A CRITICAL ANALYSIS OF THE PHILIPPINE LAW ON DAMAGES

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FOREWORD

At first blush, it would seem that no aspect of the Phiilppine law on "damages" presents a question controversial enough to justify its use as the subject for a thesis. Frequently associated with the terms "torts" and "breach of contract," the sphere of its operation is apparently unruffled by any conflicting legal questions. It is regarded and accepted as ingrafted into our general body of law in clearly delineated codal provisions presenting no difficulty whatsoever in its practical application.

Were it not for the implantation of the tenets of American jurisprudence into the Islands, there would perhaps be no occasion for a dissertation on the law on Damages. As it is, however, comparisons have not only been made between civil law principles on the one hand and Anglo-Saxon law on the other, but even purely common-law terminology have been infused into our legal concepts making for a law of damages basically civil in its origin and yet bristling with nomenclatures borrowed from an alien system of law.

It is not the object of this term to present an exposition on the entire field of the law on damages. It is not intended to fulfill the function of a textbook on damages. But rather it will deal mainly with those basic principles from which all right to damages spring, analyzing them in their original background and in the light of the judicial decisions that have received the force of law. As to those phases of the subject of Damages which do not furnish a field fertile enough for discussion, because already settled rules of law, no more than a mere passing comment shall be made.

PART I

SCRUTINIZING THE TERM "DAMAGES"

Alongside the implantation of American sovereignty on Philippine shores, we have witnessed too the gradual infiltration of a number of juristic tenets and principles peculiarly within the pale of the common law. Such principles, as was but natural, have brought along with them names and terminologies pertaining particularly to their respective fields.

A cogent example of such terms is that of "damages," the official translation of what was originally known here in the Islands as "daños y per-

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juicios," borrowed from Spanish jurisprudence.

The original text in Spanish reads:

> "Quedan sujetos a la indemnizacion de los *daños y perjuicios* causados los que en el cumplimiento de sus obligaciones incurrieren en dolo, negligencia, morosidad, y los que de cualquier modo contravinieren al tenor de aquellas." (Articulo 1101, Codigo Civil).

This has been translated as follows:

> "Any person guilty of fraud, negligence or delay in the fulfillment of his obligations or who in any manner whatsoever shall fail to comply with the terms thereof, shall be liable for any damage caused thereby." (Article 1101, Civil Code).

This translation has stood the test of years and has been generally accepted as an adequate and faithful expression of the original by our judicial tribunals, by the members of the Bar, and by students of law.

The deduction is, however, inescapable that the English translation is deficient in two respects: (1) it fails to convey an important characteristic that constitutes the kernel of all damages, which is that of "indemnizacion," and (2) it compresses the two terms "daños y perjuicios" into one English equivalent, that of "damage."

The deficiency is apparent in the last part of the translation which merely reads "liable for any damage caused thereby." "Liability" here may mean other than pecuniary liability unlike the Spanish term "indemnizacion" which clearly connotes monetary liability. Again, the use of the word "damage" is open to objection in that it is manifestly inadequate to encompass the juridical meanings that the terms "daños" and "perjuicios' separately convey. Nor can it be said to be an adequate translation of either term. That the term "damages" is not equivalent to damnum is admitted when it was said "damnum must be shown to sustain an action for damages." As the translation stands, however, "daños y perjuicios" are treated as one and the same.

The assertion that each of the said terms carries its own peculiar signification finds support in the following quotation:

> "En el Diccionario de la Academia Española estas dos voces se toman por sinonimas pues si vamos a ver que cosa es daño encontraremos que no es sino perjuicio, significa sino daño. Toman la palabra perjuicios en el mismo sentido que la palabra daños como hace la Academia Española juntandolas ambas en una frase por mera redundancia? O entienden imponer dos responsabilidades uno de los daños y otra de los perjuicios, dando a cada una de estas voces una significacion diferente? Esta es una cuestion de imensa transendencia, y convendria resolverla con exactitud para evitar toda equivocacion en la aplicacion de las disposiciones legales sobre resarcimientos.
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> Huerta en sus Sinonimos ha mirado con mas atencion el sentido de estos dos nombres, *y se ha esforzado en marcar su diferencia: Daño es un mal que directamente se hace; perjuicio es un mal que indirectamente se causa. El grani-*

zo hace mucho daño al labrador, y el bajo precio del grano se suele causar mucho perjuicio." (Escriche, p. 600 Tomo II. Daños y Perjuicios).

And as pointed out by Sanchez Roman:

> "Resulta pues, fuera de toda duda, que por *daño* se entiende el valor de la perdida sufrida por el acreedor en virtud del incumplimiento; por *perjuicio,* el valor o importe de la ganancia, utilidad o interes que uno ha dejado de percibir; lo que se llama de otro modo, daño y emergente y lucro cesante." (4 Sanchez Roman, p. 316).

In view of this deep-seated distinction made, it is not surprising that the English translation falls short of an accurate reproduction. The depth of meaning underlying each of the terms "daños" y "perjuicios" cannot be transported bodily into a codification that demands brevity and conciseness. But the same translation can be justly criticized for its lack of precision and its resultant failure to accord the term "damages" its full legal connotation.

Walton, in his translation of the Civil Law translated the above provisions thus:

> "Those who in compliance with their obligations, incur fraud, neglect or delay and those who in any way, act in opposition to the tenor of the same, become subject to pay indemnity for the damages and injuries caused thereby."

This, I believe, is a more literal and consequently a more faithful translation of the original. Unlike the original translation which makes no clear-cut distinction between "damages" viewed from its proper legal background and "injury," Walton's translation preserves the individuality of the term "damages" and gives it a personality separate and apart from the term "injury," thereby avoiding all possibility of a confounding of terms.

For the term "damages" and "injury" are by no means legally synonymous.

> "Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act; the term "damages" means the sum recoverable as amends for the wrong. The one is the legal wrong to be redressed, the other the scale or measure of recovery. There may be damages without an injury and injury without damages." (Oklahoma City vs. Hopcus, 174 Okla. 186, 50 p. [2d] 216).

This important distinction is manifestly absent in the translation first quoted. The same omission prevails in the other articles of the Civil Code. Article 1902 as now translated reads:

> "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."

It would have been better to substitute in the last line "liable in damages for the injury so done."

The same is true as to the subsequent articles:

> *Article 1903:* The father, and in case of his death or incapacity, the mother are liable for any damages

caused by the minor children who live with them.

Article 1904: Any person who pays for damage caused by his employees may recover from the latter what he may have paid.

Article 1905: The possessor of an animal, or the one who uses the same, is liable for any damages it may cause, even if such animal should escape from him or stray away.

This liability shall cease only in case the damage should arise from force majeure or from the fault of the person who may have suffered it.

Article 1906: The owner of a game preserve shall be liable for the damage caused by the game to the neighboring estates, should he not have done what may have been necessary to prevent the increase of the same or should he have hindered the owners of such neighboring estates from hunting the game.

Article 1907: The owner of a building is liable for any damages which may result from the collapse of the whole or any part thereof, if it should be due to the lack of the necessary repairs.

Article 1908: The owner shall also be liable for any damages caused:

1. By the explosion of machines which have not been cared for with due negligence, or by the combustion of explosive substances which have not been kept in a safe and proper place;

2. By excessive smoke, which may be noxious to persons or properties;

3. By the fall of trees, located in places of transit, when not caused by force majeure;

4. By the emanations of sewers or deposits of infectious matters, when constructed without the precautions appropriate to the place where they are located.

Article 1909: Should the damage referred to in the two articles next preceding arise from defects in construction, the third person who suffers it may recover from the architect or from the builders, if the latter be at fault, only within the legal period.

Article 1910: The head of a family dwelling in a house, or in a part of the same, shall be liable for any damages caused by the things which may be thrown or which may fall therefrom.

In all these articles, a substitution of the words "liable in damages for the injury caused" instead of "liable for any damages caused" would go a long way in preserving the distinction between "Damages" and "Injury" so important for a clearer comprehension of the true meaning of the term "damages."

It will be noticed further that the translations reproduced above use the words "damage" and "damages" indiscriminately and therefore loosely. "Damage" is taken as synonymous with "damages"; "damages" as synonymous with "damage." In fact one is led to believe that "damages" is simply the plural form for "damage." There is a world of difference between these two terms, however.

> "Damage" is defined to be the loss, injury, or deterioration caused by negligence, design, or accident of one person to another in respect of the latter's property, whereas "damages" signifies compensation in money for the loss or damage." (15 Am. Jur., sec. 2, p. 388).

Articles 1106 and 1107 convey the correct interpretation, however, in the sense that damages as used, refer to the compensation proper.

> *Article 1106:* The payment of damages shall include not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize, subject to the provisions contained in the following articles.
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> *Article 1107:* The losses and damages for which, a debtor in good faith is liable are those foreseen, or which might have been foreseen, at the time of constituting the obligation, and which are a necessary consequence of the failure to comply with it.
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> In case of fraud or intentional wrong (dolo) the debtor shall be liable for all damages which clearly originate from the failure to fulfill the obligation.

The criticism to which the above translations may be exposed notwithstanding, these articles taken in connection with Article 1101, interpreted correctly, give us a Civil Code concept of damages which is indemnification for depriving one of something he already had, hence the term "losses suffered," or for something which he should have obtained, that is, "profits failed to be realized." In the eyes of the law, the person responsbile for bringing these about is a debtor, whose good faith or bad faith will determine the extent of his liability.

The foregoing, however, gives a concept and not a definition. For comprehensiveness, therefore, the term "damages" is defined as the "pecuniary consequences which the law imposes for the breach of some duty or the violation of some rights." (Am. Jur., Sec. 2, p. 387).

Thus enunciated the terms "duty" and "rights" may be dealt with not only from the contractual point of view but also from the broader aspect of the social welfare where the non-fulfillment of a duty or the infraction of a right may call for the punitive intervention of the law.

From this definition, the salient features of Damages may be singled out as follows:

1. It is synonymous to pecuniary liability or financial indemnity.
2. It is imposed primarily for reparation and satisfaction for injury caused.
3. To give rise to an action for damages, there must be a legal wrong to be redressed, a breach of duty, or an infraction of a right for otherwise the case would be "damnum absque injuria."

The Panorama of Damages

One cannot help but marvel at the extensive reach of our law on damages. Far from confining its operation to a particular branch of the law, it spreads out and permeates practically every sphere in the legal firmament.

Instances of specific application to law in action are found in the Civil Code—in Article 1101, which provides us with a general principle; Article 1106, which distinguishes losses suffered or "daño emergente" from unrealized profits or "lucro cesante"; Article 1109 which contains a

stipulation for accrued interest; Article 1124, providing for the resolution of reciprocal obligations; and Articles 1135, 1152, 1155, 1295, 1298, 1303, 1307, as far as the law on obligations and contracts is concerned; followed by the law on sales, particularly Articles 1478, 1487, 1489, 1501, 1529, 1535, 1540; then by the lessor-lessee relationship, specifically Articles 1159, 1563, 1564, 1571; the liability of a building contractor found in Articles 1591 and 1596; of carriers, in Article 1602; in partnership, or Articles 1682 and 1688; nor is the principal-agent relationship neglected—Articles 1718, 1724, 1726, 1728, and 1729; plus a host of other sundry provisions starting from Article 1755, winding in and out through Articles 1757, 1784, 1833, 1889, 1893, 1896, reaching its climax in the all-embracing Article 1902 and finally terminating in Article 1910.

Nor are provisions in the Code of Commerce wanting; from Article 56, pertaining to commercial contracts with indemnification clauses, it wends its way up to Articles 314, 315, relating to troublous debtor-creditor entanglements; to commercial sales which embrace Articles 327, 339, 344, 345; to liability of carriers in Articles 359, 362, 364, 370, 602, 614, 618; to charter parties in Articles 669, 673, 681, 682, 684, 688, 689; to the domain of averages, particularly Article 806 to 812; and to the none-too-pleasant aspect of vessel collisions embodied in Articles 826, 827, 831, 834, 837, 841, 849, 859, 860 to 864.

