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NOTES AND COMMENTS:

ON VICARIOUS LIABILITY OF THE EMPLOYER

"Normally and naturally," so says Salmond,[1] the person who is liable for a wrong is he who commits it. Responsibility and consequent liability attach to the doer of the injurious act, and fault is a condition precedent for the generation of liability, criminal and civil. These are legal platitudes, banalities almost, so firmly settled and so widely accepted are they in the legal systems of civilized nations.

It was not always thus, however. In biblical antiquity, for example, the tendency to extend vicariously the incidence of liability was very marked. It was considered quite a natural thing to make a man answerable for those who were kin to him; indeed, it was deemed a piece of Divine Justice,[2] a sanction frequently threatened and applied.[3] It was thus necessary for the Mosaic legislation

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[1] *Jurisprudence*, 10 ed. (1947), p. 412.

[2] Exodus XX.5. I am the Lord thy God, mighty jealous, visiting the iniquity of the fathers upon the children, unto the third and fourth generation of them that hate me.

[3] Deuteronmy XXIII 2. A mamzer, that is to say, one born of a prostitute, shall not enter into the church of the Lord, until the tenth generation.

Leviticus XXVI 39. And if of them also some remain, they shall pine away in their iniquities, in the land of their enemies, and they shall be afflicted for the sins of their fathers, and their own. Also Numbers XIV.18; Deuteronomy V.9.

to expressly establish the principle of individual responsibility as a part of the Hebraic law.[4] Vicarious criminal liability in the sense of collective responsibility seems to have been rather widely accepted in the primitive systems of law; at least, so it was in China, Korea, Japan, Persia, and in many states of Medieval Europe. In fact, it was only the decay of the patriarchal family system and the rise of the free individual as the basis of the modern state that definitely did away with the principle in the sphere of criminal law.[5] The long tenure of the principle may perhaps be explained by referring to the then predominant theory of punishment as retribution, or expiation, or vindication;[6] the Christian theological doctrine of the Redemption illustrates the intimate relation between vicarious liabilty and expiative penalty.

Today, vicarious criminal liability is unthinkable.[7] The received maxim is *Actus non facit reum nisi mens sit rea*,[8] a maxim whose venerable age[9] indicates the exceptional character of the vicarious

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[4] Deuteronomy XXIV.16. The fathers shall not be put to death for the children, nor the children for the fathers but every one shall die for his own sin. Also 4 Kings XIV.6; 2 Paralipomenon XXV.4; Ezechiel XVIII.2, 20; Jeremias XXXI.29. All citations are from the Douay Version. The statement of Cherry, Richard R. ("Lectures, Growth of Criminal Law in Ancient Communities," in *Primitive and Ancient Legal Institutions*, 2 Evolution of Law Series, compiled by Kocourek, Albert and Wigmore, John H., at p. 144) that the introduction of individual liability was "part of the ethical revolution introduced by the later prophets" does not seem accurate, since the principle had been enunciated as early as the time of Moses. Sutherland, in *Origin and Growth of the Moral Instinct*, p. 168, records a precept of the law of the Visigoths, strikingly similar to Deut. XXIV. 16. "Let not father for son, nor son for father, nor brother for brother, fear any accusation, but he alone shall be indicted as culpable who shall have committed the fault." It is most probable that this rule represented the end product of a long process of ethical and legal evolution.

[5] Cherry, *op. cit., at* 144. Cherry observes that for political offenses, the parents and children might be punished under French law down to the time of the Revolution. See also Lea, *Superstition and Force* (4 ed.), p. 13-20.

[6] Salmond, *op. cit.*, at 412-413: ". . . so long as punishment is conceived rather as expiative, retributive, and vindictive, than as deterrent and reformative, there seems no reason why the incidence of liability should not be determined by consent, and therefore why a guilty man should not provide a substitute to bear his penalty, and to provide the needful satisfaction to the law. Guilt must be wiped out by punishment, but there is no reason why the victim should be one person rather than another."

[7] Except, perhaps, in English law, where in very special circumstances, and in certain of its less serious forms, it seems to be admitted. See Chisolm v. Doulton, 22 Q.B.D. 736; Parker v. Alder 1 Q.B. 20, cited in Salmond, *op. cit.*, at 412. And see note 46, *infra.*

[8] U.S. v. Catolico, 18 Phil. 504; People v. Pacana, 47 Phil. 48; People v. Tanco, 58 Phil. 255; Art. 12, Revised Penal Code.

[9] According to Pollock and Maitland (2 *History of English Law*, 2 ed., p. 476 n. 5) the original source is St. Augustine (38 *Augustini Episcopi*, Tom. Q., Migne ed., 973). This is the view adhered to by Sayre in *"Mens Rea"* 45 Harv. L. Rev.

extension of liability to those not privy to the fault or guilt, and suggests that, even in early systems the principle did not enjoy undisputed sway. As to civil liability, the development of the law is less clearly delineated. It is not necessary, nor is it feasible here, to trace in detail the direction which the development took. The barest outline will suffice for our present purpose.

