BARREDO v. GARCIA AND ALMARIO IN PERSPECTIVE

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Barredo v. Garcia and Almario[1] is a remarkable decision in many respects. In this case a 16 year old boy, one of the passengers of the caretela died as a result of a collision with a recklessly driven taxi. In the criminal action the parents of the deceased reserved their right to file a separate civil action. After the driver was convicted of homicide thru reckless imprudence, they brought a separate civil action against the taxi-owner based on Art. 1903 (now Art. 2180, New Civil Code). The taxi-owner's defense was that the driver having been convicted of driminal negligence, Art. 100 in relation with Arts. 102-103, Revised Penal Code should govern his liability according to which his liability is only subsidiary, but the driver has not been sued in a civil action and his property has not been exhausted. Further complicating the issue is the fact that Art. 1093 of the Civil Code expressly provided that quasi delict refers to acts not punishable by law. In a decision which is outstanding in its legal erudition as the elegance of its language, the court ruled for the plaintiff holding that it is not disposed to uphold "the letter that killeth rather than the spirit that giveth life x x x. A quasi-delict or *culpa aquiliana* is a separate legal institution under the Civil Code, with a substantivity all its own, and individuality that is entirely apart and independent from a delict or crime". This doctrine is restated in Art. 2177 of the New Civil Code:

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

The courts and the authorities on the subject, however, lack unanimity in the interpretation and application of *Barredo* and Art. 2177. This article attempts to analyze these decisions, and views, and not without temerity, indicate the personal insights of the writer on the matter.

DIANA v. BATANGAS AND RELATED DECISIONS

In variably invoking *Barredo v. Garcia,* the Supreme Court in *Diana v. Batangas*[2], *Jocson v. Glorioso*[3], *Mendoza v. La Mallorca*[4] *and Padua v. Robles*[5] re-

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fused to dismiss the action to enforce the subsidiary liability of the employer under Art. 103 of the Revised Penal Code notwithstanding either the pendency, or the finality of the dismissal, of the civil action for damages based on culpa aquiliana for the same act or omission.

In *Diana,* it was held that the defense of *res judicata* is not tenable because of the absence of identity of causes of action between the *culpa aquiliana* action against the employer and the civil action based on *culpa criminal* for the reason that the remedy in one is different from the remedy provided by the other.

The court in *Jocson* stressed that the subsidiary liability of the employer under Art. 103 of the Revised Penal Code, after conviction and proof of the civil action for *culpa aquiliana* on the ground that the driver was not guilty of negligence, is of no moment.

Relying on the *Diana* and *Jocson* decisions, the court in *Mendoza* likewise gave due course to the action to enforce the subsidiary liability of the employer under Art. 103 of the Revised Penal Code ignoring the fact that plaintiff had reserved in the criminal action his right to file a separate civil action, which action was dismissed on the ground of prescription. *Res judicata* cannot be invoked as a defense, the court ruled, because of the absence of the identity of causes of action since the evidence required to prove the liability of the employer in the *culpa aquiliana* action is different from the evidence required to prove his liability in the civil action based on crime. Despite the fact that *Jocson* and *Mendoza* decisions were rendered after the adoption of the New Civil Code, the court, unfortunately, made no reference to the proscription against double recovery under Art. 2177 or to the contradictory ruling in *Tactaquin v. Palileo*[6].

It was in *Padua* that the court confronted the fundamental question involving the interpretation of the proscription against double recovery under Art. 2177 of the New Civil Code and ruled that what it prohibits is actual recovery.

TACTAQUIN v. PALILEO

In *Tactaquin* the court dismissed the civil action for *culpa aquiliana* against the employer that was filed after the judgment of conviction for the same reckless imprudence, which also awarded damages to the plaintiff, has become final. The court said that "any civil liability contracted by appellee – whether based on quasi delict or otherwise – arose from exactly the same act or omission xxx for his act or omission appellant cannot recover twice." The court did not, however, explain why it interpreted the proscription against double recovery in Art. 2177 in this manner.

This decision contradicted the earlier decision in *Diana* but has since been superseded by subsequent decisions in *Jocson, Mendoza, Padua,* etc. which unifomly held the view that there is no legal impediment to the simultaneous or successive filing of a civil action based on quasi delict and the civil action based on crime subject only to the prohibition that plaintiff may not recover twice for the same act or omission.

