it is considered, in contemplation of law, so far the act of the master, that the latter shall be answerable *civiliter*.... The maximum *respondeat superior* is adopted in the case from general considerations of policy and security."[125]

Most of the writers, notably, Holdsworth, Laski, Salmond, Mechem, Seavey, Prosser, Smith, Morris, Tiffany, and a host of others, and the courts as well, are all agreed that a public policy is the true basis of the rule. It is in the precise delimitation of the rationale where they seem to differ and break away one from the other.

[122] SALMOND, TORTS 414 (10th ed. 1945).

[123] See also Seavey, *supra* note 21, at 150. Laski, *supra* note 13, at 109; MECHEM 240.

[124] Wigmore, *supra* note 46, at 398.

[125] Farwell v. Boston & Worchester Ry., 4 Met. 49, 3 Bacquillen 316 (1842). Pollock criticizes the theory because it is "somewhat too widely expressed, for it does not in terms limit the responsibility to cases where at least negligence is proved." POLLOCK 62.

"The justification for this rule is public policy, were the master not liable for his servant's torts a vast number of injured persons would be without effective remedy." SALMOND, TORTS 83 (10th ed. 1945).

6. *The Prevention or Carefulness and Choice Theory*

If the master were made liable for all negligent acts of his servants within the scope of employment, such will act as a wholesome deterrent against recklessness generally. He will not retain a careless servant, and the servant, knowing this, will be more careful about his assigned tasks.[126] The rule will tend in some degree to insure the community against recurrences of the same kind of acts.[127]

The liability should be absolute because one who is liable for all consequences is more apt to take precautions to prevent injurious consequences from arising than another who thinks that there may be a way out.[128] Pothier says that the same reason, which is "to render masters careful in the choice of whom they employ"[129] was the purpose of the French law before the Code Napoleon in making the employer liable in the same manner as in the common law. The same rule has been carried into the Code Napoleon.

Holmes and Pollock criticize this theory saying that is it unsound because no amount of care in the selection of the servant will exonerate the master.[130] Seavey answers this saying that our everyday experience refutes it. He compares the liability of an employer and the liability of an insurance company with respect to the effect upon him who must bear the loss. He adds that the history of insurance companies, Employer's Liability Acts and Workmen's Compensation Acts, showing decreasing mortality in an increasingly dangerous environment, indicates that the proper place to apply pressure is on the employer.[131]

7. *The Causation or Motion Theory*

Under this theory, liability is laid at the master's door because he causes, in a reasonably direct sense, the resulting harm by entrusting an instrumentality to a servant or because he has set the latter "in motion". The rule may be traced to as early as 1839 when Lord Brougham laid it down as follows:

> The rule of liability, and its reason I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done

[126] SPENS AND YOUNGER, *op. cit. supra* note 115, at 7.

[127] See Green, *The Duty Problem in Negligence Cases*, 28 COL. L. REV. 1614 (1928); 29 COL. L. REV. 255 (1929).

[128] Seavey, *supra* note 21, at 147-48.

[129] 1 POTHIER, 121.

[130] Holmes, Agency, 4 HARV. L. REV. 345, 48 (1891).

[131] Seavey, *supra* note 21, at 148-49.

for my benefit and under my direction, I am responsible for the consequences of doing it.[132]

The requirement that the servant's act be within the scope of employment lends support to this theory. If there is no responsible intimate connection between the employment and the injury to the third person, the master is not liable, a result, which, using the language of causation, may be explained on the theory that the employment has so little connection with the final result that it may be disregarded.[133]

To the possible objection that the doctrine of *respondeat superior* holds the employer liable even where he has in no sense caused the result, as where he buys a going concern and the servant injures a third person before the purchaser has had an opportunity to assume control or before the servant knows of the change of employer, Professor Seavey says:

> But while it is true that the master in such cases has in no way effected the result, his liability is in line with the cases holding that one who has purchased a structure is subject to liability if the structure, having been negligently maintained, falls upon a person outside the premises before the new owner has had an opportunity for remodeling, irrespective of his lack of knowledge that the building is defective. In both cases, the liability follows upon the assumption of control, which is a normal common law basis of liabiilty. In both cases, the *de facto* control is frequently absent; the relationship having been created, it is convenient for the law to generalize and to extend the liability on the assumption that there is control. So far as causation is concerned, there is just as much connection between the employment by the master and the later harm as there is between the assumption of the possession and the later harm caused by the thing possessed.[134]