It seems that in the early law, liability attached directly to the person or thing, animate or inanimate, that was the immediate cause of the injury, and that the master or owner or father escaped liability by surrendering the slave or thing or child to the injured person. So it was in the Hebrew,[10] Greek,[11] and early Roman [12] law. Under the Lex Aquilia, masters became personally liable for certain wrongs committed by their slaves with their knowledge,[13] and still later, shipowners and innkeepers were made liable for injurious acts of their employees on board ship or in the tavern though done without their knowledge.[14] This appears to be the first instance of masters being made unconditionally liable for their servant's wrongs. A less stringent form of vicarious liability, the unconditional type being apparently exceptional, was also provided for in the Digest; [15] this, through the intervening media of the Partidas [16] and Spanish Civil Code,[17] has been transmitted to us in our new Civil Code.[18] The primitive Teutonic customary law seems to have passed a similar course of development.[19] Speaking of the subsequent growth of the Common Law, Holmes said that the law began with liability based on fault, and tended, as it grew, to formulate external standards which might subject an individual member of society to liability though there was no fault in him.[20] This view is directly opposed to that held by the majority of legal writers and researchers to the effect that the law began with making a man act at his own peril and gradually became moralized until the liability became connected with and pre-

974, 983, n. 30. It seems however that Seneca (3 *Epistles*, Loeb ed., 92, 1.57) had stated it much earlier as "Actio recta non erit, nisi recta fuerit voluntas"; so that it would seem Seneca could lay better claim to the famous formula, although there is no doubt that St. Augustine was the point of dissemination in the Middle Ages. There are some passages in the Bible which suggest the substance of the axiom: Mark VII. 5-7, 18-23; Isaiah XXIX. 13. See Hall, Jerome, *General Principles of Criminal Law* (1947) at p. 142.

[10] Exodus XXI. 28-36.

[11] Plato, *Laws* (Bohn's Translation), pp. 378, 379, 397, 495, 388.

[12] XII Tables, VIII. 6; Institutes of Justinian 4.8-9; D. 9.1.1.; D. 9.4.2, § 1.

[13] D. 9.4.2, § 1.

[14] D. 4.9.1, § 1; *Id.* 7, § 4.

[15] D. 9.3.2.6.; *Id.* 39.4.5.1.

[16] 7th Partida, Title 13, law 4 and Title 15, law 5.

[17] Art. 1903, 1905, 1910; see 12 Manresa (2d ed.), 632.

[18] Art. 2180, 2183, 2193.

[19] Holmes, O.W., *The Common Law* (1946 pr.), p. 17-34.

[20] *Op. cit.*, p. 4, 162.

mised on fault.[21] A reconciliation of the two divergent views has been attempted, how successful we need not now determine.[22]

Basis of vicarious liability.

Before proceeding to discuss briefly the basis or bases of vicarious liability suggested by different writers, it seems best to call attention to an elementary distinction. Vicarious liability is not coextensive with liability without fault or absolute liability, as it is sometimes called.[23] Vicarious liability, strictly speaking, is liability for the harmful acts of others. The doer must have acted with fault;[24] but fault may or may not be imputable, factually or legally, to the person held vicariously liable. Absolute liability is simply liability inspite of the absence of fault in either the actor or the person held liable.

Many and novel are the theories submitted to justify the imposition of vicarious liability. This indicates that such liability is generally regarded as an abnormal deviation from a consistently moral theory of liability, from justice as a strictly ethical concept, as a distortion of the symmetry of the law, disturbing yet found necessary. Of course labored explanations will be unnecessary should we sever the traditional link of liability with fault. But no one has yet succeeded in constructing a completely satisfactory substitute for the

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[21] Ames, James Barr, *Law and Morals*, 22 Harv. L. Rev. 97, 99: "the early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." Also Smith, Jeremiah, *Liability for Damages to Land by Blasting*, 33 Harv. L. Rev. 542, 550; Wigmore, John H., *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 383, 441; Smith, Jeremiah, *Tort and Absolute Liability—Suggested Changes in Classification*, 30 Harv. L. Rev. 241, 248; Thayer, Ezra Ripley, *Liability Without Fault*, 29 Harv. L. Rev. 801, 815; I Austin, *Jurisprudence* (3rd) chap. 24-26; Kenny, *Cases on Torts*, p. 146 note on Stanley v. Powell (1 Q.B. 86); Whittier, Clarke B., *Mistake in the Law of Torts*, 15 Harv. L. Rev. 335, 336; Wigmore, John H., *Justice Holmes and the Law of Torts*, 29 Harv. L. Rev. 601, 607; Smith, Jeremiah, *Sequel to Workman's Compensation Acts*, 27 Harv. L. Rev. 235, 239.

[22] Isaacs, Nathan, *Fault and Liability*, 31 Harv. L. Rev. 954 at 966. "It seems that the history of tort law records lapses from the moral fault basis and returns to it, rather than a single movement in any one direction. There is in fact an alternation between periods of the tendency that Justice Holmes described when cases of acting at one's peril multiply in the law and periods of the kind Ames and Wigmore describe, when morals are reinfused into the law. This alternation is entirely consistent with what we know of other branches of the law.—The completest coincidence of individual fault and liability occurs in periods when legal development is by means of Equity; and that *jus strictum* brings with it a standardization of types of culpable conduct."