In the Revised Penal Code, provisions for damages are also found in Articles 38, 104, 105, 106, 107, 360 and 367.

From here to the procedural side or the Rules of Court, which superseded the Code of Civil Procedure, special references to damages are likewise interspersed in numerous provisions; in those relating to attachment (Rule 59, Sec. 20) to injunctions (Rule 60, Secs. 9 and 6); to receivership (Rule 61, Sec. 9) to delivery of personal property (Rule 62, Sec. 7); to mandamus (Rule 67, Secs. 3 and 9); to quo warranto (Rule 68, Secs. 14 and 15); to eminent domain as to consequential damages (Rule 69, Sec. 7); and to forcible entry and detainer actions (Rule 72, Secs. 1 and 8).

At this juncture, an interesting question presents itself. Are costs to be considered damages? Were we to be faithful to the definition embodied in Rule 131, the question definitely calls for an affirmative answer; it partakes of the nature of damages as far as its compensatory nature is concerned. They are intended to compensate a party for the expenses he has incurred in the prosecution of a suit. "Costs are allowed to the prevailing party as a matter of course." (Rule 131, Sec. 1). Notwithstanding the nominal sums demanded by the law, they are therefore given as a measure of compensation; as indemnification to the winning party and a corresponding penalty to the defeated for having subjected the former to the rigors of judicial trial. Again, costs are dou-

bled or trebled where an action or an appeal is "frivolous." This provision no doubt enhances its compensatory nature. Then too, costs are imposed when a witness fails to appear (Rule 131, Sec. 12)—a measure of appeasement, so to speak, for having embarked a party on a futile action.

To proceed to a subject akin, that of bond—while it has been classified as a form of damages, it seems to be a better opinion, however, that the term should not be considered as equivalent to damages nor as an aspect of it, but rather as one provided for in anticipation of damages.

Interest on judgments in contracts to pay money, however, are properly considered as an aspect of damages. In a qualified sense, interest and damages serve the same purposes inasmuch as each may be regarded within certain limits as compensation for the use or detention of property. Provision as to interest on judgments is found in Section 6 of Rule 53 (Rules of Court) namely,—when the judgment rendered is upon an interest bearing claim, it shall bear the same rate of interest; when upon a non-interest bearing claim, it shall bear the legal rate of interest.

Provisions on damages are also embodied in special laws, specifically, the Employer's Liability Act (Act 1874); the Patent Law (Republic Act No. 165, Sec. 42); the Trademark Law (Republic Act No. 166, Sec. 23); the Warehouse Receipts Law (Act No. 1237; Secs. 2 and 22); the Usury Law (Act 2655) in the form of increased interests; the Chattel Mortgage Law (Act No. 1508, Sec. 8); the Workman's Compensation Act (Act 3428, Sec. 33); the Land Registration Act (Act 496) as well as in the Copyright Law (Act 3134) and the Negotiable Instruments Law (Act 2031).

The Workmen's Compensation Act is specially significant in that it has introduced "accident" as a ground for an action for damages, a ground not recognized in the Civil Code, as the latter upholds the theory that nobody can be held responsible for a fortuitous event or accident.

Likewise, the Trade-Marks Law is deserving of special mention because of its provision on double damages where actual intent to mislead the public or to defraud the owner of a trade-mark is shown.

And lastly, the Employer's Liability Act which includes allowances for pain and suffering.

Foundation Principles in the Law of Damages

Whatever may be said of the wide expanse of the field of damages, a critical study reveals the prominence of certain provisions of law which constitute the fountainhead from which emanate all the different rulings on damages accumulated and embodied in judicial decisions.

These provisions find expression in the following articles of the Civil Code:

> *Article 1101:* Any person guilty of fraud, negligence, or delay in the fulfillment of his obligations or who in any manner whatsoever shall fail to comply with the terms

thereof, shall be liable for any damage caused thereby.

Article 1106: Payment of damages shall include not only the amount of the loss which may have been suffered but also that of the profit which the creditor may have failed to realize subject to the provisions contained in the following articles.

A perusal of these provisions shows that Article 1101 furnishes us with the origin of damages and Article 1106 with the nature of damages recoverable.

The Origin of Damages

Article 1101 is, in truth, the basic provision out of which all the other provisions on damages found in the other articles of the Civil Code, in the Code of Commerce, in the Penal Code, in the Rules of Court and in specific laws arise. And this because the term "obligations" is comprehensive enough to embrace not only contractual obligations but also those arising from tortious acts as well as obligations that are a concomitant of penal liability. Excepted only are the obligations to pay money which is governed by a specified article, Article 1108, of the Civil Code (Quiros vs. Tan Gulay, 5 Phil. 675).

As Manresa has stated, Article 1101 is a provision which is all-embracing; one that allows of flexibility unhampered by any rigid rules and one which may always be invoked in those cases where provisions are otherwise silent.

From Article 1101 it is clear that damages originate from fraud, negligence or delay, terms which have their legally accepted definitions and need not be delved on. It may also originate from the failure to comply with the terms of the obligation, a cause which is really more generic than any of the three just mentioned. This latter provision has as yet received no fixed judicial interpretation and every case must, therefore, be resolved in acordance with its attendant circumstances.

There is also Article 1902 of the Civil Code dealing with damages arising out of negligence in non-contractual obligations, to be discussed in more detail later.

The difficulty, however, lies not so much in the causes that give rise to damages but rather in the proof and appreciation of damages.

The Nature of Damages Recoverable

There are two kinds of damages that may be recovered under Article 1106:

1. Losses which may have been suffered or "daño emergente."

2. Profits not realized or "lucro cessante."

This distinction, far from being merely theoretical, is the pivotal point around which the difficult problem of the appreciation of damages revolves. Its importance is readily seen from the fact that the distinction is applicable not only to obligations arising from contract but also to those originating from tort. And it assumed added importance for it furnishes the answer to the queries often postulated—what are the damages recoverable in our jurisdiction? And what is the amount of proof required?

The Problem of Proof

Judging from the provision itself, there would seem to be very little difficulty in proving the first kind or "daño emergente" as it is immediately measurable; having been already suffered, it may be said to be actual.

> "Respecto de los daños no ofrece duda los condiciones que ha de llenar esta prueba porque al fin el daño deja una huela sensible, apreciable y tiene una base positiva de hecho, a que se refiere." (4 S. R. p. 318).

As to the second kind, however, also known as "perjuicio" or "lucro cessante" the problem of proof becomes harder to resolve.

> "En cuanto a los perjuicios, el problema de su prueba es ya mas dificil de resolver, tanto porque la idea de perjuicios no presta a la prueba la base positiva que la de daños, su supuesto es mas bien negativo y consiste en la privacion de un interes o lucro que he hubiera obtenido, a no causarse el perjuicio, cuanto porque no todos los perjuicios proceden del mismo origen, ni pueden racionalmente demandar las mismas exigencias de prueba." (4 S. R. p. 318).

Be it "daño emergente" or "lucro cessante," Article 1106 is silent as to the degree of proof necessary. There is no requirement whatsoever that courts should be unusually strict in the proof of damages. The law being silent on the point, the rule in ordinary civil actions, namely, preponderance of evidence, should be sufficient.

An examination, however, of the leading cases on damages shows the reverse tendency, a tendency to be too exacting in the amount of proof required. Said the court in Lemoine vs. Alkan (33 Phil., 162): "Actual damages are the extent of the recovery allowed to plaintiff." In Marker vs. Garcia (5 Phil., 557), "the courts cannot give judgment for a greater amount than those actually proven." In Algarra vs. Sandejas (27 Phil. 386): "Actual compensatory damages are those allowed for tortious wrongs under the Civil Code; nothing more, nothing less."

A perusal of the above-mentioned cases will show that no distinction, whatsoever is made between actual damages under "daño emergente" and damages under "lucro cessante."

There is no denying that proof must be satisfactory in both cases and that in both this is a condition precedent to recovery. The basis for this rule, however, finds justification not in the specific provisions on damages but in the broader field of evidence in civil cases which requires that a litigant must establish his case by a preponderance of proof.

> "* * * daños y perjuicios por tal modo circumscritos y ganancias frustadas que deben por lo tanto, justificarse derechamente, por los medios probatorios que la ley autoriza." (Sentencia 12 Feb. 1896).

It is this rule which, I believe, should govern. To demand strict proof of damages would in most instances frustrate such an action; it would allow the obligor to go scot-free; it would be equivalent to exacting proof beyond reasonable doubt before an allowance for damages may be granted, thereby imparting a penal

character to an action for damages, when the latter is essentially civil and hence must be governed by the Civil Law in its substantive as well as procedural aspects. Certainly, this could not have been the intendment of the law.

If courts have persisted in demanding strict proof at all times it was because of an unshaken belief that the Supreme Court of Spain had consistently adopted the same ruling in its different decisons. These Spanish decisions will reveal, however, that the proof of damages referred to is proof of the existence of such damages and not proof of the amount of such damages. There is a distinction that must be made between the measure of proof necessary to establish the fact of damage and the measure of proof necessary to enable the court to fix the damage. What is really required by the above mentioned decisons is that there is a basis for the award of damages; that the damages recoverable be certain and not speculative or contingent. Once this basis exists then the court may determine the amount of damages depending upon the evidence which may have been presented in support of such basis.

This conclusion is supported by the following decisions of the Supreme Court of Spain:

> "No puede prosperar una demanda de daños y perjuicos si no se justifica la existencia de los mismos, debiendo esta se a la apreciacion de la Sala sentenciadora sobre este particular de hecho." (Sent. 20 Mayo 1883).
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> "Cuando es imposible fijar la cuantia de lo que debe indemnizarse la reserva del derecho para que en otro juicio se fija su importancia, es una consequencia necesaria de la condenacion de cantidad iliquida." (Sentencia 25 Feb. 1867)
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> *"No es necesario que pueda determinarse el alcance o importancia de los daños y perjuicios, bastando que se pruebe su existencia."* (Sentencias de 19 de Febrero de 1904, 7 de Febrero y 7 de Junio de 1905, y 21 de Mayo de 1906, Manresa, p. 67) (Italicized mine)

And in February 19, 1904:

> "No cabe negan la posibilidad de que el mero incomplimiento de una obligacion carezca de consequencias perjudiciales, añadiendose que de no seguirse la interpretacion dada al precepto del Articulo 1101, perderia la indemnizacion su natural caracter adquirido el de una sancion penal; concepto muy diferente del contenido en esa disposicion, y en las relacionadas con ella, que expresa y literalmente se refieren a los daños y perjuicios causados o que se causen."

This same conclusion was recognized even in the case of Algarra vs. Sandejas (27 Phil., 284) the very same case which held that actual compensatory damages are alone recoverable in this jurisdiction. It held:

> "But while certainty is an essential element of the award of damages, it need not be mathematical certainty. * * * The profits of established business may be considered in calculating the measure of damages for an interruption of it * * * *The lower court had before it sufficient evidence of the damage to plaintiff's business in the way of prospective loss of*

profits to justify it in calculating his damages as to this item." (Italicized mine).

This lends weight to the position above taken that it is only in "losses suffered" that a greater quantum of proof may be required; but when it comes to profits which by their very nature are variable and contingent, the same degree of proof canot be demanded. What is here required, therfore, is certainty—the award of damages depending on the strength of the evidence presented to substantiate the claim.

To the same effect is the ruling in Mercado vs. Abañgan, to wit, "no judgment for damages can be sustained unles the evidence of record proves the existence of such damages.

Again in Marcelo vs. Velasco, the Supreme Court ruled: "The lower court did not err in allowing her no further damages because there was no evidence that she had suffered any."