WHICH IS THE BETTER VIEW?

Judge Cesar Sangco, an imminent authority in Torts and Damages, expressed agreement with the interpretation of Art. 2177 of the New Civil Code made in *Tactaquin*. He holds the view that implicit in *Barredo* is the principle that the election of either one of the remedies would preclude availment of the other.[7]

With due respect, such interpretation of *Barredo* is questionable. It would take out of the context of the decision that part adverted to, to wit: "Thus there were two liabilities of Barredo: First, the subsidiary one because of the civil liability of the taxi driver arising from the latter's criminal negligence; and second, Barredo's primary liability as an employer under Art. 1903. The plaintiffs were free to choose which course to take and they preferred the second remedy."[8] This should be read in the light of the underlying objective of *Barredo* which is to "re-establish an ancient and additional remedy, and for the further reason that an independent civil action, not depending on the issues, limitations and results of a criminal prosecution, and entirely directed by the party wronged or his counsel, is more likely to secure adequate and efficacious redress."[9] Thus the recognition of the right of the plaintiffs to choose which course to take does not necessarily preclude the institution of simultaneous or successive civil actions for damages based on the separate liabilities of the employer and employee. There is merit in the argument that *Barredo* does not inhibit the filing of simultaneous or successive civil actions against the employer. Such procedure reinforces *Barredo* in providing the plaintiff a remedy which is distinct from the delictual remedy because the availment of simultaneous or successive remedies improves the plaintiff's chances of recovery.

Tactaquin, it has been suggested, is based on the doctrine of election of remedies.[10] This doctrine has been frequently regarded as an application of the law of estoppel, or the theory that a party cannot, in the assertion or prosecution of his rights, maintain inconsistent positions, and that where there is by law or by contract a choice between two remedies which proceed to opposite and irreconcilable claim or right, the one taken must exclude and bar the prosecution of the other.[11] Accordingly, remedies are inconsistent where the one is founded upon the affirmance, and the other upon disaffirmance, of a voidable transaction, or of a contract, where relief in the one suit is predicated on title in the plaintiff, and in the other, on title in the defendant. Thus, assertion of a lien upon property is inconsistent with the assertion of the title thereto. And where the plaintiff could have pursued either of the co-existing provisional remedies of receivership or sequestration, the choice of one will bar the other and inconsistent remedy.[12] To the extent that this doctrine is basically premised on the existence of a single liability of the defendanet, it would be inapplicable to *Tactaquin.* Art. 2177, it is emphasized, creates two entirely separate liabilities. In this context, "liability" is different from "remedy". Liability is synonymous to responsibility; the state of one who is barred in law and justice to do something which may be enforced by action.[13] Remedy is the means employed to enforce a right or redress an injury.[14]

The conflict between *Tactaquin* and *Padua* involves the meaning of the proviso in Art. 2177 "that the plaintiff cannot recover damages twice for the same act or omission of the defendant". According to *Padua,* the proviso refers to a prohibition against double "actual" recovery. This adheres to its plain and ordinary meaning. On the other hand, *Tactaquin* implies that the correct interpretation of the proviso is that the choice of one remedy excludes the other. This is not correct. The state having provided that the civil liability arising from quasi-delict is entirely separate and distinct from that arising from criminal negligence, what immediately strikes the legislator is the need to adopt a measure to protect the defendant against possible injustice as a result of the application of this rule. An obvious remedy would be for the statute to provide, either expressly or by clear implication, that the election of one remedy excludes the other. As it is, it does not. Ergo, *Padua* states the better view.

RES JUDICATA

In *Mendoza v. La Mallorca,* supra, the court ruled that *res judicata* may not be invoked in damage suits filed simultaneously or successively on the basis of the liabilities created in Art. 2177 because there is absence of identity of causes of action between the different suits. The underlying argument in *Mendoza* is that under Art. 2180, the liability of the employer arises out of his own negligence in the selection and supervision of his employee, is primary or personal to him, but he may interpose the defense that he exercised diligence in the selection and supervision of the Revised Penal Code on the other hand, his liability arises out of the criminal negligence of his driver, is subsidiary, and the judgment of conviction of his employee, and the award of damages, are conclusive on him.