[23] Smith, in 30 Harv. L. Rev. 241 at 325, classifies absolute liability into three categories: liability for non-culpable mistake, liability for non-culpable accident, and vicarious liability for wrongful acts of others; this scheme was taken from Salmond, *Torts* (4 ed.) p. 15.

[24] On the question of extending vicarious liability to cover cases where the actor was without fault, see Smith in 22 Harv. L. Rev. 235, 236, 251, 254-256.

moral basis. So we content ourselves with chipping off exceptions, invoking social expediency, real or imagined.[25]

The explanations offered by many of the civilians display a deep reluctance to divorce fault from liability and an attempt to maintain elegantia juris. Giorgi, Mosca, Sechi and the majority of the Italian commentators base the vicarious responsibility of the master and principal in an absolute presumption of negligence, either *in eligiendo* or *in vigilando* or both, the basis of the presumption being liberty of choice or possibility of supervision.[26] Others like Gabba, Orlando, Prazantaro, Glük, and Barasi, postulate the existence of liability *sin culpa objetiva*. They do not repudiate fault or culpa as the ordinary basis of liability, but accept the special character of vicarious liability as *extraculpable*. This approach begs the question and explains nothing.[27] The French jurists Theilhard, Bertrand de Greville, and Tarrible, who took an important part in the framing of the Code Napoleon, accepted the same fiction of negligence unconditionally imputed by law to the master or employer that the majority of the Italian writers used.[28] But is this presumption of negligence warranted in fact? Is it not in conflict with what is generally observed in daily life? Instead of careless abandon in the choice or negligence in the supervision of his servants, a master's personal interest impels him, as a general rule, to employ only the most apt and inclines him to strict supervision over the servant chosen. "Fictitious or presumed negligence is generally an injustice while responsibility without negligence may, on the contrary, appear most just." [29] Accordingly, Lessona, Sainctelette [30] and Saleilles [31] admitted the fact of inculpable liability imposed for reasons of "social order and public interest."

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[25] Isaacs, in 31 Harv. L. Rev. 954 at 978: "Yet we firmly criticize these temporary expedients even while we use them. Those of us who seek to justify them at all, refer to 'public policy' or 'social justice,' or try to demonstrate that in the long run, or in the average case, the burden imposed on a man or on an enterprise for the benefit of society will be shifted to society. But nobody preaches that a low morality is essential or desirable in law."

[26] Velez v. Llavina, 18 P.R. 634; 12 Manresa (2d ed), 626.

[27] 12 Manresa (2d ed.), 626.

[28] *Ibid.*, quoting Theilhard commenting on Art. 1384 of the Napoleonic Code: "Regulada de esta forma, la responsabilidad parece justa en todas sus partes. Aquellos á quienes incumbe deben imputársela á si mismos: unos por su debilidad, otros por su mala elección, todos por su negligencia"; quoting de Greville, "Los amos y los comitentes no pueden, en ningún caso, deducir argumento alguno favorable de la imposibilidad en que pretenden haber estado para impedir el daño causado por sus servidores o comisionados en las funciones que le fueron confiados, y por eso el Proyecto (del Codigo Napoleón) les sujeta á entera é inequivoca responsibilidad. No es el servicio de que se aprovecha el amo lo que ha producido el mal que viene obligado á reparar? No debe por tanto, reprocharse á si mismo el haber otorgado su confianza á personas ignorantes, imprudentes ó ineptas?. . ."

[29] *Ibid.*, at 627, quoting Lessona.

[30] *De la Resp. et de la Gar.*, p. 124, cited in 12 Manresa (2d ed.), 628.

[31] *Essai d'une Theorie General de l'Obligat*, p. 376, cited in 12 Manresa (2d. ed.), 628.

Domat too accepted inculpable responsibility, but framed a theory of representation or agency, that is, persons were held vicariously liable because they were the representatives of the actual doers, the *preposez.*[32] Toullier, Borsari, Meucci, and Chironi[33] adhered to this theory and took refuge in the maxim, *"qui facit per alium facit per se."*[34] The very fact of substitution renders liable the substituted employer to third persons, by *culpa contractual* if the substitution takes place respecting the compliance with an obligation derived from contract, by *culpa extracontractual* in the absence of an antecedent contractual obligation of the substituted employer. The term substitution is given a much wider scope than that generally accepted for agency. The defect of this theory of representation is that the servant or employee does not represent the master or employer in a juridical sense; there is a legally significant distinction between a servant and an agent.

Interest or benefit has also been offered to explain vicarious liability. The maxim is *"Cujus comoda ejus est incomoda,"* or as phrased by Manresa, *"Quien obra por propio interés obra á propio riesgo."* The "incomoda" or "riesgo," said Danni, is part of the effects of a determinate activity on him who gave it impulse and motion. Bolaffio drew a fine distinction between interest and representation: the servant acts for the interest but not in representation of the master.[35]

Other explanations offered impress one as academic curiosities.[36] Gierke bases vicarious liability on "authority or seniority" in the economic sphere; Aubri, Rau, and Sourdat base it on control or direction exercised by the master; Venezian satisfies himself with an ontological reason, causality, that is, the injury causes the liability; Leoning and Unger invoke the danger attendant in an industrialized society; Barassi rests on the principle of *"interés lucrativo,"* while Prazantaro offers the maxim *"Unicuique suum tribuere neminem laedare."* Still other reasons have been put forward by Gabba, Coviello, Bennardo, Merkel, and Ferrini; but enough have been men-

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[32] *Loix Civille,* lib. 2, p. 132, cited in 12 Manresa (2d ed.), p. 628.