It is true that in a still earlier case, Marker vs. Garcia, 5 Phil., 557, the court held: "a party claiming damages must establish by competent evidence the amount of such damages and courts cannot give judgment for a greater amount than that actually proven." This pronouncement by itself, however, cannot be taken as establishing a general rule on damages; rather it must be correlated with the facts that gave rise to such ruling. The case involved an action for damages for breach of contract in the construction of a skating rink which defendant as a contractor agreed to build but which allegedly was constructed in so unworkmanlike a manner that as a consequence the plaintiff had suffered damages.

It will be noted that the claim was based on losses *already suffered;* hence, the stricter requirement for proof of such damages is not in the least bit surprising. On the contrary, far from negating the stand above deduced from an interpretation of Article 1106, this case serves rather to strengthen it. The Court allowed as damages therein the amount expended by the plaintiff in completing the building and in correcting the defects of construction, the amount which in reality made up the actual loss suffered by the plaintiff.

All the foregoing show, therefore, that the certainty required is certainty as to the existence of damages but not as to the amount of damages; that a stricter degree of proof is properly demandable only in damages falling under "daño emergente" and not those falling under "lucro cessante."

The Measure of Damages

There is a third fundamental provision, which also calls for and merits attention. It is fundamental because Article 1106, is made specifically subject to its stipulations. This is Article 1107 of the Civil Code, which reads as follows:

> "*Article 1107:* The losses and damages for which a debtor in good faith is liable are those foreseen or which might have been

foreseen at the time of constituting the obligation, and which are a necessary consequence of the failure to comply with it.

"In case of fraud or intentional wrong, the debtor shall be liable for all damages which clearly originate from the failure to fulfill the obligation."

Correlated with Articles 1101 and 1106, it is apparent that it prescribes both restrictions and qualifications. Restrictions in the sense that within the limits of each class, the only damages that may be recovered are those prescribed therein, and qualifications too in that the law imposes as a criterion the intent that may have motivated the non-fulfillment of the obligation.

There are two parts to the Article: the first part deals with good faith and the second part with bad faith. With Articles 1101 and 1106 again as the background, the deduction is inescapable that the question of good faith or bad faith can come into play only in the consideration of delay. It cannot enter in the determination of negligence because good faith or bad faith presupposes intent and there can be no intent in a negligent act. "Es caracter de su naturaleza, como en el dolo, la nota de perjuicio, pero le falta el elemento intencional del dolo, en relacion directa con el perjuicio mismo, o sea el deliberado proposito de perjudicar o dañar que en el dolo es indispensable." (Sanchez Roman, 314). Neither does it operate in cases of fraud for the latter inherently presupposes malice or bad faith.

As in Article 1106, here again, we discern a difference in the degree of proof between the first and the second part. Where the debtor acted in good faith, the proof of damages seems to be more exacting as the law provides "necessary consequence of the failure to comply." The damages must not only be a consequence of the failure to comply but must be a necessary consequence thereof. In addition they must be of such a nature that they were foreseen or might have been foreseen. All these requisites must concur. In the second case, on the other hand, where the debtor is in bad faith, it will be easier to prove the damages mentioned, for it is sufficient that the damages "clearly originated from" and not a "necessary consequence" of the non-fulfillment. As long as there is a plausible trace of relation of cause and effect, such damages are imputable to the debtor in bad faith. As to the debtor in good faith, not only should this relation be established, but in addition, the damages must have necessarily resulted therefrom. Mere contingency or incidental relationship will be insufficient.

Again, while the first circumstance is presumed in the absence of evidence to the contrary, the second should be established by competent proof. It devolves upon the person claiming damages that the debtor falls within the second and outside the pale of the first.

All the foregoing indicate that there is absolutely nothing in our

law to support the assertion that malice is a factor alien in the consideration of damages. On the contrary, Article 1107 specifically provides for the rule that should control where bad faith has actuated a wrong doer. How such an allegation could ever have been made is hard to fathom unless it is supposed that the general applicability of Article 1107 was then unknown or unrealized.

The Role of Actual and Nominal Damages

While "actual damages' are by judicial pronouncement recoverable in this jurisdictions, as to nominal damages, our Supreme Court has held in numerous decisions that the said doctrine is inapplicable under our laws. The Civil Code makes no provision for nominal damages. Algarra vs. Sandejas, 27 Phil., 284; Tan Te vs. Bell, 27 Phil., 354; Bian Hin vs. Tan Bomping, 48 Phil., 523; Guevara vs. Almario, 56 Phil., 476. This ruling has no doubt again been prompted by the decisions of the Supreme Court of Spain which required certainty as to the existence of damages. "Es doctrina constantemente reconocida y declarada por el Tribunal Supremo que a toda condena de daños y perjuicios, ya provenga de incumplimiento de un contrato o este determinada por la ley, ha de preceder justificacion bastante de la realidad y existencia de los daños y perjuicios que se demandan." (Sentencia, 30 Septiembre, 1898). And "realidad y existencia" as used here, has been interpreted by our courts to mean that only actual or compensatory damages are recoverable in this jurisdiction.

But is this conclusion justified?

"Nominal damages" has been defined as that which the law infers from the breach of an agreement or the invasion of a right; if no evidence is given any particular amount of loss, it declares the right by awarding what it terms "nominal damages." (15 Am. Jur., 390). "Actual on compensatory damages on the other hand, are 'damages' in satisfaction of, or in recompense for loss or injury sustained? (15 Am. Jur. 397). Because the award of Nominal damages does not require the presentation of evidence as to the amount of loss, because it cannot be measured in terms of dollars and cents, it is concluded that nominal damages cannot be recovered under our laws.

Having Articles 1101, 1106, and 1107 in mind again, there seems to be no repugnance whatsoever in awarding nominal damages. In fact there is no mention therein that only actual damages in the sense in which the term is understood in the common law can be recovered. "Daño emergente' and "lucro cessante," (the latter known in American law as future or prospective profits) it is true are aspects of actual or compensatory damages; but it by no means follows that they bar a recovery for nominal damages. If our Courts have unwaveringly stood for the theory that nominal damages are not recoverable in this jurisdcition, be it for breach of contract or for tort, it

is only because the case of Algarra vs. Sandejas, supra, citing several decisions of the Supreme Court of Spain has been considered as having laid down a fixed and invariable rule.

Examining the reason behind the several rulings promulgated by the Tribunal of Spain, however, to the effect that the existence of damages must be indubitably shown, it will be seen that they were laid down not so much because they were pursuant to provisions of law but rather because they were necessary to curb the pernicious tendency of litigants to swell their claims for damages to enormous proportions and to include a claim for damages as an accessory relief to every action.

> "Toda reclamation de perjuicios lucha siempre en la practica judicial con algun espiritu de alarma y prevencion hasta cierto punto justificada, por parte de los Tribunales que la fundan *en la observacion diaria del abuso que de esta causa de responsabilidad suele hacer la pasion y rutina de los litigantes * * * Hasta un grado inconcebible.* Enfrente de esta corruptela, hija de la pasion, * * * suele ofrecerse tambien una resistencia alguna vez excesiva precisamente por consecuencia de aquel motivo, por parte de los Tribunales, *para presumir, al menos mientras la prueba no demuestre lo contrario, segun la aprociacion que de ella se haga de ordinario con un criterio algo mas exigente en este punto que son evagcradas todas la pretensiones de resarcimiento o indemnizacion de daños y perjuicios y principalmente la de estos ultimos.* (Italicized mine).

It is evident, therefore, that certainty as to the amount of damages has been insisted upon mainly as a matter of judicial policy. But certainly, it does not follow that the same ruling prohibits the recovery of nominal damages, or that recovery should be confined to actual damages.

It cannot be aleged that the allowance of nominal damages will do violence to the ruling on certainty of the existence of damages; it can not upon the very same principle. Nominal damages cannot be granted in do so for it rests and draws its life the event fo failure to show that facts exist to justify their recovery.

> "Where the sole object of the action is the recovery of damages, a failure to prove substantial damage is a failure to prove the substance of the issue; and when there is no inherent personal or property right to determine, the plaintiff is not entitled to nominal damages." (Swift and Co. vs. Newport News, 105 Va. 108).

The Advisability of Allowing Nominal Damages

There being no prohibition in our laws, would it be advisable to adopt the doctrine of nominal damages?

The writer is of the opinion that nominal damages should be allowed in this jurisdiction particularly in actions for damages by reason of personal injuries, (1) to making the law more in consonance with the true concept of damages and (2) to avoid the possibility of the injustice that may be occasioned every now and

then, were the law made to stand as it is. Once there is a clear violation of a right, from which violation there is good reason to believe that damages resulted, in justice and in equity, a verdict for nominal damages should lie.

We cannot lose sight of the fact that the primary object of an award of damages is indemnity for loss or injury sustained by the complainant. It would be to make a farce of damages if the injury once having been established and damages consequentially sustained, damages would still be withheld on a mere technicality—what happens where actual damages, the absence of proof. This is exactly in the sense in which it has been interperted by our Courts are doggedly insisted upon.

To insist on the theory of actual damages as set forth in the different Court, is to demand strictest proof rulings promulgated by our Supreme at all times; in the absence of such proof, an action for damages will not prosper. It enforces a law as dictated by legal technicalities instead of law as conceived by common sense and natural justice. It is in absolute disregard of the variegated facts that simply evade a stereotyped rule on damages. It violates the elementary rule that "every injury from its very nature legally imports damage." (Blackburn vs. Alabama, G.S.R. Co., 143 Ala 346; Ulfricht vs. Eufala Water Co., 86 Ala., 588). It leaves without redress or remedy the actual invasion of a right where no actual damages resulted or none could be shown.

It is indeed an anomalous situation that calls for immediate remedy. It is an error that has dragged on all these years. Be it under the guise of rectification, or under that of liberalization for those who pay reverence to precedents, there is need for a change to bring our law on damages up to date with justice and equity.

That proof of the amount of damages is not an indispensable requirement at all times may be deduced from Article 1108 of the Civil Code.

> *"Article 1108:* Should the obligation consist in the payment of a sum of money, if the debtor should become in default, the indemnity for losses and damages in the absence of a stipulation to the contrary, shall consist in the payment of the interest agreed upon, or, should there be no agreement, in the payment of interest at the legal rate."

In cases falling under this provision, it is sufficient to prove the existence of the obligation and the default, to justify the recovery. In other words, the damages to be awarded have been previously determined by law. All that the claimant has to prove is the existence of such conditions as would give rise to the damages stipulated beforehand in a specific legal provision.

> "En efecto: Observese la diferencia que hay entre aquellos perjuicios originados en hechos de caracter singular y variado, especialismos en cada caso y producto de las multiples combinaciones hu-

manas, y aquellos otros perjuicios que se fundan en una hipotesis prevista por las leyes, apreciada y resuelta por ellas.

"Cuando se trate de perjuicios de la primera clase claro es que la prueba debera ser tan circumstanciada, especialisima y compleja, como lo sea el especial origen y variada combinacion de circumstancias que en aquel caso dieran lugar a los perjuicios, cuya indemnizacion se reclame; pero cuando se trate de los de la segunda clase, es evidente que debe bastar la justificacion de haber concurrido en el caso el mero supuesto legal, unica base y frente de los perjuicios que, dado aquel supuesto, se producen, puede decirse, por ministerio de la ley, que les hace consecuencia, en justicia del mismo." (Sanchez Roman, 318)

All of which goes to show that granted a certain state of facts a recovery may be had for a definite sum without the indispensable necessity of proof as to the amount thereof.

This is not to advocate, however, the total abrogation of proof. Let the claimant produce the best evidence that his case can muster; but if for some reason actual damages have not been satisfactorily proved and yet the inference is clear that damages were in fact sustained, then let not the remedy of damages be denied. In other words, when their nature and the cause from which they arise can be ascertained with a reasonable degree of certainty, damages are and should be recoverable.

Nor is this meant to advocate uncertain, contingent or speculative damages for once a reasonable basis for damages has been established, it cannot be asserted that such damages are uncertain or contingent. A certain degree of speculation may come in, but this is an unavoidable necessity, and its danger may be offset by the fact that its use can always be tempered by sound judicial discretion.

