COMMENTS

OBSERVATIONS ON THE NECESITO DECISION

On June 30, 1958, the Supreme Court in a unanimous decision promulgated the case of *Preciliano Necesito, etc. v. Natividad Paras, et al.*[1] The decision is significant in more ways than one.

For one thing, the Court drew some qualification on the rule relating to recovery of moral damages in actions *ex contractu,* which it laid down earlier in *Cachero v. Manila Yellow Taxicab.*[2] And in another respect, the case is, also, significant for the rule that it announced touching on the liability and the degree of diligence required of common carriers.

The solid front offered by the unanimous Court[3] would seem to discourage any critical observations on the cogency and soundness of its reasoning. Unanimity, however, is not necessarily a flawless guarantee of the reasonableness of a court's decision.

The facts of the *Necesito* decision may be reduced into a nutshell: Plaintiffs were passengers in one of the busses of defendant carrier. The bus was driven at a moderate speed, but on reaching a bridge spanning a nine-foot-deep creek the steering knuckle of the vehicle went beyond control. The bus plunged into the creek, drowning some of the passengers, injuring others, and resulting in the loss of some other personal objects of value belonging to the passengers. The undisputed fact is that "the accident was caused by the fracture of the right steering knuckle, which was defective in that its center or core was not compact but 'bubbled and cellulous', a condition that could not be known or ascertained by the carrier despite the fact that regular thirty-day inspections were made of the steering knuckle, since the steel exterior was smooth and shiny to the depth of 3/16 of an inch all around."

The lower court held the accident was exclusively due to fortuitous event. The Supreme Court thought otherwise: it found the defendant carrier deficient in failing to observe the standard requirement of "utmost diligence" and, therefore, negligent; and that, even assuming that the carrier, itself, was not negligent, it was, nevertheless, liable for the negligence of the manufacturer of the defective steering knuckle under the rule of *respondeat superior.*

What is "utmost diligence"?

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[1] G.R. No. L-10605, June 30, 1958.

[2] G.R. No. L-8721, May 23, 1957. For a discussion on this point, *see* Comment, Gatilao, R. and Saludo, A., *Recovery for Moral Damages in Breaches of Contract and the Cachero Case, infra.*

[3] Justice J.B.L. Reyes penned the decision, concurred in by the rest of the justices of the Supreme Court

Did the common carrier in the *Necesito* decision fail to live up to this legal standard of human conduct under the admitted facts of the case?

The Civil Code lays down the rule thus:

> "Art. 1755. A common carrier is bound to carry the passengers safely *as far as human care and foresight can provide, using the utmost diligence of very cautious persons,* with a due regard *for all the circumstances.*"

This article is a restatement of the rule of extra-ordinary diligence imposed upon common carriers by article 1733 of the same Code,[4] which provides as follows:

> "Art. 1733. Common carriers, from the nature of their business and for reasons of public policy, are bound to observe *extra-ordinary diligence* in the vigilance over the goods and for the *safety* of the *passengers* transported by them, *according to all the circumstances.*"

It is settled that the requirement of "utmost diligence" or "extra-ordinary diligence" does not go so far as to render the carrier an absolute insurer against the risks of travel [5] because the presumption of negligence [6] in the cases not coming within any of the enumerated instances in article 1734 may still be rebutted by evidence that the injury is the proximate effect of a fortuitous event.[7]

If the "utmost diligence" of article 1755 and the "extra-ordinary diligence" of article 1733 quoted in the foregoing may be established impliedly by showing that the proximate cause is a fortuitous event, was not the accident in the *Necesito* decision brought about by what the law denominates as such *caso fortuito?*

The Supreme Court gave a ready "no": the owners and operators of the common carrier known as *Philippine Rabbit Bus Lines, Inc.* were negligent and that the "knuckle's failure cannot be considered a fortuitous event that exempts the carrier from responsibility." Reliance was placed squarely on *Lasam v. Smith* [8] and *Son v. Cebu Autobus Co.*[9]

In *Lasam v. Smith,* the Supreme Court held "that some extraordinary circumstance independent of the will of the obligor, or of his employees, is an essential element of a *caso fortuito.* Turning

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[4] PADILLA and CAMPOS, THE LAW ON TRANSPORTATION 58 (1956 ed.).
[5] Lasam v. Smith, 45 Phil. 657 (1924); Strong v. Iloilo-Negros Air Express, 40 O.G. 12th Supp. to 18, 269 (1940).
[6] CIVIL CODE OF THE PHILIPPINES Art. 1735.
[7] *Id.*, Art. 1174; PADILLA and CAMPOS, *op. cit. supra,* note 4 at 27; Alba v. Sociedad Anonima de Tranvias cited in 102 JURISPRUDENCIA CIVIL 928.
[8] 45 Phil. 567 (1924).
[9] G.R. No. L-6155, April 30, 1954. Any reference hereafter to the Lasam case, *supra,* shall be understood, unless the contrary is provided, as including, also, the Son case, these two cases being on all fours in their material facts and the holding of the Supreme Court in both being identical.