[33] 12 Manresa (2d ed.) 629, quoting Chironi: "Los lineas genericas de la representación en general, se advierten en el hecho de que al sustituerse por otro en el cumplimiento de un acto que se quiere efectuar en el propio interés, ó en el disfrute de un derecho estipulado para sí, pero con el cual va unida la observancia de determinadas obligaciones, es sustituido, sin poner en juego con el sustituto una verdadera y propia relación de representación, ó aun sin querer tal cosa, *hace juridicamente por sí lo que hace por medio de otro.*" (Italics supplied).

[34] Cf. Wigmore in 7 Harv. L. Rev. 383 at 398: "But very often the juridical mind gave up the troublesome task of accurately expressing a reason, and quite content with the policy of the rule, took refuge, when it came to naming a reason, in a fiction or other form of words. . . . The favorite expressions of this sort however were 'The act of the servants is the act of the master,' when done in the execution of authority . . ., and 'qui facit per alium facit per se' . . ., and perhaps 'respondeat superior' has often been used thus to evade giving a clear reason."

[35] 12 Manresa (2d ed.), 630.

[36] The following writers and their respective theories are all enumerated in 12 Manresa (2d ed.), 628-629.

tioned to show the bewildering confusion, which Baty called the "hopeless groping," [37] for a basis, realistic and adequate.

One cannot escape the impression that all the above reasons were thought of after the fact. Perhaps the true historical basis of vicarious liability, whatever it was, is not, or is no longer, significant for us today. If the rule finds present justification in some ground of policy, in some real need of our society, set as it is in a particularized environment, an elaborate, artificial, quasi-philosophical basis need not be formulated. And vicarious liability does find present justification on definite grounds of policy.[38]

Vicarious liability of the employer in Philippine Law.

The New Civil Code, reluctant to accept a utilitarian basis, still rests the vicarious liability of the employer on a rebuttable presumption of negligence on the part of the employer either in the selection or in the supervision of the employee, or both. It is the negligence of the employer himself that is the significant fact, the nonfulfillment of those duties of precaution and prudence established by the special relations of authority or superiority that adhere in the employer-employee relationship. The liability ceases upon proof that those vicariously liable exercised the diligence of a good father

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[37] Baty, T. in his book *Vicarious Liability* (1916) in p. 148 gives the following tabulation: (those in italics have been added by the writer; see note 36, *supra*).

1. Control—Raymond, Grove (?), Erskine (?), Gierke, Dalloz, Sourdat, Brougham, *Aubri, Rau, Seavey* (see 56 Harv. L. Rev. 72 at 78).
2. Profit (or interest)—Raymond, Gibbs, Best, Bruns, Wright, *Danni, Bolaffio, Barassi.*
3. Revenge—Holmes, Lowell, Bramwell.
4. Carefulness and Choice—Pothier, Robertson, Laurent, Demolombe.
5. Identification (or representation)—Wigmore (?) Blackburn, Glenlee, *Domat, Toullier, Borsari, Meucci, Chironi.*
6. Evidence (or evidential difficulties)—Eyre, Cranworth, *Salmond* (Jurisprudence, 10 ed., p. 414).
7. Indulgence—Bacon.
8. Danger—Pollock, Leoning, *Unger.*
9. Satisfaction—Maitland (?), *Salmond, Baty* ("In hard fact, the real reason for the employer's liability is the ninth; the damages are taken from a deep pocket.")

[38] Ames, James Barr in 22 Harv. L. Rev. 97 at 110: "On grounds of public policy, there are and always will be many cases in which persons damaged may recover compensation from others whose conduct was morally blameless. . . . the results in these cases are much less disturbing to one's sense of fairness than in those in which the innocent victim of the unrighteous are allowed no redress. The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to the chief object of the law, it must be sacrified." Laski, H. *The Basis of Vicarious Liability,* 26 Yale L.J. 105 at 106: "The age has passed when each man might bear untroubled the burden of his own life; today the complexities of social organization seem, too often, to have cast us, like some Old Man of the Sea, upon the shoulders of our fellows. . . ." quoted in Smith, Y.B., in 23 Col. L. Rev. 446, 457.

of a family.[39] While the new Code has extended the scope of the employers' liability, to include employers not engaged in any business or industry,[40] the retention of fault as a prerequisite of the vicarious liability of the employer is a serious limitation of the social utility of our tort law. The available defense of a good father of a family will, in practical effect, leave the plaintiff without effective redress in almost all cases. The standard of diligence is easily satisfied. Thus, choosing workmen from a "standard garage," who are licensed by the government, and "apparently thoroughly competent" is sufficient compliance with *diligencia in eligiendo;* while the issuance of "suitable rules, regulations, and instructions" for the information and guidance of the employees satisfies *diligencia in vigilando.*[41] The need of proving fault often defeats the just purpose of the law in granting the plaintiff his right of action. No employer would deliberately employ one notoriously unfit or leave his employees to shift for themselves. It may be impracticable to require a higher degree of diligence; but that is no adequate answer to the plaintiff who is compelled to shoulder the loss, for in most if not all cases, the negligent servant is financially irresponsible, incapable of the burden of civil liability.[42]