The foremost exponent of the causation theory in its more general and wider aspect as applied to tort law in general is Professor Takayanagi who has written a scholarly treatise on the subject.[135]

8. *The Theory of Sympathy*

In his search for a reason directed towards a different direction, Hacket has formulated the humane theory of emotional sympathy for a fellow-being in distress. He says that research into the reports of earlier decisions will not lead to the true reason behind the master's vicarious liability. The real reason lies in human nature and our perception of the springs of human action. He continues:

> The rule may be attributed to the influence that our feelings of sympathy have over us for a fellow-being in distress. We cannot look upon the unfortunate victim of an accident without being sensible, not only of pity for him, but of more or less indignation and resentment against the person whom we take to be the party in fault... The 'master' being more or less connected in our thoughts with the affair and being moreover a man able to respond with his money, we should assume the responsibility of what we easily call his share in the accident. We see no hardship in making him pay the bills, and we leave him to console himself with the reflection how much better off he is than the poor fellow who has been injured.[136]

9. *The Theory Based on Evidence*

This theory is premised on the difficulty of proving negligence. If there is no rule of absolute liability of the master, such as is now followed, the injured party would be at a disadvantage due to the hardship entailed in proving his case. Whether an employer was negligent in the selection or supervision of his servant would ordinarily have to be proved by evidence in the possession of or subject to the control of the master. Usually, the testimony of fellow workers would be the only proof. It would be hard to obtain truthful statements from them when, a word in favor of the injured stranger would be against his employer from whom he draws his daily bread.[137] Salmond puts it this way:

> The rational basis of this form of vicarious liability is in the first place evidential. There are such immense difficulties in the way of proving actual authority, that it is necessary to establish a conclusive presumption of it. A word, a gesture, or a tone may be a different indication from a master to his servant that some lapse from the legal standard of care of honesty will be deemed acceptable service. Yet who could prove such a measure of complicity? Who could establish liability in such a case, were evidence of authority required, or evidence of the want of it admitted?[138]

Aside from Salmond, those listed as sharing his view are Eyre and Cranworth.[139]

10. *The Theory of Business Necessity*

This theory takes cognizance of the present-day business and commercial world wherein most of the activities which result in harm to others are those of corporations or juridical entities which the law recognizes as legal persons. Seavey says that under such conditions, the doctrine of *respondeat superior* is practically a necessity. Thus:

> Finally, in the situations most frequently occurring, that is, those in which a corporation or other business organization is a defendant, it is reasonably obvious that the doctrine of *respondeat superior* is practically a necessity. Without this, the members of the organization, normally free in any event from personal liability, would be released as to the funds contributed, not only for the harms caused by the physical negligence of servants, but also for the wrongs

[132] Duncan v. Finlater, 6 Cl. and Fin. 910 (1829).
[133] Seavey, *supra* note 21, at 132-33.
[134] *Id.* at 133-34.
[135] Takayanagi, *supra* note 54. See also Laski, *supra* note 13, at 109, and MECHEM 240.
[136] Hackett, *Why is Master Liable for the Tort of His Servant?*, 7 HARV. L. REV. 107, 112 (1893).
[137] Seavey, *supra* note 21, at 149-50.
[138] SALMOND, JURISPRUDENCE 414 (1947).
[139] BATY 148.

done by the deceit and other similar torts of the directors and other corporate executives. To permit a group of persons so to organize that without personal liability they can secure the profits resulting both from the lawful and the unlawful conduct of those in charge of the organization without having the assets subject to liability for the harm caused by the unlawful conduct, is so shocking that it would seem to be unnecessary to do more than to state the alternatives.[140]

Moreover, the knowledge that he will be held strictly liable for his servant's torts will be taken by an employer as a factor in the pursuit of his business. This certainty created by a fixed rule makes it easier for the businessman to plan his way about his enterprise. Likewise, on the other hand, the person dealing with an employer through an agent is more prone to do so if there was a rule by which to gauge the extent of protection available to him from the agent's fraud or misdeed.