to the present case (*Lasam* case), it is at once apparent that this element is lacking. *It is not suggested that the accident in question was due to an act of God or to adverse road conditions* which could not have been foreseen. *As far as the record shows, the accident was caused either by defects in the automobile or else through the negligence of its driver.* That is not *caso fortuito.*" (Italics supplied.) It should be noted, furthermore, that according to the testimony of the witnesses for the plaintiff in the *Lasam* case, defects developed in the steering gear so as to make accurate steering impossible, and after zigzagging for a distance of about half a kilometer, the car left the road and went down a steep embankment.

In arriving at its decision, therefore, the Court in the *Lasam* case could not have ruled otherwise than to hold the defendant therein liable. The intervention of *caso fortuito* is a matter of defense,[10] and the burden of establishing it rests on the defendant. Thus, the Court found that "the accident was caused either by defects in the automobile or else through the negligence of its driver." Which is which could not be determined because the defendant failed to establish either possibility. Assuming that the defect was in the steering gear, the nature of the defect, itself, was not shown. Not every mechanical defect is attributable to the common carrier. The nature of the defect should be ascertained. Did such defect consist in a rusty or worn-out steering gear which could be detected by visual inspection, or did it consist, as in the *Necesito* decision, of a steering knuckle which was defective in that its center or core was not compact but "bubbled and cellulous", a condition that could not be known or ascertained by the carrier...since the steel exterior was smooth and shiny to the depth of three-sixteenth of an inch all around? Certainly, the *Lasam* and *Son* cases did not answer either. The *ratio decidendi* of these cases could not have settled one or the other. While in the *Lasam* and *Son* cases the actual cause of the accident could not be determined, here in the *Necesito* decision the Court found as an undisputed fact that the accident was due to a hidden mechanical defect.

The Supreme Court in relying on the *Lasam* case to support its holding that defendant carrier in the *Necesito* case was negligent failed to recognize the obvious distinction in the material facts of the two cases. If the Court had to hold defendants in the *Necesito* case negligent, as it did hold them negligent, its decision must find support on some other rule or decision and not on the *Lasam* case which stands on an entirely distinct plane from the facts obtaining in the *Necesito* decision.

[10] See note 6, *supra;* SALONGA, PHILIPPINE LAW OF EVIDENCE, 522-524 (1st ed. 1955).

Thus, it would need no second consideration to hold that if defendant carrier fails to rebut the presumption of negligence against it, an adverse verdict follows as a matter of course. Likewise, if the facts show that the defective part of the vehicle, to which was traced the cause of the accident, was rusty, or otherwise, worn-out that visual observation would have cautioned replenishment and that no such repair was made, then there is hardly any room for argument that an unfavorable judgment should, also, follow.

But should our Supreme Court have rendered a like decision in the *Necesito* case when the defect was at the center of the steering knuckle such that "a regular thirty-day inspection could not have exposed the defect since the steel exterior was smooth and shiny to the depth of 3/16 of an inch all around"? On this point the Court had to rely solely on the *Lasam* and *Son* cases and on its *naked* judgment of what is negligent conduct and what is not. On the other hand, American authorities abound in support of the proposition that a common carrier is not liable for "unknown mechanical defects", especially for the kind obtaining in the *Necesito* case. Thus, we find this statement of the rule:

> "If the mechanical defect is unknown and could not reasonably be discovered, and if no other cause of the injury appears, then the driver (and/or owner) of the vehicle will not be held liable for the injury. However, a "pure" case of injury caused by an unknown defect alone is rare. One early decision involved a near-perfect example of the rule in this situation. In Sweet v. Capps,[11] the defendant was driving on a country road behind a wagon pulled by horses. Defendant was traveling about ten miles an hour and the plaintiff's wagon about eight miles an hour. A car approached from the other direction. When the defendant tried to apply his brakes, the rear axle broke on his automobile. He tried to apply the hand brake, but this did not stop his car from running into the wagon. The wagon was damaged, but the plaintiff was thrown from the wagon and injured. The court held that the defendant was not liable since he was guilty of no act of negligence. The court pointed out that the automobile was manufactured by one of the largest and most reputable producers in the country, that it was about two years old, and had been driven only three or four thousand miles. On these facts it was concluded that the defendant would have no reason to suspect or discover a defective rear axle."[12]

A qualification of the rule just stated is admitted. The carrier would be liable if it was negligent when the accident took place, as when the vehicle was driven at reckless speeds. But does this quailfication apply in the *Necesito* case when in the very language of the Supreme Court

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[11] 10 Tenn. App. 24 (1928).
[12] Comment, Prince, *Unknown Mechanical Defects—Driver's Liability*, 25 TENN. L. REV. 505-510 (1958).