Moran holds the contrary view that there is only one cause of action, and not two causes of action, there being only one wrong (reckless driving), one injury (killing of the victim), and one person injured (the death victim). Consequently, resort to the other remedy, after failing in one remedy, would be splitting up a single cause of action into civil complaints, which is offensive to Secs. 3 and 4, Rules of Court.[15]

Judge Sangco's discussion on this subject is more incisive and thorough. He says: "It must be noted that the cause of action does not arise in a real sense from delict or quasi-delict as distinct and separate obligations but from the same negligent act or omission of the same person, and that the threshold issue litigated under both causes of action is whether the said negligent act or omission was the proximate cause of plaintiff's damage or injury, and proof of the affirmative of said issue will establish plaintiff's claim in both or either action."[16] This conclusion is based on his premise that the liability of the employer under Art. 2180 does not arise from his lack of diligence in the selection or supervision of his employee but from the damage caused by his employee's negligence. That this is so is deduced from the fact that under Art. 2181 the employer has the right to full indemnity from his employee for what he pays to the person injured or damaged by the latter's negligence. He adds: "Moreover, it is equally obvious that the presumption of negligence in the selection and supervision of his servant or emplo-

yee and his liability based thereon will not arise against the employer until the negligent act or omission, because before then neither of them will have anybody to indemnify. x x x. Otherwise stated, the employer or master is not and cannot be held independently liable for his negligence in the selection or supervision of his employee or servant.[17] x x x. Consequently, the institution of an action based on either cause of action whether against the author thereof or those responsible for him, will abate a subsequent action based on the other under the principle of *lis pendens;* and a judgment in one of said causes of action will bar an action based on the other not only by express provision but under the doctrine of *res judicata* or estoppel by judgment."[18]

On the other hand, the theory that the responsibility of the master under Art. 1903 (now Art. 2180) is based ultimately on his own negligence was propounded in *Bahia v. Litonjua v. Leynes*[19] which was cited, with approval, by *Barredo*.

It was held in Bahia:

> "From this article two things are apparent: (1) That when an injury is caused by the negligence of a servant or employee there instantly arises a presumption of law that there was negligence on the part of the master or employer either in the selection of the servant or employee, or in the supervision over him after the selection, or both; and (2) That the presumption is *juristantum* and not *juris et de jure,* and consequently, may be rebutted. It follows necessarily that if the employer shows to the satisfaction of the court that in selection and supervision he has exercised the care and diligence of a good father of a family the presumption is overcome and he is relived from liability.
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> This theory bases the responsibility of the master ultimately on his own negligence and not on that of his servant. This is the notable peculiarity of the Spanish Law of negligence. It is, of course, in striking contrast to the American doctrine that in relation with strangers, the negligence of the servant is conclusively the negligence of the master."

The court reiterated this doctrine in *Cangco v. Manila Railroad*[20]. It said: "The liability, which under the Spanish law, is, in certain cases imposed upon employers with respect to damages occasioned by the negligence of their employees to persons to whom they are not bound by contract, is not based, as in the English Common Law, upon the principle of *respondent superior* – if it were, the master would be liable in every case and unconditionally- but upon the principle announced in Article 1902 of the Civil Code, which imposes upon all persons who by their fault or negligence, do injury to another, the obligation of making good the damage caused. x x x. (This) is in complete accord with the authoritiative opinion of Manresa, who says that the liability created by Article 1903 is imposed by reason of the breach of the duties inherent in the special relations of the authority or superiority existing between the person called to repair the damage and the one who, by his act or omission, was the cause of it."

It is noted that Judge Sangco expressly disagrees with the decision in *Bahia.*[21] The clear implication would be, if we were to adopt his opinion, that the

employer who is sued under Art. 2180, may not raise the defense that he has exercised the diligence of a good father of a family in the selection and supervision of his employee. In effect, he would want to transplant our concept of quasi-delicit which is rooted in the Spanish Law of negligence to American law or jurisprudence. Candidly he says, "The Civil liability of the employer, master, or principal for the negligent act or omission of his employee, servant or agent, is what is known in American law and jurisprudence as "derivative responsibility", which, to the author's mind, is a more apt and precise definition of its nature."[22] This paves the way for the applicability of the rulings of American Courts to the effect that where the liability was entirely derivative the rule on *res judicata* regarding the nonprivity of the parties was inapplicable, and the negligence of the servant, having already been tried in the action against the employer, could not be retried against the employee.[23]