Nor is it meant to espouse the cause of insignificant damages. But here again, the danger does not in reality arise for the award is made subject to the restraining power of a judge which may be considered ample enough to prevent unconscionable verdicts.

Summary

Summarizing all the foregoing, we arrive at a working principle—the recreant is liable for whatever losses may have been suffered and for profits not realized by the aggrieved party. To this extent the person responsible for the breach becomes a debtor; if he acted in good faith the extent of his liability is limited to damages foreseeable at the time of the breach; if in bad faith, he is responsible for all damages arising out of the breach. The amount recoverable at all events will depend upon the court's determination of the merits of the case; there is no stereotyped amount; the award may be as low as ₱50.00 (Cerrano vs. Tan Chuco, 38: 392) or as high as ₱30,000 (Suiliong & Co. vs. Nanyo, 42: 722).

On the strength of these rules, in turn, may be derived the following deductions, which although not in strict accord with rulings laid down

in judicial decisions, appear to the writer as more in keeping with the letter of the law:

1. The rule on strict accountability of proof can be applied only in those cases properly caled "daño emergente," and not in those falling under "lucro cessante." In these cases, the most that can be exacted is certainty of the fact that damages have been sustained, the amount thereof to be determined by judicial appraisal.

2. The Civil Code manifests no repugnance to the recovery of nominal damages and consequently should be allowed.

3. Where the obligor has acted in good faith, a stricter degree of proof may be required than in cases where the obligor was prompted by bad faith.

PART II

INTRODUCTORY

The preceding discussion has laid more emphasis on broad and basic principles. The pages following will deal in turn with the more specific aspects that enter into the subject-matter of Damages.

The entire field is divided into two main divisions: damages in actions ex contractu for the breach of a contract and damages in action ex delicto for the breach of some duty imposed by law.

DAMAGES IN CONTRACTUAL OBLIGATIONS

The "contract" contemplated herein includes not only that expressly stipulated between the parties, but also the contractual obligation imposed by law on all carriers to transport safely passengers and cargo in their vehicles for hire. Damages may have been stipulated or not in which latter case, the court will be guided principally by the cricumstances of every individual controversy as it arises. On the whole it may be stated that the measure of damages recoverable in each case will have relation to the nature and purpose of the contract itself viewed in connection with the character and extent of the injury. For specific rules reference need only be made to judicial decisions.

As to the conditions necessary to give rise to an action for damages, it is axiomatic: (1) that there be a constituted obligation; (2) that there has been noncompliance; (3) that as a consequence of such noncompliance, injury has been caused; and (4) that the injury be attributable to the obligor. (Decision of Supreme Court of Spain, June 26, 1903)

A long line of cases (De Guia vs. Manila Electric, 40 Phil., 706, Lasan vs. Smith, 45 Phil. 657), Hicks vs. Manila Hotel, 28 Phil. 325), Laureano vs. Kilayco (32 Phil 194), Cerrano vs. Tan Chuco, 38 Phil. 392); Bachrach vs. Golingco, 39 Phil. 138; Suiliong vs. Nanyo (42 Phil. 722), furnish us with consistent rulings applying the general principle above mentioned. The case of Laureano vs. Kilayco invests the courts with wider discretion in that they are accorded the power to "modify the

penalty stipulated between the parties when the principal obligation has been partly or irregularly fulfilled by the debtor in cases where the indemnity provided for is esentially a mere penalty having for its principal object the enforcement of compliance with the contract."

All these being non-controversial call for no comment.

Interference in Contractual Obligations

There is an interesting aspect in contractual relations, however, which calls for more than a word or two. This is summed up in the term "interference," squarely considered by our Supreme Court in Gilchrist vs. Cuddy.

It is interesting in that there is an apparent departure from basic civil law principles and an apparent implantation of a typically common-law rule. "It must be admitted that the codes and jurisprudence of the civil law furnish a somewhat uncongenial field in which to propagate the idea that a stranger to a contract may be used for the breach thereof." (Daywalt vs. Corporacion, supra) For, in our jurisdiction, it is elementary that contracts are binding only between the parties and their privies (Art. 1257, Civil Code), and that as a result a stranger or a third party, being clearly alien to it is without legal personality to bring an action to enforce its performance. Conversely, the logical sequel would be that an action by either of the privies would not lie against a party foreign to that contract. In other words, privity is an essential factor for an action based on contract to prosper.

In allowing damages for wrongful interference, however, assuming that this is actionable, is not the above basic rule violated?

In Daywalt vs. Corporacion, supra, an action brought to recover damages for allegedly wrongful interference, in the contract entered into between plaintiff and one Teodorica Endencia, the Court refused to consider the defendant corporation as co-participant in the breach. Said the court:

> "To our mind a fair conclusion on this feature of the case is that Father Labarza and his associates believed in good faith that the contract could not be enforced and that Teodorica would be wronged if it should be carried into effect. Any advice or assistance which they may have given was, therefore, prompted by no mean or improper motive."

While therefore, damages were allowed the plaintiff in a previous case (Daywalt vs. Endencia, R. G. No. 7331) where only he and Teodorica Endencia were the contending parties, in the instant case brought by a third person the Court refused to render the Corporacion liable for damages too "remote and speculative."

From all these we gather the rule that "interference" to be actionable must necessarilly be wrongful; it must be a culpable act—"any act which is blameworthy by accepted legal standards." Advice prompted

by sympathetic considerations cannot be considered actionable interference. Nor can advice unactuated by improper, mean or malicious motives.

> "Malice in the sense of ill-will or spite is not, however, essential. * * * It is enough if the wrongdoer having knowledge of the existence of the contract relation, *in bad faith* sets about to break it up. Whether his motive is to benefit himself or gratify his spite by working mischief to the employer is immaterial."

In the last analysis, therefore, it is the good or bad faith of the alleged intermeddler which till tip the the balance in favor of either liability or non-liability for damages.

And this is as it should be if the innocent, the unschooled and the unsuspecting are to be shielded from the unscrupulous machinations of men who will stop at nothing to satisfy their lust for gain. The ruling welcomes and protects disinterested advice; it is a restraining factor to unlawful interference.

As thus formulated, however, is the action against the interferor removed from the pale of contracts and transferred to that of tort? Obviously, the answer must be in the affirmative and the legal principle switches from the domain of culpa contractual as embodied in Articles 1101 et seq., to that of culpa aquiliana as set forth in the all-embracing Article 1902 of the Civil Code. This is admitted in the decision itself:

> "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 * * * 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."

Interpreted thus, the rule remains a basically civil law rule, borrowing nothing from the common law despite first impressions to the contrary. To the query above postulated therefore, the answer is that the civil law rule is not violated; that this is one of those cases where a tortious act springs from a contract, both interrelated and yet independent of each other insofar as the right of action is concerned. One is ex contractu, necessarily limited to the parties, the other is ex delicto, and hence generative also of civil liability.

This conclusion is further strengthened by the ruling in the Daywalt case (supra) to wit, "the stranger cannot become more extensively liable in damages for the nonperformance of the contract than the party in whose behalf he intermeddles." While both are so related, therefore, that one cannot exceed the other, each is yet independent insofar as the liability of one is not the liability of the other, nor is the right of action giving rise to one, the same right of action giving rise to the other.

The preceding discussion has centered mainly on the case of Daywalt vs. Corporacion, principally because it is in this case where the question

of wrongful interference was squarely touched upon. The case of Gilchrist vs. Cuddy, it is true, sets forth important rulings on the same subject; but as was stated by Justice Moreland, in his concurring opinion, "the question of a breach of contract by inducement, which is substantially the only question discussed and decided, is not in the case in reality, and, in any judgment should not be touched upon." Relying on this statement, the case of Daywalt vs. Corporacion brushed aside the rulings in the previous case as mere obiter dicta.

It would be profitable, however, to inquire into this case. The defendants induced the owner of a cinematographic film (Cuddy) to break his contract of lease with a theater owner and lease the film to them at a much higher price. After coming to the "inevitable" conclusion that the defendants knowingly induced Cuddy to violate his contract with a third party, the Court then propounded the question "were the defendants likewise liable for interfering with the contract between Gilchrist and Cuddy, they not knowing at the time the identity of one of the contracting parties? The answer was in the affirmative: "The liability of the appellants arises from unlawful acts and not from contractual obligations; * * * so that *if* the action of G had been one for damages, it would be governed by Article 1902 of the Civil Code. There is nothing in this article which requires as a condition precedent to the liability of a tortfeasor that he must know the identity of a person to whom he causes damage."

The "if" is significant. It shows that the Court despite the fact that it was fully cognizant of the nature of the case before it as one not calling for damages, yet proceeded with a comprehensive discussion on the question of whether or not an action will lie for wrongful interference with a contractual relation, deciding the question in the affirmative.

The Court in that case, however, not only indulged in might-have-been but clearly went too far and digressed from the subject in litigation. Not that it was unaware of the fact, for as it stated, "If the action of G had been one for damages, it would be governed by Article 1902 of the Civil Code." But whatever its reasons for deviating from the point in controversy, the fact remains that its rulings therein cannot be considered as judicial pronouncements which have the force of law.

These dicta which as yet, therefore, belong to the category of unsettled and controversial questions may be enumerated as follows:

1. In actions for damages for wrongful interference, "the law does not require that the responsible person shall have known the identity of the injured person."

2. Mere right to compete does not justify appellants in inducing C to take away plaintiff's contractual rights. And citing a Massachusetts case: "If disturbance or loss comes as a result of competition or the

exercise of like rights by others, it is damnum absque injuria, unless some superior right by contract or otherwise is interfered with";

3. Citing 3 Elliott on Contracts, Section 2511, "Injunction is the proper remedy to prevent a wrongful interference with contracts by strangers to such contracts where the legal remedy is insufficient and the resulting injury is irreparable. And where there is a malicious interference with lawful and valid contracts a permanent injunction will ordinarily issue without proof or express malice.

Its ruling expressly overruled in the case of Daywalt vs. Corporacion is its sweeping statement that the "interference with lawful contracts by strangers thereto gives rise to an action for damages in favor of the injured person."

Reduced to brass tacks, the Gilchrist case is merely "authority for the proposition that one who buys something which he knows has been sold to some other person can be restrained from using that thing to the prejudice of the person having the prior and better right." (Daywalt vs. Corporacion, supra)

Construing these two cases, therefore, the conclusion is inevitable that as to whether an action will lie for interference with contractual relations still remains to be considered by express judicial pronouncement, especially when we remember that "the codes and jurisdiction of the civil law furnish a somewhat uncongenial field in which to propagate the idea that a stranger to a contract may be sued for the breach thereof."

Mere interferenc alone would not be generative of liability for damages under the civil law; if at all, it is only interference coupled with or resulting in a tortious act that will be actionable, and this not on grounds ex contractu, but on grounds ex delicto.

All in all, therefore, it is only the liability for the breach of a contractual obligation which is determined and settled in Philippine law; this must be determined in the light of the situation in existence at the time the contract is made; "the damages ordinarily recoverable are in all events limited to such as might be reasonably foreseen in the light of the facts then known by the contracting parties.' (Daywalt vs. Corporacion, supra)

This and related rules that spring from it are easily obtainable from a perusal of judicial decisions.

Damages in Non-Contractual Obligations

In General

The fundamental principle governing this particular phase of Damages is embodied in Article 1902 of the Civil Code, which, like Article 1101, is extensive in its application.

> "*Article 1902:* El que por accion u omision causa daño a otro, interviniendo culpa o negligencia, esta obligado a reparar el daño causado."

The Spanish text is used advertently for the criticism already stated in the first chapter.

On the whole it may be stated that the general principle for the recovery of damages already enunciated in contractual obligations is applicable also in non-contractual obligations.