In the law of contracts, it is firmly settled that the exercise of the diligence of a good father of a family is no defense to an action on breach of contract, where the breach is attributable to the defendant's employee acting in the course of his employment.[43] The reasons advanced for this rule,—that a contrary ruling would give rise to the "anomalous result" that persons acting through the medium of agents or servants in the performance of their contracts

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[39] Art. 2180, par. 8, Civil Code; 12 Manresa (2d ed.) 630; Bahia v. Litonjua & Leynes, 30 Phil. 624, 627; Cuison v. Norton & Harrison Co., 55 Phil. 18, 23; Walter A. Smith & Co. v. Cadwallader Gibson Lumber Co., 55 Phil. 517, 524-526; Maxion v. Manila Railroad, 44 Phil. 597, 606; Cangco v. Manila Railroad Co., 38 Phil. 768, 775; Barredo v. Garcia and Almario, 73 Phil. 607, 613, quoting with approval 4 Amandi 429, 430.

[40] Art. 2180, par. 5.

[41] Bahia v. Litonjua & Leynes, *supra,* at 627; also Marquez v. Castillo, 40 O.G. No. 5 (2S), 204; Negros Transportation Co. v. Jayme, 72 Phil. 73, 75.

[42] Salmond, *Jurisprudence,* 10 ed. at 414: "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 . . . 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 condition that he who delegates them shall remain answerable for the acts of his servants, as he would for his own."

[43] Cangco v. Manila Railroad Co., *supra,* at 775; Del Prado v. Manila Electric Co., 52 Phil. 900, 904-905; Manila Railroad Co. v. Cia. Transatlantica, 38 Phil. 875, 887; De Guia v. Manila Electric Co., 40 Phil. 706, 710; Rakes v. Atlantic Gulf and Pacific Co., 7 Phil. 359; Baer Senior and Co. v. Cia. Maritima, 6 Phil. 215; N.T. Hashim & So. v. Rocha & Co., 18 Phil. 315; Tan Chiong San v. Inchausti & Co., 22 Phil. 152.

would be in a better position than those acting in person, and that juridical persons would otherwise enjoy practically complete immunity from damages for breach of contract [44]—are equally valid in the realm of quasi delict; and yet, the rule in tort law is different. It is not to be admitted that contractual obligations are, in some recondite way, "more binding" than extra contractual ones; all obligations are equally enforcible, all are ultimately derived from law.[45] Is there a valid reason, juridical or sociologic, for this difference in doctrine? Our judicial literature is significantly silent. It is submitted that there is none.

Under the Revised Penal Code,[46] the subsidiary civil liability of persons engaged in industry for felonies committed by their servants and employees in the discharge of their duties cannot be escaped by pleading due diligence.[47] Once the employee is convicted, and shown to be insolvent, the subsidiary civil liability follows as a matter of course.[48] A single negligent act productive of injury may be considered either as a tort or as a crime.[49] The injured person may himself bring a civil action for damages directly against the employer,[50] or wait for the criminal prosecution and conviction of the servant and then proceed against the employer to enforce the latter's subsidiary civil liability. Neither of these two recourses can be termed adequate. If the plaintiff sues on tort, the defense of a good father of a family will in all probability preclude recovery. On the other hand, criminal proceedings require a greater quantum

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[44] Cangco v. Manila Railroad Co., *supra*, at 775.

[45] Corbin in 21 Yale L.J. 552 says: "All enforcible obligations are created by the law." Langdell, C.C., *A Brief Survey of Equity Jurisdiction*, 1 Harv. L. Rev. 55, 56 note I—"Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation."

[46] Art. 103. It is worthy of note that the proposed Code of Crimes (art. 178), following the Italian Penal Code (art. 189), extends the subsidiary civil liability of employers to the payment of fines imposed for crimes committed by their employees, in spite of the fact that fine is one of the principal repressions (penalties) prescribed for crimes (art. 386). Report of the Code Commission (1950) at p. 28: "This subsidiary liability is intended to compel employers to exercise the utmost diligence in controlling and supervising their employees in the discharge of the latter's duties. Morever, the employer is benefited by the work of the employee, and if in the course thereof, some criminal offense is committed, it is but equitable that the employer should be subsidiarily liable for the payment of the fine."

[47] Arambulo v. Manila Electric Co., 55 Phil. 75, 79; City of Manila v. Manila Electric Co., 52 Phil. 586, 590, 597; Yumul v. Juliano and Pambusco, 72 Phil. 94, 97; Telleria v. Garcia, 40 O.G. (12S) No. 18, p. 115.

[48] 2 Viada (5ed.) pp. 487-495; 1 Hidalgo, pp. 331-334; 1 Groizard, pp. 736-738; decisions of the Supreme Court of Spain dated October 10, 1884; January 3, 1887; June 15, 1889; March 6, 1897; December 14, 1894; February 19, 1902; 22 Revista de Legislacion y Jurisprudencia, p. 412; Martinez v. Barredo, G.R. 49308 (May 13, 1948).