> "We are inclined to agree with the trial court that it is not likely that bus No. 199 of the Philippine Rabbit Lines was driven over the deeply rutted road leading to hte bridge at a speed of 50 miles per hour, as testified for the plaintiffs. Such conduct on the part of the driver would have provoked instant and vehement protests on the part of the passengers because of the attendant discomfort, and there is no trace of any such complaint in the records. We are thus forced to assume that the proximate cause of the accident was the reduced strength of the steering knuckle of the vehicle caused by defects in casting it"?

Our Supreme Court insists that defendants in the *Necesito* case were negligent because they failed to apply the proper tests:

> "In the case now before us the record is to the effect that the only test applied to the steering knuckle in question was a purely visual inspection every thirty days, to see if any cracks developed. It nowhere appears that either the manufacturer or the carrier at any time tested the steering knuckle to ascertain whether its strength was up to the standard, or that it had no hidden flaws that would impair that strength. And yet the carrier must have been aware of the critical importance of the knuckle's resistance; that its failure or breakage would result in loss of balance and steering control of the bus, with disastrous effects upon the passengers. No argument is required to establish that a visual inspection could not directly determine whether the resistance of this critically important part was not impaired. Nor has it been shown that the weakening of the knuckle was impossible to detect by any *known test;* on the contrary there is testimony that it could be detected. We are satisfied that the periodical visual inspection of the steering knuckle as practiced by the carrier's agents did not measure up to the required legal standard of 'utmost diligence of every cautious persons' — 'as far as human care and foresight can provide".'

What "test" does the Court have in mind? Tension tests? Or x-ray tests? It is a little intriguing for the Court to require that there must be a test and at the same instant to hold its peace on what, perhaps, this test may be. We can easily understand, of course, the great anxiety of the Court of affording the injured victims of the accident in the *Necesito* case speedy and proper remedy. Besides the fact that they were physically injured, they were mostly poor folks from the province. "Severina Garces and her one-year old son, Preciliano Necesito, carrying vegetables," boarded the ill-fated vehicle in question. We feel safe in assuming that even the vegetables were, also, lost in the waters of the creek into which the vehicle fell. We sympathize with the unfortunate victims of the accident. But at the same time, we hasten to add that court decisions mean much more than vegetables.[13]

[13] CIVIL CODE OF THE PHILIPPINES Art. 8.

If decisions in American courts would free the common carrier from liability when the proximate cause of the accident is a hidden mechanical defect, in the absence of any concurring negligence of said carrier, and *without requiring that the proper "tests" be applied* (since the defect is hidden anyway), it is sad indeed to note that our Philippine Supreme Court, which is expected to take judicial notice of the fact that we are not as advanced in technology as America is, can go so far as to require that "tests" be used to detect hidden mechanical defect. Our Court asks of common carriers what American courts have not yet gone so far to require. Perhaps, because of our high regard for the value of human life. Why, are American courts less anxious to throw safeguards for human life than is our Supreme Court?

The case under comment does not seem to be entirely one of first impression. Way back in 1940 our Court of Appeals exempted an airplane carrier from liability because:

> "A carrier is not liable for defects of the ignition cables used on his airplane ,nor of the installation thereof, which cables were purchased from a competent and reputable manufacturer, in the absence of showing that it knew those defects or that such kind of ignition cables is not ordinarly used on the airplane operated by it."[14]

This decision concerned air transportation and is embraced within article 1732 of the Civil Code:

> "Art. 1732. Comomn carriers are persons, corporations, firms or associations engaged in the business of carrying or transporting passengers or goods or both, by land, water, *or air*, for compensation, offering their services to the public." (Italics supplied.)

The Court declared, also, that the negligence of the manufacturer of the defective steering knuckle is imputable to the defendant carrier on the principle of *respondeat superior*, under which the principal is *conclusively* held answerable for the negligence of his agent.[15] The Court relied on a string of decisions of American courts.[16]

Under the Court's holding, the defendant carrier in the *Necesito* case is the principal, and the manufacturer of the defective steering knuckle is its agent; and as such agent, the negligence of the manufacturer is conclusively the negligence of the carrier.

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[14] Strong v. Iloilo-Negros Air Express Co., Inc. (C.A.), 40 O.G. 18, 269 (1940).
[15] Cangco v. Manila Railroad Co., 38 Phil. 768, 772 (1918).
[16] 10 AM. JUR. 205, sec. 1324; Pennsylvania Railroad Co. v. Roy, 102 U.S. 451, 26 L.Ed. 141; Southern Railroad Co. v. Hussey, 74 A.L.R. 1172, 42 Fed. 2d. 70, Ed. Note, 29 A.L.R. 788; Ann Cas. 1916 Ed. 929; Justice Hannan in Francis v. Gackrell, LR 5 Q.B. 184; 29 A.L.R. 789; Morgan v. Chesapeake etc., 15 L.R.A. (N.S.) 790, 16 Ann Cas. 608.