> "Las disposiciones de los articulos 1101, 1103, y 1104 son de caracter general y aplicables a todo genero de obligaciones, y no ofrecen contradiccion con las especiales de los articulos 1902 y 1903." (Sentencia, 4 Diciembre 1894)

One notable variation, however, is found in Article 1903, which holds expressly responsible for the payment of damages not only those who themselves were the actors in the injuries which gave rise to damages, but also those who may have the latter under their care except if it be proven that the persons thus made responsible acted with the diligence of a good father of a family in order to prevent the injury.

Damages under Article 1902 may arise in two ways: by fault or by negligence. Fault implies an act, while negligence an omission. In either case, the fault or the negligence must not be of such a degree as to amount to a criminal act, for then, it would be removed from the pale of the civil law. This would be the case where the actor acted deliberately with the intent to damage. And it should be fault or negligence that arises without any anterior obligation for otherwise, the case would fall under Articles 1101, et seq.

To justify an allowance of dámages under Article 1902, two requisites should co-exist: (1) the existence of the "daño or perjuicio" not originating in acts or omissions of the prejudiced person himself and (2) that such daño y perjuicio must have been caused by the fault or negligence of a person other than the sufferer. Between the first and the second, the relation of cause and effect should exist. (12 Manresa, Comentarios al Codigo Civil, p. 604)

Save for these variations, the general rule for the recovery of damages prevails. The specific provisions set forth in Articles 1904, 1905, 1906 and 1907 respectively, are too clear as to doubt that there would hardly be any difficulty encountered in their application.

Law cannot remain static, however, and with the years we notice a decided development in our law on damages. A notable advance along this line is that pertaining to damages for death and damages for personal injuries. Except for the general rule laid down in 1902, there is no specific provision pertaining to these, and we turn perforce to judicial decisions.

Damages for Death of a Person

Under this heading we note a remarkable difference from the harsh common law rule "actio personalis moritur cum persona." Pursuant to this maxim, courts in common-law countries have been unanimous in ruling that in the absence of an enabling statutory rule, no action for damages may be brought for the death of an individual.

In Manzanares vs. Moreta, 38 Phil. 821, the leading case on the subject, Justice Malcolm in his concurring opinion, laid down categorically the civil law rule that an action for damages can be maintained for the death of a person caused by the wrongful act of another.

This judicial pronouncement finds basis and justification in Article 1902 of the Civil Code, already cited.

The situation, however, is not without difficulty. Inquiry must be directed as to (1) who are the persons entitled to bring such an action; (2) what are the factors that determine the right to recover; and (3) what is the amount of recovery that may be awarded to the survivor of the deceased.

In the above-cited case, Manzanares vs. Moreta, which concerned an action brought by a mother for the death of a child caused by a proven negligence of another, it was held that "the primary right of action is in the parent." The award of presumptive damages was therein predicated on the relationship existing between the person bringing the action and the deceased, which was that of parent and child.

To quote:

> "Those seeking to recoup damages must ordinarily establish their pecuniary loss by satisfactory proof. But in certain cases the law presumes a loss because of the impossibility of exact proof and computation in respect to the amount of loss sustained. * * * For instance, where the *relation of husband and wife or parent and child exist,* provided the child is shown to be a minor, the law presumes a pecuniary loss from the fact of death and it is not necessary to submit proof of such loss." Italicized mine)

Similarly, in To Guioc vs. Del Rosario (8 Phil. 546) an action to recover damages for death, a question arose as to whether the plaintiff brought the action in his capacity as administrator or as brother of the deceased. The case was remanded to the lower court "for such further evidence as may be taken on the subject of the relationship and qualification of the plaintiff."

Relationship, therefore, is a primary criterion. And the law leans towards a relationship that is legitimate where there is a dispute between the mother and the natural father.

> "The mother and not the natural father who had never recognized the child is the proper person to recover damages for the death of the child * * *." (Bernal vs. House, 54 Phil. 327)

Where there is no controversy, however, as in the case where only one of the parents sues for damages, legitimacy of relationship is not an indispensable factor:

"The company defends this suit for damages for causing death by electrocution by negligence of defendant, on the ground that it has not been proved that deceased is an acknowledged natural child of the plaintiff mother. This is technically correct. (Art. 944, C. C.) But it does not appear that this question

was raised below. Further, while the mother may thus be precluded from succeeding to the estate of the son, yet there is no reason why she cannot be permitted to secure damages from the company." (Astudillo vs. Manila Electric Co., 55 Phil. 427)

But this is not all; after such relationship is established, the degree of dependence between the deceased and the claimant for damages, as well as the measure of advantage derivable from the services of one to the other, will yet have to be considered.

Thus the majority opinion in the Manzanares vs. Moreta case held:

> "* * * it follows that said defendant is liable for the great damage so caused, and should indemnify the plaintiff, mother of the deceased, who has thus prematurely lost a child, and has been deprived of the aid and assistance which, it is presumed, she would be entitled to in her old age, if said child should have lived to be a man."

From the foregoing we note that once the fact or omission generative of liability has been proven, the circumstances of age, relationship and dependence for support are the crucial factors that will determine the right of a claimant for damages as well as the extent of damages recoverable. They must, therefore, be established as conditions precedent to the accrual of the right to recovery.

This principle is reiterated in all the cases cited in the concurring opinion. The case of City of Chicago vs. Hensing (p. 830) involved an action to recover damages brought by the parents, laboring people, for the death of their child, 4 years old. There it was stated: "when proof is made of the age and relationship of the deceased to the next of kin, the jury may estimate the pecuniary damages from the facts proven.'

Again, the decision of the Supreme Court of Spain on December 14, 1894 (p. 832) centered on claim for damages brought by the widow in her own right as representative of her daughter for the death of her husband. The widow's claim was not granted; the court went on further and reserved the right of the other child of the deceased by the first marriage to demand indemnification. Here again the important role that the relationship between the deceased and the claimant plays is evident.

More emphatic and to the point is a Porto Rican case, Gonzalez vs. San Juan Light and Transit Co., 1911, 17 Porto Rico, 115, which further confirms the indispensability of evidence as to loss of services of the deceased or for support by the deceased. This case concerned a complaint brought by the mother for the death of her son:

> "* * * the mother would never have been entitled to any other damages than those arising out of the loss of the services of her son, and never to those damages which he himself might have been entitled to claim had he not died or arising from the injuries that he himself might have suffered on account of the accident. The damages which would give the plaintiff in this case a right to recovery

against the defendant are only the loss of support, or contributions thereto, which the son was accustomed to make to his mother from his earnings and of which she may have been deprived by his death."

No evidence having been presented to attest to the earning capacity, the claim was denied.

The circumstances of age, relationship and dependence for support have so far been treated with particular emphasis on their role in determining the right to recovery. Will the absence of proof as to such circumstances preclude the claimant's right altogether?

1. *Relationship.*—Judging from the excerpts in the decisions above cited, the importance of this factor lies principally in the determination of the problem as to who is the real party in interest in an action for the recovery of damages. From the same decisions we note that it is the parent, in case of the death of a child, the surviving spouse in case of the death of the other.

No decisions have as yet been rendered as to the right of the children to bring an action for the death of their parent. That they can do so, however, is deducible from Article 667 of the Civil Code—"heirs succeed to all the rights and obligations of the decedent by the mere fact of his death," correlated with Article 924, to wit—"the right which the relatives of a person have to succeed him in all the rights which he would have had, if alive, or if he had been capable of inheriting, is called the right of representation." If still under age, they will necessarily have to be represented by their guardians, pursuant to our general rules on Procedure; otherwise they can bring the actions in their own right.

Nor is the right to bring an action for damages limited to those in the direct line. It is given also to the next of kin. "In jurisdictions where the laws award damages for a death to the family of the deceased, it appears to be uniformly held that actions therefore must be prosecuted by the relatives personally and are not available to the executor or administrator as the recovery forms no part of the decedent's estate. (To Guioc vs. Del Rosario, 8 Phil. 546)

While the right of relatives is not questioned. the latter part of the ruling as to the administrator's or executor's right to bring the action is open to doubt because of the ample powers given the administrator by the Rules of Court. The opinion is advanced by the writer hereof, that the ruling in the To Guioc case has not been overruled. Section 1 of Rule 88 provides:

> "*Section 1.*—Actions which may and which may not be brought against executor or administrator: * * * but actions to recover real or personal property from the estate, or to enforce a lien thereon, and actions to recover damages for an injury to person or property, real or personal, may be commenced against him."

As will be noted, the rule speaks of actions against the administrator and not by him. The ruling of the To Guioc case therefore, should still be applicable not only because of the

absence of a specific provision to the contrary but also because the very nature of the remedy and of the elements that enter in the determination of that remedy call for the personal intervention of the next of kin to the deceased. We cannot lose sight of the fact that the administrator or the executor as the case may be represents the decedent's state. The action for damages on the other hand concerns considerations personal to the claimant, the benefit from which accrues to him alone and not to the estate of the deceased.

2. *Age of the Deceased.*—This factor assumes importance only when the deceased is a minor. It is important not only because it is considered in the determination of the right to recover but also because it decides the question of whether proof of pecuniary loss will have to be presented. In Manzanares vs. Moreta, it was held: "* * * provided the child is shown to be a minor, the law presumes a pecuniary loss from the fact of death and it is not necessary to submit proof of such loss." Plaintiff having shown that the deceased was her son and that he was of 8 or 9 years of age at the time of death, it was neither necessary nor possible to prove loss of services or support or to prove special damages as if the object of the loss had been a horse or other animal. No doubt the damage could be greatly enhanced by showing the personal characteristics of the deceased. Outside of this however, the pecuniary loss may be estimated from the facts at hand with reference to the general knowledge which all possess."

From the foregoing pronouncement and the other cases cited in the concurring opinion of Justice Malcolm, insofar as the question of age of the deceased is concerned, we can gather the following important considerations:

(1) Where the action for damages is for the death of a man of mature years, proof of the existence of damages in the form of earnings by the deceased which used to accrue to the survivors is necessary;

(2) Where the action is one for the death of a child with earning capacity, proof of damages with particular emphasis on his earnings is likewise necessary;

(3) But when the action is for the death of a child of tender years, the law can presume a pecuniary loss from the fact of death, the amount of indemnity being neither excessive nor immoderately inadequate as judged by the standards of human wisdom and justice.

> "It is not indispensable that there should be proof of actual services of pecuniary value rendered to next of kin nor that any witness should express an opinion as to the value of the services that may have been or might be rendered. Where the deceased was a minor, and left a father who would have been entitled to his services had he lived, the law implies a pecuniary loss, for which compensation under the statute may be given. (Chicago vs. Hesing, 83 Ill. 204)

3. *Dependence on support by the deceased.*—That this factor must be established as a condition precedent to recovery when the deceased child is one with earning capacity is clearly illustrated in the following excerpt:

> "* * * But does the evidence introduced by the plaintiff support her claim to recover such damages? We are of the opinion that it does not, because she has not proven that her son was really earning the amount alleged in the complaint, nor any other sum whatever, nor how much money he was earning by his work during the days immediately preceding his death or at any time * * * nor was it shown that his mother derived any benefit from his wages * * *. For lack of evidence in regard to the existence of the pecuniary damages sustained and facts from which to infer the amount thereof, plaintiff's claim is denied." Gonzalez vs. San Juan Light and Transit Co. (1911, 17 Porto Rico, 115)

The next phase of inquiry pertains to the amount of compensation for the loss of a human life. Originally, the amount recoverable in criminal cases was fixed at ₱1,000 as indemnity to the heirs of the deceased. Judgments for the same amount were rendered in Manzanares vs. Moreta, supra, and Bernal vs. House, 54 Phil. 327). In the latter case as in the former, such sum was granted by way of presumptive damages. By virtue of Commonwealth Act 284, however, the amount recoverable has been increased to ₱2,000.