[49] Arts. 3 and 365, Rev. Penal Code; Art. 2176, Civil Code.

[50] Art. 31, Civil Code; Barredo v. Garcia and Almario, 73 Phil. 607, 610, 614.

of proof and generally are protracted. Their institution is dependent on the fiscal's discretion. Meanwhile the injured person, who may have been incapacitated for work, may be starving quietly. The law draws a distinction between tortious liability and civil liability arising from a crime, between a quasi offense and a quasi delict, between criminal and civil negligence,[51] a purely historical distinction perhaps more shadowy than substantial. Despite its dual aspect, the harmful act is one and the same, integral in fact if not in law. Besides, civil liability arising from a crime is itself premised on the private aspect of a public offense. The separate civil action granted by the new Civil Code may well fail in its avowed purpose of fostering "individual self reliance and inititative" in the enforcement of personal rights of action regardless of the action of the State attorney,[52] if the defense of a good pater familias is allowed to remain available.

To many the proposal to adopt the rule of respondeat superior, for the denial of the defense of a good pater familias will amount to that, will savor of legal heresy. But clinging to legal orthodoxy is not so important as making the law serve better the needs of the people whose lives it regulates. Respondeat superior, or vicarious liability even without fault of the master, should be viewed as a technique of administering losses which are more or less inevitable consequences of activity in human society, a method characterized by the wide distribution of the loss. "This distribution," according to Professors Shulman and Fleming, "by itself confers some benefits on society and is one among a number of possible objectives which may be pursued in shaping the development of tort liability." [53] Distribution, in practice, will mean the shifting of the loss to the party who has available the means of distributing it, generally the employer. Until the rise of large corporate enterprises, few of the

[51] Art. 2177, 1161, 1162, *id.*, Almeida Chantangco & Lete v. Albaroa, 218 U.S. 476, 40 Phil. 1056, 1064; Francisco v. Onrubia, 46 Phil. 327, 336; Report of the Code Commission (1948), p. 162; see especially Barredo v. Garcia and Almario, *supra*, at 611.

[52] Report of the Code Commission (1948) at p. 46: "It is not conducive to civic spirit and to individual self reliance and initiative to habituate the citizens to depend upon the government for the vindication of their own private rights. It is true that in many of the cases referred to in the provisions cited, a criminal prosecution is proper, but it should be remembered that while the state is the complainant in the criminal case, the injured individual is the most concerned because it is he who has suffered directly. He should be permitted to demand reparation for the wrong which peculiarly affects him.

In England and the U.S. the individual may bring an action in tort for assault and battery, false imprisonment. * * * This independent civil action is in keeping with the spirit of individual initiative and intense awareness of one's individual rights in those countries.

Something of that same sense of self reliance in the enforcement of one's rights is sought to be nurtured by the Project of the Civil Code. Freedom and civic courage thrive best in such an atmosphere, rather than under a paternalistic system of law."

[53] Shulman, Harry, and Fleming, James, Jr., *Cases and Materials on the Law of Torts* (1942) at p. 71.

possible defendants besides governmental units were equipped with those means. The development of liability insurance has greatly increased and facilitated the distribution of losses by even the small single proprietor. Where the defendant is engaged in industry, the distribution may be made directly by charging the loss as part of the cost of production and passing it to the consumer in the form of higher prices. This seems to have been the underlying principle of the Workmen's Conpensation Act (Act No. 3428) [54] which constitutes perhaps the most important exception to the general rule requiring fault for the imposition of liability.[55] If it is socially expedient to spread and distribute throughout the community the inevitable losses occasioned by injuries to employees engaged in industry, is it not equally socially expedient to spread and distribute the losses due to injuries to third persons which are just as inevitable?[56] Vicarious liability without fault of the employer can achieve in the latter case what Workmen's Compensation statutes have accom-

[54] Seager, *Principles of Economics*, at p. 601: "The justification of policy is that the loss to wage earners resulting from the accidents of industry should be regarded as an expense of production which the employer should bear as he bears the other expenses of production and which, since the burden falls on all employers alike, he will be able normally to recover in the somewhat higher prices he will obtain for his goods."

Ives v. South Buffalo Ry. Co. 201 N.Y. 271: "There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of the employer, who can protect himself against loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer, that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing disabled or defective machinery, appliances or tools . . ." Also, Abueg v. San Diego, 44 O. G. 80. The limitation of the unconditional though subsidiary civil liability of the employer under the Revised Penal Code to cases where the employer was engaged in an industry (Clemente v. Foreign Mission Sisters, 38 O.G. 1594; Steinmetz v. Valdez, 72 Phil. 92, 93; Telleria v. Garcia, *supra*) indicates that similar considerations can serve as present justification for the imposition of a liability that has existed as far back as the Spanish Penal Code of 1870 (art. 20), before any Compensation Act came into being.

[55] Murillo v. Mendoza, 66 Phil. 689, at 699-700, quoting with approval Mobile & O.R. Co. v. Industrial Commission of Illinois, 28 F. 2ed) 228, 229: "Under such an Act, injuries to workmen and employees are to be considered no longer as the results of fault or negligence . . . The law substitutes for liability for negligence an entirely new conception; that is, that under the doctrine of man's humanity to man, the cost of compensation must be one of the elements to be liquidated and balanced in the course of consumption." See also Cohen, Morris R., in 22 Col. L. Rev. 775.