It is essential to stress that in *Cangco* the principle that the responsibility of the employer under Art. 1903 is based ultimately on his own negligence and not on that of the servant was referred to, to underline the difference between the liability of the employer *ex contractu,* from his extra-contractual obligation. The court held in that case: "The foundation of the legal liability of the defendant is the contract of carriage x x x. That is to say, its liability is direct and immediate, differing essentially, in the legal viewpoint from that presumptive responsibility for the negligence of its servants imposed by Article 1903 of the Civil Code, which can be rebutted by proof of the exercise of due care in their selection and supervision."[24] Were we to follow the suggestion that in extra-contractual obligations the negligence of the employee is conclusively the negligence of the master then we would in effect erase the distinction between contractual and extra-contractual obligations of the employer painstakingly laid down in *Cangco*.

It is difficult to believe that Judge Sangco would want our courts to abandon the legal principles laid down in *Bahia* and *Cangco,* which have long been part of our jurisprudence because such would have the effect of substantially altering the procedural system for the enforcement of rights and obligations arising out of contracts and quasi-delict. One is more inclined to believe that his objective is to provoke an in-depth study of the double recovery problem under Art. 2177 since the decisions of the courts in cases wherein this issue was raised, such as in *Diana, Jocson,* or *Mendoza,* this matter was not thoroughly discussed. Indeed, it cannot be over-emphasized that long accepted legal concepts should not be trifled with for the sake of the stability of our legal system.

The decisions in *Diana* and *Mendoza* to the effect that neither *lis pendens* or *res judicata* is applicable to actions filed simultaneously or successively against the employer on the basis of his separate liabilities mentioned in Art. 2177 relied mainly on the principle that the action under Art. 2180 is to enforce the primary liability of the employer for being negligent in the selection and supervision of his employee, while the action under Art. 103 of the Revised Penal Code is to enforce his subsidiary liability upon final judgment of conviction and proof of insolvecy of the employee. To say that the liability of the employer under Art. 2180 is based on the very act or omission of the employee would definitely result in the conclusion that in both actions there is identity of the cause of the wrong, as well

as of the liabilities of the employer, hence *lis pendens* or *res judicata* will apply.

It is not correct to conclude that because under Art. 2181 of the Civil Code the employer may recover from the employee what he has paid for the damage caused by the latter, the employer's liability is based on the act or omission of the employee and not on his negligence in the selection and supervision of the employee. It is stressed that the character of the legal relationship between the employer and the injured party is entirely different from that between the employer and the employee who caused the damage. This is analogous to the rule governing the relationship between the creditor and several debtors in a case where the latter's obligation is solidary. There exists only one *vinculum* linking the creditor and the debtors, but the obligation created by law upon payment by one of the debtors of the entire debt, in which case the payor becomes the creditor vis-a-vis his co-debtors, is joint.[25]

It is true that one may insist that the adoption of the principle laid down in *Bahia* would be inconsistent with Art. 2181. If we were to adopt, however, the rule that the liability of the employer under Art. 2180 is based on the act or omission of the employee this would not jibe with the clear implication of the provisions of Art. 2184. That the employer's liability is solidary with his driver, if the former, who was in the vehicle, could have, by the use of due diligence, prevented the misfortune,[26] patently suggests that it is only in this situation that the employer becomes partly liable to the inured party on the basis of the act or omission of his employee.

Furthermore, independently of the argument that well established legal precepts should not be readily discarded, the recognition of the right of the employer to interpose as a defense the fact that he has exercised diligence in the supervision and selection of his employee is a wise rule. Human nature being fallible the possibility that the employee would cause damage through his fault or negligence despite the exercise of the employer of the required diligence cannot be ruled out. Upon the happening of such an event, it would only be fair and equitable that the employer should be exempt from any liability.