This does not imply, however, that the recovery is limited to this amount. The amount of recovery will be limited to ₱2,000 only in those cases where by reason of the facts surrounding the case, presumptive damages may be allowed. In all other cases, especially those which require proof of pecuniary loss as set forth above, judgment will be rendered accordingly. Then too where "special personal characteristics" of the deceased are shown, damages may be increased. "These statutory limits should only be taken as a guide to the permissible amount of damages." (Cheathan vs. Red River Line, 56 Fed. 248; The Oceanic, 61 Fed., 338; Farmer's L and T. Co. vs. Toledo A. A. and N. N. Ry. Co., 67 Fed. 73)

In Astudillo vs. Manila Electric Co. (55 Phil. 427) for example, the amount of ₱1,500 was awarded as damages for the electrocution of a 24-year old young man due to negligence of the defendant:

> "The basis of this award would be the ₱1,000 which is allowed in other cases for death of young children without there having been tendered any special proof of the amount of damages suffered, in connection with which should be taken into account the more mature age of the boy in this case and the particular expenses caused by his death for travel and funeral."

Thus far only an intimation has been made us to presumptive damages, the damages awarded in the case of Manzanares vs. Moreta. This particular type of damages however, merits more than passing consideration. n fact, this case of Manzana-

res, with special emphasis on the illuminating concurring opinion of Justice Malcolm may well be considered as a land-mark in our jurisprudence on damages. It is significant because it has laid down a ruling that departs from the rigid rules established first in the case of Algarra vs. Sandejas (27 Phil., 284) and the cases following, that only actual damages can be recovered in this jurisdiction, and, that nominal damages are in no way recognized under the civil law. These rules made for a harsh and strict proof loss in order to entitle a claimant to recover. The case of Manzanares, therefore, is a welcome relief from the stringency of the rules hitherto observed. It has laid down a ruling that is more just and more equitable unhampered by ponderous requirements as to proof. It permits in reality an allowance of nominal damages styled presumptive damages, which in fact is no different from the former since in both a definite amount is recoverable once the right to their recovery could be infered from the facts established and proved.

While the ruling is applicable only to that particular case, concerning damages for death, yet the departure from the previous rulings is in truth significant not only because it is humane but also because it carries with it an implied admission of the harshness of the previous rule and a confirmation of the opinion already ventured by this student that there is no repugnance whatsoever to the recovery of nominal damages under our substantive provisions in Damages as set forth in the Civil Code.

This tendency towards a liberalization of the rule as to proof of damages so beneficient in its effect, could well be made to extend not only in actions for death but in other actions for damages the facts of which warrant the application of the rule.

Damages for Personal Injuries

This is another interesting subtopic on damages recoverable under Article 1902 of the Civil Code, supra. Physical injuries whether entailing disfigurement or incapacity to perform any of the functions of life may be the predicate for compensation in damages.

The general rule relative to such damages may be summed up in the following judicial pronouncement.

> "Evidence relating to injuries both external and internal, received by (a claimant) must be examined chiefly in the bearing upon his material welfare, that is ,in its results upon his earning capacity, and the expenses incurred in restoration to the usual condition of health."

This ruling has been followed consistently by our Supreme Court in the leading cases it has promulgated on damages for personal injuries. (Marcelo vs. Velasco, 11 Phil. 287; Algarra vs. Sandejas, 27 Phil. 285; Borromeo vs. Manila Electric, 44 Phil. 165; De Guia vs. Manila Electric, 40 Phil. 705; Gutierrez vs. Gutierrez, 56 Phil. 178)

The factors enumerated therein, material welfare, earning capacity, expenses incurred, are all matters of

proof and evidence. Where proof is wanting, damages shall not be allowed —all of which are merely a reiteration of the rule on actual damages already discussed.

The strictness of the rule is evident in a decision rendered by the Supreme Court of Spain cited in Algarra vs. Sandejas: "No evidence was then offered by the plaintiff to show that this slight lameness in any way interfered with the conduct of his business or that she could make any less amount therein, than she could make if she did not suffer from this defect. The court, therefore, did not err in allowing her no further damages on this account, because there was no evidence that she had suffered any."

A deviation from this stringent rule is again imperative. To insist on it is to stultify if not to negate the beneficial effects that an award of damages is supposed to impart. As in actions for damages for the death of an individual, nominal damages should be allowed in actions for the damages under discussion.

> "The question in the present case is not one of punitive or exemplary damages, but of compensation for damages sustained. In order to allow such compensation *it is not necessary that the complainant should prove his loss in terms of dollars and cents,* it being sufficient in cases of this nature to prove that the plaintiff, thru the fault or negligence of the defendant and not through his own fault and negligence, had sustained a real damage, consisting of physical pains, loss of work, confinement in a hospital, mental suffering, etc." (Diaz vs. San Juan Light and Transit Co., 1911, 17 Porto ico, 641)

Of this case Justice Malcolm said: "This decision recognizes the principle of presumptive recovery."

Once more this upholds the hypothesis previously advanced that there is nothing in the Civil Law which prohibits the recovery of nominal or presumptive damages.

A survey of the different cases on physical injuries thus far promulgated reveals the conspicuous absence of any fixed rule or exact standard by which damages in personal injury cases may be measured. The law does not assume that a particular injury calls for a definite amount of compensation. The facts of each case must be the basis on which the amount in each case is predicated.

In Marcelo vs. Velasco (11 Phil. 287) the plaintiff's legs were broken and had to be hospitalized for several months. The court granted ₱1,813 for doctor's charges and hospital bills.

In Algarra vs. Sandejas (27 Phil. 285) because of personal injuries received from collision, the court awarded ₱10.00 for medical expenses, ₱100 for two months' enforced absence, and ₱250.00 for damages due to business by way of loss of profits.

In Borromeo vs. Manila Electric (44 Phil. 165) the plaintiff's left foot was amputated and an artificial foot had to be made. He was allowed ₱5,400 by the trial court. On appeal, the Supreme Court added ₱2,000 more "taking into account the age of the plaintiff and the salary he de-

rived from the profession from the exercise of which he had been deprived.

In De Guia vs. Manila Electric (40 Phil. 705), a physician earning ₱200 a month was allowed ₱900 for inability to attend to his professional labors for 3 months.

In Gutierrez vs. Gutierrez (56 Phil. 178) due to a fractured leg which required medical attendance for a considerable period of time and which even at the date of trial appeared not to have healed properly, the Court allowed ₱5,000, although the claim was for ₱10,000.

In Lilius vs. Manila Railroad (59 Phil. 758) a landmark in our law on damages the Court relaxed the rule established in Algarra vs. Sandejas, supra and granted ₱10,000 for medical expenses, ₱10,000 for the left leg suffered by a young and beautiful society woman; ₱5,000 for a permanent deformity on the face and legs of a 4-year old child belonging to a well-to-do family as well as for a diminution of matrimonial possibilities.

All these go to show that in our jurisdiction, for some reason or other, a greater amount of damages may be recovered for mere physical injuries than for death by reason of the ₱2,000 fixed and arbitrary amount already indicated.

Revamping the Rule on Damages for Pain and Suffering

Parallel to the rulings in damages for physical injuries is that which holds that a claimant cannot recoup damages for pain and suffering. In the case of Algarra vs. Sandejas, 27 Phil. 284, it was held:

> "Actual damages, under the American system include pecuniary recompense for pain and suffering, injured feelings, and the like. Article 1902 as interpreted by this Court in Marcelo vs. Velasco (11 Phil. 287) does not extend to such incidents. Aside from this exception, actual damages in this jurisdiction, actual damages, in the sense that they mean just compensation for the loss suffered are practically synonymous with actual damages under the American system."

Our Supreme Court has been consistent in the denial of damages for pain and suffering, a stand which is a bit surprising considering its unwavering adherence to its theory of actual damages. "Actual damages include such as may be awarded for bodily pain and suffering." (Murphy vs. Hobbs, 7 Colo. 541; Ross vs. Liggett, 61 Mich. 445)

As 'recompense for the loss or injury sustained," the term actual damages should embrace those for pain and suffering. No complicated process of reasoning is required to arrive at the conclusion that one who has sustained physical injuries necessarily undergoes bodily pain and suffering. It is impossible to exclude mental suffering; it is the natural and the inevitable result of personal injuries. In truth and in fact it is this pain and suffering more than anything else that should be compensated for, if the term damages be accorded its real import as reparation for injury sustained; as a fair and just compensation commensurate with the loss sustained by reason of the defendant's act. What are doctor's fees. hospital bills, medical expenses and

loss of salary, after all, compared to the immeasurable pain and suffering that an individual undergoes because of the injury inflicted. Such factors are at most and at best objective standards and in reality extraneous and foreign in so far as the injured individual himself is concerned, for whatever amount is awarded, goes not to his pocketbook but to the parties to which such items pertain, with the exception of lost salary. On the other hand, the pain and mental suffering affect the man himself, his feelings, his emotions, his sensibilities—those qualities that go to the root of life itself.

But this is not the only reason. Examining Article 1902, we find that the person who has acted with fault or negligence "esta obligado a reparar el daño causado." Compared with Article 1101, we discern a difference in terminology. The latter provides that those who fail to comply with their obligations for the causes therein enumerated 'queden sujetos a la indemnizacion de los daños y perjuicios." It is hardly possible that this difference was due to mere accident or oversight. Rather, it was deliberately made and for that reason is significant. While "reparacion" may include "indemnizacion," the converse is not true. The former is of a broader connotation than the latter; for while "indemnizacion" is limited to those susceptible of mathematical computation, "reparacion" is not so limited but may extend to other forms of reparation besides. Said reparation, to be efficacious and substantial must rationally include the generic idea of complete indemnity.

The writer believes that "reparacion" is a more comprehensive term, and that as applied to actions arising out of tort, other elements besides material loss alone should be taken into consideration whenever the facts of the case so warrant. Save for this deduction there is no other way of accounting for the difference.

Such being the case, here again it is advanced and maintained that Article 1902 does not prohibit the recovery of damages for pain and suffering. Rather it allows such recovery impliedly by the use of the general term "reparacion."

To insist on the now prevalent ruling to the contrary would be to canalize our law on damages along stringent standards resulting in its stultification if not negation.

The reasons propounded apply with equal force to libel cases. The mortification and the chagrin which the person libelled has suffered should be repaired somehow. As was held in Farrand vs. Aldrich (85 Mich., 593, 48 N. W. 628), "If a virtuous young woman is entitled to no consideration for her injured feelings when she has been publicly charged with the grossest immodesty, courts might as well deny her a cause of action."

It is true that in its decision of December 6, 1882, in connection with a proceeding for slander, the Supreme Court of Spain held:

> "Inasmuch as the value of honor is a thing that can not be appraised it is not possible to fix the amount

be damage, nor can the payment of indemnity be imposed upon the offender under the Penal Code by way of civil liability arising out of criminal acts."

It is perhaps this and similar decisions that have influenced in so small degree the earlier rulings of our Supreme Court on damages in its insistence on appraisability and actuality of damages.

In a later decision of the same Court, however, that of December 6, 1922, we note an evident departure from and, in fact an obvious reversal of the above ruling. Said the court:

> "It is true that honor is beyond the commerce of man and there can be no material amount to pay for it, but it is up to the court to fix a reasonable amount, taking into consideration her age and social position. We should not wait until the actual damage has been shown."

The action was one for damages on account of a libelous publication, exactly the same cause of action as that which gave rise to the decision of 1882. Being a later decision, its ruling is logically the one that should prevail.

It is indeed regrettable that our Libel law now embodied in Article 360 of the Revised Penal Code is silent as to the nature of damages recoverable in a defamatory action. "Under the provisions of Section 11 of the old Libel Law (Act 277) the offended party was entitled to recover in a civil action, not only actual pecuniary damage sustained by him but also damage for injury to his feelings and reputation and in addition such punitive damages as the Court might think would provide a just punishment to the libeller and an example to others. (Guevara, Commentaries on the Revised Penal Code, p. 795)

Would this silence be construed as negating an award of damages for injury to feelings? The case of Topacio vs. Tribune (406 G. 12th Supp. p. 21), held affirmatively:

> "Pero la ley No. 277 ha sido expresamente derogada actualmente ya no pueden recobrarse otros daños sobre esta materia mas que los actuales."