[56] Laski, H., in 26 Yale L.J. 105 at 112: "If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained." See also Smith, Young, B., *Frolic and Detour*, 23 Col. L. Rev. 446, 456-457. As Judge Swayze in 25 Yale L.J. 5 observes, legal liability without fault is even more extensive under the Compensation Acts than under *respondeat superior*, since the the latter was qualified by the fellow servant rule and the theory of assumption of risk.

plished in the former. It is not just a matter of shifting a loss from the innocent plaintiff to the innocent defendant, nor a retrogression to the rules of a primitive era of less refined notions of justice, a sort of legal atavism. It is the transfer of the loss to the party who can best absorb the economic shock of the injury, who can dissipate such shock to the point of negligibility by spreading it thin. It is a necessity of our society which today seeks in intensified industrialization the solution to its economic ills.[57] Industrialization generally carries with it a wider incidence of injuries.

It must be admitted that where the defendant is not engaged in industry, that is, in the case of domestic servants, there is less justification for vicarious liability without fault of the master. However, the greater number of servants at present are not domestics but are engaged in industry. Furthermore, most of the cases of injuries to third persons are caused by servants engaged in business or industry. Practically the only type of domestic servant who injures others with any degree of frequency is the family chauffeur, and here the imposition of liability on the owner is not as harsh as it may seem. The availability of liability and accident insurance should result in spreading such losses among the group of car owners; the proportionate part that a particular employer bears (the insurance premium) is relatively small.[58] The bond required by the new Code [59] from car owners to answer for injuries to third persons is an inadequate, and so far a dead measure, for recovery on the bond is naturally contingent on the attachment of liability which can be easily defeated. The presumptions of negligence on the part of the driver [60] mitigate but do not solve the problem at all.

Vicarious liability of the employer without fault is not as alien to our new Civil Code as might be supposed. The Code makes the distributive principle of the Workmen's Compensation Act applicable to all "owners of enterprises and other employers." [61] This has the effect of abrogating the Employer's Liability Act (Act No. 1874) which had been applicable to small industrial establishments whose gross receipts for the year preceeding that of the injury did not exceed ₱20,000, the Workmen's Compensation Act being applicable to

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[57] See the *Proposed Program for Industrial Rehabilitation and Development of the Republic of the Philippines* (Beyster Report of 1947); and the *Report to the President of the United States by the Economic Survey Mission to the Philippines*, October 9, 1950. Wigmore in 7 Harv. L. Rev. 315, 383 at 392 points out that the extension of the doctrine of *respondeat superior* was occasioned by the changed industrial and commercial conditions in England during the Age of Anne. See also Thayer in 29 Harv. L. Rev. 801 at 814.

[58] See Smith, Y.B., in 23 Col. L. Rev. 446 at 459.

[59] Art. 2186. This article attempts to insure a financially responsible defendant without first providing for the imposition of liability. The two must go hand in hand. See Clark & Shulman, *A Study of Law Administration in Connecticut* (1932) p. 166; on financial responsibility statutes, see *Problems Relating to Bill of Rights and General Welfare* (1938), New York Constitutional Convention Committee, p. 599 *et seq.*

[60] Arts. 2184-2185.

[61] Art. 1711.

industries grossing more than ₱20,000.[62] Under Act No. 1874 the small employer was liable only when he or certain of his employees had been negligent;[63] now all employers, big or small, are liable for compensation, regardless of their own lack of negligence, for the death or injuries to their servants arising out of and in the course of the employment. The liability attaches "even though the event may have been purely accidental or entirely due to a fortuitous cause."

It may be objected that it is unwise to saddle small or infant industries with the burden of responding unconditionally for the injuries of the employees, that it will inhibit the establishment of such industries. The answer to this is that such an expense is as much a part of production outlay as the cost of raw materials or the wages of laborers; it simply must be reckoned with by those contemplating the founding of industrial establishments. An enterprise that is unable to meet the cost of production has no right to continue in operation. Its inability to meet such basic costs may only be a reflection on the managerial ability of the entrepreneur, a fact that cannot be allowed to affect the employee's rightful claim to compensation. Where the small or infant industry is especially affected with a public character, or where its products are vitally necessary to the national security, the needs of the nation may counter-balance the interests of a limited group of workers. The social value of article 1711 is however vitiated by two things. Firstly, the contributory negligence of the worker, where his negligence is less than the notorious kind which precludes compensation altogether, is permitted to mitigate recovery;[64] secondly, article 1712 provides that if a fellow worker's intentional or malicious act is the only cause of the death or injury, the employer is not answerable if he exercised due diligence in the selection and supervision of the fellow worker. Under Section 6 of the Compensation Act, the plaintiff could proceed either against his employer or the fellow servant. Now, recovery against either is very problematical; the due diligence required from the employer is easily fulfilled, while the fellow servant is generally irresponsible financially.[65]

The new codal provisions on carriers also display a tendency to increase the number of instances of vicarious liability without fault on the part of the employer. Thus article 1759 makes carriers liable

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[62] Sec. 42, Act No. 3428 as amended by Act No. 3812.