If the business of the world is to be done by agents, third persons in dealing with them must be relieved, so far as is possible, from uncertainty as to the extent of their authority, and it is for the general advantage of the entire class of persons acting as principals that occasionally an individual principal should be held liable for contracts which he did not authorize. Mechem says that the rule is congenial to and consistent with industrial civilization. Professors Seavey and Mechem seem to be the only exponents of this theory.[141]

11. *The Theory of Control*

The control theory states that it is the master who selects the servant and controls him. He should be made to suffer the loss rather than the injured person. The power to exercise physical control over the servant is the most outsanding element of the doctrine of *respondeat superior*. It is this element which is stressed in the opinions.

In fact, that which distinguishes a servant from an independent contractor is the extent of control of the master over the physical conduct of one or the other in the performance of the service. If the physical conduct in the performance of the service is controlled or is subject to the right to control by the master, the person employed is a servant; otherwise, he is an independent contractor. In the former, the master has a vicarious liability; in the latter, none.[142]

Those upholding this view are: Raymond, Gierke, Dalloz, Sourdat, Brougham, and maybe, Grove and Erskine.[143]

12. *The Theory of Revenge*

Under this theory, it is said that the master is being held liable in the same manner that he was made liable under the primitive law. He buys off his servant as he bought off his slave. In the early part of this paper it was shown that the basis of early primitive law was to quench the thirst for revenge of him who was hurt or of his kindred, if he died. To preserve the peace of the kindred, the master could ransom or buy off his slave, if it was the slave who caused the harm. The same was true of the servant who was a freeman. With the passage of the centuries the master is still held liable for his servant's torts. His liability must have the same basis as the early law. He is just buying off his servant. Baty says that those who associated with the theory are: Holmes, Lowe, and Bramewell.[144]

13. *The Indulgence Theory*

This theory has the realistic approach in that it states that it is a great concession to have servants. If any man is allowed to employ another, then there should be a corresponding responsibility. We cannot do without servants. They are a part of us. Since we must have them we should pay for having them. Bacon is the only one to whom the theory is attributed.[145]

However, Pollock sems to be leaning to this manner of rationalization when he says:

> And the true principle is otherwise clearly announced. I am answerable for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.[146]

14. *The Enterpreneur Theory*

This theory appears to be the modern expression of the true basis of the doctrine of *respondeat superior*. It has merited the acceptance of most of the recent writers on the subject.[147] Stated briefly, the master is held liable because he is better able to bear the burden and to distribute it to the public.

The rational justification for the rule is social expediency; that it is socially more expedient to spread or distribute among a large group of the community the losses which experience has taught are inevitable in the carrying on of industry, than to cast the loss upon a few; that the master should be made responsible not merely because he is better able to pay, but because he is better able to effectuate the spreading (by means of insurance)

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[140] Seavey, *supra* note 21, at 152-53.
[141] *Id.* at 145; MECHEM 245.
[142] RESTATEMENT, AGENCY 55 2, 212-15.
[143] BATY 148.
[144] *Ibid.*
[145] *Ibid.* See also PROSSER 472.
[146] POLLOCK 62.
[147] Seavey, *supra* note 21, at 151-52; PROSSER .72-73; Laski, *supra* note 13; Young Smith, *supra* note 14; Douglas, *supra* note 81; Morris, *The Torts of Independent Contractors*, 29 ILL. L. REV. 339 (1935); TIFFANY 100-05; MECHEM 109; Takayanagi, *supra* note 54.

and the distribution (by enhanced price) of such losses.[148]

The principle back of this doctrine is the principle underlying Workmen's Compensation Laws. The latter have been enacted under an awareness that the needs of the modern state require that the burden of loss of life or limb in industry is chargeable to production expenses, meaning, that the employer shall bear the same. Both principles represent the typical modern reaction against mid-Victorian individualism. The need of the modern state is most emphatically that the welfare of the workers should be the first charge upon industry.[149]