To the same effect are the rulings in Ocampo vs. Evangelista (C. A.—R. G. 44306) and Garcia vs. Alvarez (C. A.—R. G. No. 3618).

Notwithstanding, it is advanced that such damages should lie. Silence in a statute alone cannot be considered as entailing prohibitive effects. Such damages should be allowed in the absence of express prohibition, for broad considerations of justice and equity. The enjoyment of a private reputation is as much a constitutional right as the possession of life, liberty or prosperity. There is nothing in our statutory law that is repugnant to such a recovery. The modern trend is towards an amplification of the award of damages. Our jurisprudence should beat in tempo with this march. Such damages had always been recoverable under the previous law. There is no rhyme or reason for a departure from the old rule despite an omission in the Revised Penal Code, which after all may not have been deliberately made.

Moral and Patrimonial Damages

What has been said of damages for pain and suffering and of damages for injury to feelings, may be similarly extended to moral and patrimonial damages, all of which pertain to the general classification of damages incapable of pecuniary estimation.

We note with satisfaction therefore, the decision laid down in the case of Lilius vs. Manila Railroad, promulgated in May 4, 1935, as being a welcome departure from the rigid rule established in the cases of Marcelo vs. Velasco and Algarra vs. Sandejas, supra. In the Lilius case, in addition to the damages granted for doctor's fees, hospital and nursing services, loss of personal effects and torn clothing, for Sonja Lilius was adjudicated ₱10,000 by way of indemnity for patrimonial and moral damages. And for the daughter, the sum of ₱5,000 not only because of the physical injuries which she had suffered but also because said physical injuries would unfavorably and to a great extent affect her matrimonial future.

This case, just like the case of Manzanares vs. Moreta, ushers in a new judicial outlook in the field of our law on damages. It confirms the fact that justice demands in the determination of the amount of damages, the recognition of more than merely material welfare, earning capacity or expenses incurred. There are other elements besides, which although not directly susceptible of pecuniary estimation should be considered in the appreciation of the damages to be awarded.

Are Exemplary Damages Unknown in Our Laws

A leading case, Algarra vs. Sandejas, 27 Phil. 385, has held:

> 'Under the Anglo Saxon law, when malicious or wilful intention to cause the damage is an element of the defendant's act, it is quite generally regarded as an aggravating circumstance for which the plaintiff is entitled to more than mere compensation for injury inflicted. *These are called exemplary or punitive damages, and no provision is made for them in Article 1902 of the Civil Code* * * * The Civil Code requires that the defendant repair the damage caused by his fault or negligence. No distinction is made therein between damage caused maliciously and intentionally and damage caused through mere negligence insofar as the civil liability of the wrongdoer is concerned. Nor is the defendant required to do more than repair the damage done, or in other words, to put the plaintiff in the same position, so far as pecuniary compensation can do so, that he would have been in had the damage not been inflicted."

This ruling is in my opinion inaccurate. It is true that there is no distinction made in Article 1902 "between damages caused maliciously and intentionally and damages caused through mere negligence." This by no means implies however, that in no way can there be a recovery for damages under Article 1902 by reason of fraud.

"Even in the absence of the express provision of Article 1270 of the Civil Code on "incidental deceit" there may always be a recovery for damages occasioned by fraud or deceit under Article 1902 of the Code. The broad scope of this article would cover all cases of fraud independent of contract and causing damage to another person by virtue of the scope given to "culpable act" by the Supreme Court in the case of Daywalt vs. Corporacion, supra." (Tolentino, Torts and Damages, p. 145).

Nor does the absence of the distinction, justify the assertion that exemplary damages are not recoverable under our laws. The distinction is not in reality wanting for it is found elsewhere in the code—specifically, Article 1107, already cited. And it is an article that covers not only damages arising from contract but also those falling under Article 1902. Therein a distinction is made between good faith and bad faith; and bad faith is specifically made to aggravate the liability of the wrongdoer to all damages resulting from the wrongful act as distinguished from damages that necesarily result therefrom. That there is a resultant aggravation is apparent from the terminology and context of that particular provision—from damages *necessarily arising* from the failure to comply where the debtor is in good faith, it expands the liability to *all* damages which clearly originate from the failure to fulfill the obligation, where the debtor is guilty of bad faith.

Could a more explicit statement be desired? If exemplary damages are as ordinarily accepted "damages imposed by way of punishment and given in addition to compensation for a loss sustained," or as "increased award of damages in view of the supposed aggravation of the injury, in addition to actual damages" (C.J. 17, 710-716), can it not be asserted that Article 1107 fulfills the said requisites and clearly aggravates the amount recoverable where bad faith supervenes?

A Spanish commentator has expressed an opinion against the award of punitive damages. He said:

"Nosotros insistimos en que la Ley no habla de indemnizaciones sino para reparar y que no admite las que no con otra cosa que una amenaza o pena." (Amandi, Cuestionario del Codigo Civil)

It will be noted, however, that "punitive" here is used in a different connotation:

"Se ha creido por muchos que los tribunales podian condenar al pago de ciertas sumas 'en concepto de daños y perjuicios' como una verdadera pena, a *fin de construir al deudor a cumplir su obligacion.* Asi por, ejemplo, decretado un divorcio, y disponiendose que los hijas sean entregados a la madre, pueden los tribunales, en vista de la resistencia del padre a cumplir esta parte del fallo, *condenarle al pago de una cantidad por cada dia que demore su ejecucion.*"

"Punitive" is used to mean therefore, that imposed to punish "resistencia ilegal" to an order of the court. Clearly enough, this has no place in

an action for civil liability for damages, unsupported as it is by any legal provision.

If, however, by exemplary damages we consider those originating from "malicious or willful intention to cause the damage" which in turn is * * * "regarded as an aggravating circumstance for which the plaintiff is entitled to more than mere compensation for injury inflicted" (Algarra vs. Sandejas, supra), Article 1107 seems to be sufficient authority for the statement that exemplary damages are allowed even under Article 1902. For Article 1107 being one of general application, its provisions must necessarily govern cases falling under Article 1902 of the Civil Code.

There are, however, special laws in the Philippines allowing exemplary damages. Specifically, such damages are awarded in Section 3, Act No. 666 and Section 18, Act No. 2793. The former relates to an action for infringement of trademarks or tradenames or for unfair competition where actual intent to deceive the public or defraud the owner of the trademark or tradename is shown, the latter to an action for violation of patent rights if the defendant had been an operative or employee of the patentee or had obtained knowledge of the invention by unlawful means.

Exemplary damages may also be allowed when the defendant, upon being called to account for a libelous publication concerning the plaintiff, publishes a pretended disavowal which, in effect, is a satirical comment on plaintiff's reputation and is itself libelous. (Jimenez vs. Reyes, 27 Phil. 52)

Drawing the Dividing Line Between a Civil Action for Damages and a Criminal Action

While it may be that Article 1092 of the Civil Code provides categorically that civil obligations arising from felonies or misdemeanors shall be governed by the provisions of the Penal Code and that, therefore, there should be no conflict between their respective fields, in practical application, however, particularly in those acts for which either a civil or a criminal action may be brought, the line at which one ends and the other begins would be difficult to draw.

For where death has supervened or where physical injuries have been inflicted as a result of the act of another, several interesting questions come to the fore:

1. Should a civil action be brought for damages or should the obligor be held liable criminally and in the criminal action exact the corresponding civil liability?

2. As to persons whom the law makes responsible also for the acts of another, assuming that the latter have been held criminally liable, should the subsidiary liability in the Revised Penal Code, be enforced or should he be held directly responsible under Article 1903 of the Civil Code?

3. Once an accused employee has been acquitted of the criminal charge, can the employer still be held liable

in a civil action brought to recover damages?

That a single fault or omission may give rise to a subject matter in either a separate civil or criminal action, is evident.

> "An action was brought against a railroad company for damages because the station agent, employed by the company had unjustly and fraudulently refused to deliver certain articles consigned to the plaintiff. The Supreme Court of Spain held that this action was properly under Article 1902 of the Civil Code." (Sentencia, Feb. 14, 1919)

Of this case Justice Bocobo said: "The above case is pertinent because it shows that the same act may come under both the Penal Code and the Civil Code * * *. The action of the agent was unjustified and fraudulent and therefore, could have been the subject of a criminal action." (Barredo vs. Garcia, G. R. No. 48006, July 8, 1942; O. G. Nov. 1942, p. 761)

Similarly, in Manzanares vs. Moreta, supra, and Bernal vs. House (54 Phil. 327), civil actions brought to recover damages resulting from the death of the child, the Supreme Court applied Article 1902 of the Civil Code, although the acts of the defendants could very well, have been prosecuted in a criminal case for reckless or simple imprudence under Article 365 of the Revised Penal Code.

Wherein lies the demarcation line? Or is one merged and obliterated by the other?

When we consider Article 1093 of the Civil Code, it would seem that the above cases should have been brought instead within the operation of our Penal Law.

> *"Article 1093:* Those which are derived from acts or omissions in which fault or negligence, not punishable by law intervenes shall be subject to the provisions of Chapter II, Title XVI of this book."

The phrase "not punishable by law" is significant. Construed literally, in connection with the Revised Penal Code, all acts resulting in death and physical injuries would properly fall under the Penal Code. by virtue of Article 365, referring to imprudence and negligence and Article 263, 264, 265, 266, referring to physical injuries. Article 365 covers not only reckless but even simple imprudence or negligence, while Articles 263-266 embrace all conceivable forms of physical injuries. So much so that it would seem as if, insofar at least as death and injuries are concerned, more often than not, the liability of the defendant should be determined in a criminal action. In other words the sphere of operations of Article 1902 is evidently crowded out.

This interpretation would seem to be the logical one. Article 1902 of the Civil Code presupposes in the first place the existence of a fault or negligence upon which the action is based, and secondly, it refers to a fault or negligence not punishable by law. This is because if the fault or negligence is punishable by law, it

ceases to be the quasi-crime of negligence having purely civil effects, and becomes a crime or misdemeanor according to the gravity of the penalty imposed by law in that case it does not come within the provisions of Article 1902.

Our Supreme Court, however, not only, in the cases above cited but in others besides (Bahia vs. Litonghua, 30 Phil. 624; Cerf vs. Medal, 33 Phil. 37; Carson vs. Norton and Harrison, 55 Phil. 18; Smith and Co. vs. Cadwallader & Co., 55 Phil. 517) has repeatedly applied the provisions of the Civil Code and not of the Penal Code. The reason for this unwavering stand can be no other than to preserve untouched the individuality of the doctrine of Lex Aquiliana in our laws.

Hairlike though the demarcation between the two may be, the fact remains that the one is still independent of the other; that the civil action for the damages which one sustains as the result of the wrongful act of another is not affected by the fact that the particular act is punishable under the criminal laws.

> "By the positive legislation of the Philippine Codes, civil and criminal, a distinction is drawn between a civil liability which results from the mere negligence of the defendant and a liabilty for the civil consequences of a crime by which another has sustained loss or injury." (Almaida vs. Abaroa, 40 Phil. 1056)

Maura, in his Dictamenes, Vol. 6 pp. 511-513, has the following to say on this point:

> "El titulo en que se funda la accion para demandar el resarcimiento, no puede confundirse con las responsabilidades civiles nacidas de delito, siquiera en esta, sea el cual sea, una culpa rodeada de notas aggravátorias que motivan sanciones penales, mas o mennos severas. La lesion causada pòr delito o falta en los derechos civiles, requiere restituciones, reparaciones o indemnizaciones que cual la pena misma atañen al orden publico; por tal motivo vienen encomendadas de ordinario, al Ministerio Fiscal; y claro es que si por esta via se enmiendan los quebrantes y menoscabos, el agraviado excusa procurar el ya conseguido desagravio; pero esta eventual coincidencia de los efectos, no borra la diversidad originaria de los acciones civiles para pedir indemnizacion. Siendo como se ve, diverso al titulo de esta obligacion y formando verdadero postulado de nuestro regimen judicial la separacion entre justicia punitiva y tribunales de lo civil, de suerte que tienen uncs y otros normas de fondo en distintos cuerpos legales."