[63] Sec. 1, Act No. 1874; Cerezo v. Atlantic Gulf & Pacific Co., 33 Phil. 425; Act No. 2473 however established a presumption of negligence on the part of the employer. Cuevo v. Barredo, 65 Phil. 290.

[64] Chan, Manuel O., *The New Civil Code Provisions on Work and Labor,* 2 The Law Rev. 11 at 20: "Now, because of some contributory negligence * * * the employer can wrangle with the injured or sick employee or his dependents for the reduction of either the amounts of compensation or the periods thereof. The employee who does not agree to the reduction will be forced to go to the courts, suffer the long delay, and perhaps starve in the process. As it was before, because employers know that the employees' claim could be defeated only by proof of the most notorious kind of negligence on the part of the employee, most claims were paid without much ado."

[65] *Ibid.,* at p. 21.

for the death of or injuries to passengers through the negligence or wilful acts of his employees, although such employees may have acted beyond the scope of their authority or even in violation of the orders of the employer. It may be objected that this liability is not really new but rather based on the contract of carriage. If it were so, then it would have been superfluous for the Code to expressly provide that due diligence of the employer is no defense. The Code further makes the carrier an insurer against injuries to passengers due to wilful acts or negligence of other passengers or strangers which could have been prevented by the carrier's servants using due diligence.[66] The proper defense in this case is not lack of negligence of the employer, but lack of negligence of the servants. Likewise, the carrier is an insurer against acts committed by thieves or robbers not acting with grave or irresistible threat, violence, or force,[67] a liability also imposed on hotel and innkeepers.[68]

"Extraordinary diligence" is thus required from carriers for reasons of public policy [69] for the benefit of passengers and owners of goods transported. But what about the pedestrian? Is he on a lesser position in law than the passenger or freight owner? The common practice of land transportation companies and "jeepney" operators is to make the wages of drivers and conductors, over and above a small basic salary, depend on the number of passengers transported. The result is fierce competition even among employees of the same employer, profitable perhaps to the carrier but extremely hazardous and dangerous to pedestrians. The latter sorely need the protection that the imposition of vicarious liability without fault of the employer can give them.

An interesting instance of vicarious liability of municipal corporations remains to be noticed. The new Code makes cities and municipalities subsidiarily liable for damages when a member of its police force refuses or fails to render aid to a person in case of danger to life or property.[70] It is abundantly clear that to allow the defense of due diligence will render this provision meaningless. For the law lays down detailed rules on the selection and supervision of municipal policemen,[71] compliance with which surely satisfies the re-

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[66] Art. 1763.

[67] Art. 1745 (6).

[68] Arts. 2000-2001. Also, Art. 102, Rev. Penal Code.

[69] Art. 1733; Report of the Code Commission (1948), p. 66-67. Cf. Thayer in 29 Harv. L. Rev. 801 at 805: The futility of degrees of care in general has long been recognized; but in the case of public service companies, the habit of talking as if the carrier owed some special degree of care other than that of the ordinary prudent man has persisted and is common today. Clear-headed judges, however, have pointed out that the distinction is illusory. The ordinary prudent man would never take human beings into his keeping under conditions where they trusted utterly in him, and where life and limb was the stake, without qualifying himself in advance in all practicable ways for so dangerous a business and without using all available precautions in carrying it on. In such a business, the highest care is thus nothing more than ordinary care under the circumstances."

[70] Art. 34.

[71] Secs. 2259-2272, Rev. Administrative Code.

quirement of due diligence. The plaintiff faces well-nigh insuperable evidential difficulties in overcoming the presumption of the due performance of official duty. It should also be mentioned that municipal corporations are liable for deaths or personal injuries due to the defective condition of the roads, bridges, buildings and other public works under their control and supervision.[72] This liability may be unconnected with fault where the defective condition is attributable to lack of the necessary funds to pay for the needful repairs. The fault, if any, hardly pertains to the officers charged with the duty of keeping the streets in good condition. Of course so far as artificial persons are concerned, all liability is vicarious and absolute; the tax payers ultimately bear the burden.

It is submitted that our present system of limiting the liability of the employer (with the exceptions mentioned above) to cases where fault is attributable to him no longer subserves enlightened policy, which under prevailing conditions, should regard the fact of injury and not the question of fault as the test of the plaintiff's right and the employer's liability. It is true that the suggestion violates presently accepted concepts of legal justice. But ethical norms have changed in the past and will doubtless continue to change in the future. The suggestion is merely a different way, to some a more intelligent way,[73] of dealing with a social problem.

FLORENTINO P. FELICIANO

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[72] Art. 2189, Civil Code; but see Sec. 4 of Republic Act No. 409.

[73] Smith in 23 Col. L. Rev. 446 at 454. Pound in *The End of Law as Developed in Legal Rules and Doctrines*, 27 Harv. L. Rev. 195 at 233 admits that "there is a *strong and growing tendency* where there is no blame on either side to ask in view of the exigencies of social justice who can best bear the loss and hence to shift the loss by creating liability where there has been no fault." (Italics supplied).