CONCLUSION

The conclusion therefore is that the action under Art. 2180, which is based ultimately on the negligence of the employer in the selection and supervision of his employee constitutes a cause of action which is separate and distinct from that in an action to enforce the subsidiary liability of the employer under Art. 103 of the Revised Penal Code. In short, although this is a case wherein one act or omission at least from the layman's point of view, produces a single wrong, since the law, Art. 2177, states that it nevertheless gives rise to two liabilities, one entirely separate and distinct from the other, a separate cause of action arises corresponding to each liability. Consequently, the decisions in *Diana, Jocson, Mendoza,* and other decisions of similar import, are meritorious.

It is enlightening to state the comments of the Code Commission in respect of Art. 2177, to wit:

> "The foregoing provision though at first sight startling is not so novel or extraordinary when we consider the exact nature of criminal and civil negligence. The former is a violation of the criminal law, while the latter is a *'culpa aquiliana'* or quasi-delict, of ancient origin, having always had its own foundation and individuality, separate from criminal negligence. Such distinction between criminal negligence and *'culpa extracontractual'* or *'cuasi-delito'* has been sustained by decisions of the Supreme Court of Spain and maintained as clear, sound and perfectly tenable by Maura an outstanding Spanish jurist." [27]

With the amendment of Sec. 2, Rule 111, Rules of Court, removing the requirement to make a reservation in the criminal action of the right to file an independent civil action for damages under Arts. 32, 33, 34 and 2177, following the decision in the case of *Abellana v. Morave*[28] there is no longer any procedural measure which could serve to implement the requirement, in accordance with the principle of election of remedies, that the plaintiff elect or choose the remedy he considers appropriate to enforce the civil liability of the employer of the employee. Thus to adopt the view that the filing of simultaneous or successive actions on the basis of the liabilities stated in Art. 2177 would not be sanctioned for the reason that such procedure violates the *lis pendens* or *res judicata* rule, would place the plaintiff in danger of losing his right of recovery because of a procedural technicality. One could easily come up with various factual situations wherein his is highly possible. Their common denominator is the fact that it is the Fiscal who is authorized by law to decide whether or not to file the information with the court against the employee for criminal negligence. This situation could not have been envisioned by the legislator.

There may be injustice in subjecting the employer to multiple suits for damages involving one act or omission. This should be balanced by the fact that the persons who would benefit from the rule allowing the filing of simultaneous or successive actions on the basis of the separate liabilities of the employer under Art. 2177 are the ones who sustained injury in their person or property. Oftentimes, their loss is irreplaceable or beyond pecuniary value. In any event they are not allowed to recover twice for the same act or omission.

The doctrine laid down by *Barredo v. Garcia,* supra, which inspired the decisions allowing the filing of successive or simultaneous actions to enforce the rights of the plaintiff under Art. 2177 as above stated, is meritorious but may leave room for improvement. This poses a challenge to legislators to formulate a better statute.

FOOTNOTES:

[1]73 Phil. 607 (1942).

[2]93 Phil. 391 (1953).

[3]G.R. No. L-22686, January 30, 1968, 22 SCRA 316.

[4]G.R. No. L-26407, March 31, 1978, 82 SCRA 243.

[5]G.R. No. L-40486, August 29, 1975, 66 SCRA 485.

[6]G.R. No. L-20865, September 29, 1967, 21 SCRA 346.

[7]Sangco, Phil. Law on Torts and Damages, Fourth Ed., P. 44.

[8]Barredo v. Garcia, Ibid, p. 614.

[9]Barredo v. Garcia, Ibid, p. 614.

[10]Sangco, ibid, p. 40.

[11]25 AmJur 2d, p. 648.

[12]Ibid.

[13]Bouvier's Law Dictionary, Third Revision, p. 1950.

[14]Ibid, p. 2870.

[15]Moran, Comments on the Rules of Court, 1979 Edition, Volume 1, p. 138.

[16]Sangco, ibid, p. 38.

[17]Ibid, p. 35.

[18]Sangco, ibid, p. 38.

[19]30 Phil. 624 (1915).

[20]38 Phil. 768 (1918).

[21]Sangco, ibid, p. 35.

[22]Ibid, p. 36.

[23]Ibid, p. 36.

[24]Cangco v. Manila Railroad Co., ibid.

[25]Art. 1217, New Civil Code.

[26]Art. 2184, New Civil Code.

[27]Report, Code Commission, p. 162.

[28]G.R. No. L-27760, May 29, 1974, 57 SCRA 106.