To the first question above propounded therèfore, the answer is that the parties are free to choose the course they desire to take which in their judgment would furnish the most effective remedy for the triumph of their cause.

The same fredom of choice must hold as to the second question. For the choice of one or the other, however, there is an important distinction that should be noted between the liability under Article 1903 of the Civil Code, and the liability un-

der Article 101 of the Revised Penal Code. In the former the persons therein enumerated namely, the father or in case of his death or incapacity, the mother, guardians, owners or directors of an establishment or houses, the State when acting through a special agent, and finally the teachers or directors of arts and trades are held primarily responsible not under the doctrine of "respondeat superior" but under that of "paterfamilia." "The direct liability is evident from its opening paragraph: "The obligation imposed by the next preceding article is demandable not only for personal acts and omissions, but also for those of persons for whom another is responsible."

Under Articles 102 and 103 of the R. P. C. on the other hand, the liability of inn-keepers, tavern-keeper, other persons or corporations, employees, teachers, persons and corporations engaged in any kind of industry is only subsidiary. The opening sentence reads: "In default of persons criminally liable * * * shall be civilly liable."

To quote from Maura again:

> "Los Articulos 20 y 21 del Codigo Penal, despues de distribuir a su modo las responsibilidades civiles entre los que sean por diversos conceptos culpables del delito o falta, las hacen extensivas a las empresas y los establecimientos al servicio de los cuales estan los delincuentes; *pero con caracter subsidiario,* o sea, segun el texto literal, en defecto de los que sean responsables criminalmente. No coincide en ello el Codigo Civil * * * Por esto acontece, y se observade intervenir en las causas criminales con el caracter subsidiario de su responsabilidad civil por razon del delito, son demandadas y condenadas directa y aisladamante, cuando se trata de la obligacion ante los tribunales civiles." (Dictamenes, Vol. 6, pa. 512)

It is in the light of this important distinction therefore, that the answer to the second question must be that the parties are again free to choose under which system of law, they will exact liability of the persons held by law to the responsible.

Which brings us to the third query, closely related to the second. It is elementary that it is only when the accused in a criminal case is convicted that the subsidiary civil liability arises, for being by its nature secondary, its life is dependent on that principal. If the accused is acquitted, then there is no room for exacting the subsidiary liability provided for under the Revised Penal Code. In view, however, of the distinction above drawn it is clear that in spite of acquittal in a previous criminal action, especially in cases where the employees was not made a party therein, a separate civil action will lie. And this is because the gist of the action in the latter is entirely distinct from that of the former. In the latter what the party seeks to establish is the lack of diligence of the employer, which factor is directly imputable and personal to him having nothing to do with the employee although the act of the latter is in fact that which generates the reason for the employer's liability.

It follows, consequently, that in spite of previous acquittal, the employer can still be held liable in a civil action for damages.

For supporting authority we need only a Spanish decision of October 21, 1910. In this case, Ramon Lafuente was run over by a street car belonging to the defendant company and was instantaneously killed. The conductor was prosecuted criminally and was acquitted. The widow thereupon brought a civil action for damages which the lower court awarded. On appeal the Supreme Tribunal held:

> "* * * Es manifesto que la de lo civil, al conocer del mismo hecho bajo este ultimo aspecto y al condenar a la Compañia recurrente a la indemnizacion del daño causado por uno de sus empleados, lejos de infringir los mencionados textos, se ha atenido estrictamente a ellos, sin invadir atribuciones ajenas a su jurisdiccion propia ni contrariar en lo mas minimo el fallo recaido en la causa." (Sentencia de Octubre 21, 1910)

Nor would this general rule be subject to the provisions of Rule 107 of the Rules of Court because of the entirely different foundations on which the criminal and civil actions are predicated. Thus in Chaves vs. Manila Electric (31 Phil. 47), a criminal action previously filed resulted in the conviction of the employee of the defendant-employer. A civil action was then brought against the defendant-employer. It was alleged that the action did not lie because there was no reservation made of the right to maintain a civil action. It was held therein that it was not necessary for the plaintiffs to expressly reserve the right to bring and maintain an action for civil damages against the defendant.

While this may be true as to right to institute an action, nevertheless, it must yield to paragraph (d) of the same rule.

> Rule 107, par. (d). 'Extinction of the penal action does not carry with it the extinction of the civil, unless the extinction proceeds from a declaration in a final judgment that the fact from which the civil might arise did not exist."

If, therefore, the judgment is explicit as to the fact that there is no basis in law for holding the employer liable, then the institution of the separate civil action must logically be barred.

Do We Have a Philippine Common Law on Damages?

The assertion has been made by an American Justice of the Supreme Court of the Philippines, that in view of the incorporation into our law of so many common-law principles on damages, the Philippine law may as well be converted into a Philippine common-law on Damages.

The statement is not in the least surprising when we consider that Philipine jurisprudence has been interpreted and applied for so many years by American jurists, who could not, despite the presence of civil law, help but compare our law in the Islands with Anglo-Saxon law whenever the opportunity presented itself.

Prejudiced perhaps by nationalistic

considerations, but arrived at only after a painstaking and careful survey of the field of damages, I have come to a different conclusion. I do not belittle the role that Anglo-Saxon law has played and perhaps will play in our law on damages; but I maintain that whatever principles savoring of common-law influence have been implanted on Philippine soil have merely added to and supplemented an already existing body of law, complete and adequate by itself, covering all possible angles, civil commercial, penal, "a law conceived in the womb of the civil law under an entirely different form of government." No Anglo-American principle on damages adopted by our Courts has introduced a legal angle not heretofore recognized under our law.

It may be alleged that pain and suffering as an element to be considered in the determination of damages is an off-shoot from the Common law and has no place in the jurisprudence of the Civil Law. The following excerpt speaks for itself in

> "La naturaleza del daño causado importa poco. En la mayor parte de los casos sera un daño que afecto al patrimonio de la persona que le haya ocasionado gastos o perdidas apreciables en dinero. O tambien el daño puede afectar a la victima en su persona fisica; sera este el caso de un accidente que causa la muerte o la incapacidad del contagio de una enfermedad infecciosa.
>
> *"Pero el daño puede ser tambien de orden moral.* Lo es por ejemplo un ataque a la reputacion, a la consideracion de una persona; procedente de conversaciones injuriosas o palabras o escritos calumniosos lo es la ruptura injustificada de una promesa de matrimonio; lo es el hecho de una seduccion dolosa. O tambien el perjuicio causado a un conjugue por el adulterio del otro. En todos estos casos, la jurisprudencia concede indemnizacion de daños y perjuicios.
>
> "Hasta va aun mas lejos. Cuando un accidente ha causado la muerte de una persona, concede a sus parientes proximos una indemnizacion no solo por el perjuicio material y moral que esta muerte puede causarles, privandoles de los recursos procedientes del trabajo del difunto y de la situacion social que el acidente les ha hecho perder, sino tambien por *la perdida de afeccion, el dolor que les ha causado la desaparicion de un ser querido.*
>
> "Esta jurisprudencia ha provocado criticas. Algunas autores han protestado contra esta aplicacion de una reparacion pecuniaria de los daños que no pueden ser apreciados en dinero. En semejante caso, se dice, la fijacion del importe de la indemnizacion tiene que ser necesariamente arbitraria.
>
> "Hay indiscutiblemente algo de fundamento en estas criticas. Pero pareceria aun mas chocante que ninguna reparacion viniese a compensar la perdida; la perturbacion moral sufrida por el demandado. Si el arbitrio del juez es siempre un peligro, la negativa de toda sancion contra el mal sufrido por obra de otro seria una injustica escandalosa. A falta de cosa mejor, el dinero sirve en esta vida para cerrar muchas heridas, muchos sufrimientos. Todo el mundo admite

su inconveniente que una indemnizacion pecuniaria puede compensar la ofensa dirigida contra la reputacion o el honor de un individuo. Del mismo modo, la indemnizacion de daños y perjuicios reparara de un modo aproximado, y sin duda imperfecto, el daño inferido a la afeccion o a los sentimientos intimos del demandante.

"El Codigo suizo de Obligaciones esta en este punto conforme con las soluciones de nuestra jurisprudencia. En efecto, despues de haber declarado que en caso de accidente mortal, si, a consecuencia de la muerte, quedan otras personas privadas de su sosten, hay que indemnizarlas tambien de esta perdida; añade: el juez puede teniendo en cuenta las circunstancias particulares, conceder a la victima de las lesiones corporales, o en caso de muerte de un hombre, a la familia, una indemnizacion equitativa a titulo de reparacion moral." (Colin y Capitant—Tomo 3, p. 43)

This, indeed, is an eloquent testimonial of the fact that indemnity for patrimonial and moral damages, for pain and suffering, for injury to feelings, has been recognized by civil law countries even as far back as the 19th century, and insofar as these are concerned, civil-law jurisprudence has borrowed nothing from the Common Law.

That similarity exists in certain aspects, however, cannot be disputed. The rules on actual or compensatory damages are almost identical. The measure of damages is arrived at by the same evidence. But whatever similarity exists is due principally to the fact that the law of damages here or elsewhere is based and built around the law of natural justice and therefore universal.

There are two points, however, common practice in common law countries, which we would do well to adopt: The first refers to recovery of damages arising after the commencement of the suit. This is specially true in personal injury cases, although by no means confined thereto, where further damages may be occasioned in the interim between the commencement of the action and the time set for trial, particularly if the injury sustained is permanent or continuing in character. Provided these damages result from the same injury that is the subject matter of the action, there should be room allowed for their presentation and proof.

There is nothing in our procedural law that would stand as a bar to the recovery of such damages. In fact, were such a case to arise, even in the absence of specific statutory legislation the proof of such damages would in all probability be allowed. They could be introduced through the medium of supplemental pleadings.

The second improvement that could be introduced is that which is known in Anglo-Saxon law as "general survival" and "general revival" acts. The first refers to "causes of action for injuries to the person which are made to survive the death of the injured person, whether the death results from the injury or for some other cause." (15 Am. Jur., S. 99, p. 509) The latter term concerns

actions for personal injuries constituted by the person injured before his death to be prosecuted by his personal representative after his death. (15 Am. Jur. Sec. 99, p. 509)

Just as damages for wrongful death find their justification in Article 1902 of the Civil Code the same thing may be said of general survival acts. It must be noted that between the two there is an important difference in that while in the former the wrongful death is the principal cause of action, in the latter it is the injuries sustained. In the latter, death may or may not have resulted from the injuries themselves; in the former death must be the direct result of the act of the defendant. But inasmuch as our jurisdiction recognizes damages for wrongful death, there is nothing to prevent either the prosecution of actions that fall under the so-called general survival acts. Besides, there is that general principle in Succession which declares that the heirs succeed to all the rights and obligations of the decedent. Be it under this provision or under Article 1902, therefore, "general survival acts" likewise may be cognizable under Phihlippine Laws.

As to its counterpart, or "general revival acts," our rules on procedure again justify their recognition. They are what is known under the Rules of Court as actions that survive. When the claimant dies after having instituted his complaint, the action may be brought to completion by the legal representatives. In this connection no problem would be encountered if the death supervenes after the greater part of the evidence has been introduced at the trial. The difficulty arises, however in the event where no such evidence has been presented, and in those cases where proof can alone be personally presented by the claimant, as in the case of pain and suffering. In which case, as to whether the action will prosper or not will lie entirely in the judicious exercise of discretion by the Court.

In conclusion, therefore, it may be stated that while a few graftings have been transplanted from the common-law our law on damages is deeply and firmly rooted in the soil of CIVIL-LAW JURISPRUDENCE.