If the enterprise were big, with the progress made in actuarial science, the extent of the liability may be predicted with a fair degree of accuracy, same as in insurance. If it were small, the individual employer can always secure insurance to absorb the loss. But then, it might be said that it would just be shifting the burden from one poor man to another. Not so. In the majority of cases, it is the injured person rather than the employer, who is unprotected by insurance against harm. The injured persons themselves are consumers, and since the consumer pays, the imposition of liability upon employers is an indirect method of requiring the consumer class to provide its own insurance.[150]

Why not then make the state a mutual insurance company against accidents and distribute what otherwise would be the burden alone of the employer among all the people? Justice Holmes answers this question by stating that the state does not do this because "its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise."[151]

The further question may be asked: Is this not a leveling process by taking from those "who have" to give to those "who have not?" This was asked of Professor Seavey by Macneil to which he replied:

> Very likely this is true; but in view of the modern temper which requires all to be taken care of, it would seem preferable to have industry rather than the state perform the function of protection. Believing as I do that privately managed enterprises, in spite of their obvious abuses, are, on the whole, managed better than public ones, it seems to me better to allow a person who has suffered harm to receive compensation from 'the man who has' rather than force him to become a temporary charge upon the community. Also I prefer to compensate the victims of my personal activities rather than, through taxation, be required to compensate the victims of others.[152]

Those identified with this theory are: Douglas, Laski, Mechem, Morris, Pollock Prosser, Seavey, Smith, Takayanagi, and Tiffany.

It will be noted from these different rationalizations of the master's vicarious liability that each one of them was conceived and formulated to achieve a desirable result. But as is always the case with law, each theory had to give way to the other with the change in the social and economic conditions at a given time and place.

Take the theory of implied command, for instance. It held good before the advent of the industrial revolution. The master is held liable under the doctrine because he is deemd to have implicitly commanded the servant to commit the tortious act. At that time, master and servant were often within talking distance of each other in the pursuit of the master's business. With the coming of the machine age and big industry, the servant no longer was within the beck and call of the master. He was only one among hundreds and even thousands charged with a specific job. And instructions were given him not to do this or that. And yet, even if he violated these instructions, it was deemed desirable to hold the master liable. But this was not consonant with the theory of implied command. The master cannot command that which he forbade. Hence, the birth of another theory.

Did the civil law follow the same pattern of inconstancy? Or did it adopt an abiding principle that was flexible enough to adjust itself to every age? That is our next point of inquiry.

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[148] "Every industry has its regular losses. This may be in property e.g. breakage of utensils in a restaurant business; depreciation of buildings and machinery; breakdown in operations; or it may be in injuries to life and limb, e.g. liability under Workmen's Compensation and Employer's Liability Laws. Ordinarily, the owner of the enterprise bears this loss as cost of operations. It can and does spread the burden by including it in its charges. The cost to the public is insignificant, very unimportant when compared to the cost to the victim if he were to bear it simply." MECHEM 242-43. To the same effect are: Smith, *supra* note 14, at 716; Seavey, *supra* note 21, at 151-52; PROSSER 472-73; TIFFANY 100-05.

Modern French writers have advocated a theory similar to but not quite the same as the enterpreneur theory of American authors. It is called the theory of collective responsibility based on the idea of social solidarity. The essence of the theory is that the damage which is the consequence of collective activity and not of individual fault, must be borne by the community at large. The theory was advocated by Demogue, and elaborated by Tridanfil and Duguit. The so-called *"risque"* liability is not based on the risk created by the enterpreneur, as is advocated by the followers of *"theorie des risques,"* but is a sort of collective responsibility. The economic changes of modern days, it is said, gave rise to collective economy side by side with individual economy. Enterprise in the modern sense is collective enterprise of a part or the whole of society. It consists not only of the enterpriser, the laborer, the scholar, the artisan, and the capitalist, but also of the public which creates a demand for what kind of enterprise. It is, therefore, just it is said, that the loss arising out of the enterprise should be divided among all concerned. Takayanagi, *supra* note 54, at 427-28.

[149] Laski, *supra* note 13, at 126.

[150] Seavey, *supra* note 21, at 150-52.

[151] HOLMES, THE COMMON LAW 96 (1881).

[152] Seavey, *supra* note 21, at 151 n. 41.