In thus so holding, has not the Court disregarded, albeit unwittingly, the rule that a carrier is not an insurer of the risks of travel? Has not the Court forgotten, perhaps, that when article 1755 speaks of "utmost diligence" and article 1733 of "extra-ordinary diligence", those provisions mean exactly what they say? And not absolute diligence (if there is such a legal concept)? If a carrier must now answer conclusively for the negligence of the manufacturer, what chance has it to show that it exercised the requisite standard of utmost or extraordinary diligence?

The Court would seem to suggest that a carrier must either supervise the process of manufacturing the parts it purchases or not to buy any parts at all where it is not one hundred per cent certain that such machine parts are in perfect condition. Otherwise, it shall answer conclusively for the defect in the process of manufacturing them. And this on the doctrine of *respondeat superior.*

It is, however, a rule too well settled to be assailed that:

> "The doctrine (of *respondeat superior*) implies that the person sought to be charged must stand in the relation of superior to the wrongdoer, *and is founded on the right to direct and supervise. It rests on the power of control and direction which the superior has over the subordinate, and on the power which the superior has a right to exercise and which, for the protectoin of third persons, he is bound to exercise over the acts of his subordinate. The doctrine does not exist, and cannot be applied where there is no superior to respond....*" (Italics supplied.)[17]

Has the defendant carrier "the right to direct and supervise" the work of the manufacturer in the *Necesito* case? May it be properly said that the manufacturer is the *subordinate* of the carrier? And if so, does said carrier possess the requisite power of "control and direction" over the business of the manufacturer without which, in the language of the above-quoted authority, "the doctrine (of *respondeat superior*) does not apply"?

It is, furthermore, agreed as a matter of settled law that:

> "The doctrine of respondeat superior has been said to be a *tort principle,* and that the true basis of the doctrine is liability and not culpability." (Italics supplied.)[18]

In the *Necesito* decision, the cause of action was founded on *breach of contract of carriage.* What judicial impulse moved the Court to stretch its long arm across the vast Pacific to scoop from American reports lengthy quotations on *respondeat superior* which

[17] 77 C.J.S. Respondeat Superior, 319 (1952 ed.).
[18] *Id.*

is peculiar to the law of torts, when the issue involved was breach of contract is beyond our comprehension. Perhaps, we should add, not altogether without some nostalgic touch, that the heavy line Justice Malcolm drew between contractual and tort liability in *Cangco v. Manila Railroad Co.*[19] has now paled into the graveyard of forgotten jurisprudence.

In invoking the American authorities upon which it relied, the Court laid heavy stress on the fact that the passengers, while related to the carrier by contract of carriage, do not stand in privity with the manufacturer of the defective machine part. As such, the Court reasons, the injured passengers, not having any cause of action against the manufacturer, should be allowed to proceed against the carrier with which they stand in legal privity. And it is for the carrier in turn to recover from the manufacturer under the contract of sale what it paid to the passengers under the judgment for breach of contract of carriage. The arrangement seems to ring with soundness. *Ibi jus ibi remedium.*

It is, however, an admitted rule, also, that the law is not meant to require an impossibility. Under the ruling in the *Necesito* decision, we wonder if the Court does not expect too much of common carriers, considering the stringent "tests" it speaks of which appear to border on the impossible. Faced with what is impossible and the rather hard requirement laid down by the Court, we can only ask: what is the difference between a young cat and a full-grown kitten? The length of the whiskers, we presume!

We are willing to join in singing with our unanimous Court in the *Necesito* decision that every right should be armed with the corresponding remedy. But the remedy should be the proper remedy. It should not work some injustice, as the remedy worked out by our Court would appear to do.

The negligence in the *Necesito* case was imputable to the manufacturer. Our purpose is to hold him liable and to make him pay for his negligence. Is this attained by compelling the carrier, instead, to pay? Why cannot the injured passengers go against the manufacturer?

The Court said this is not legally possible because there is no legal relation created between the passengers and the negligent manufacturer.

This proposition is not accurate. Is there anything in law which would prevent the injured passengers from bringing an action based on tort? While there is no legal tie between the manufacturer and

[19] Note 15, *supra*.

the complainant passengers arising from contract, certainly there is a legal privity between them arising from negligence. This is precisely the substance of a quasi-delict. Thus in terms too plain for our Court to have overlooked, the new Civil Code provides as follows:

> "Art. 2176. Whoever by an act or omission causes damage to another, there being *fault or negligence*, is obliged to pay for the damage done. Such fault or negligence, *if there is no pre-existing contractual relation between the parties*, is called a *quasi-delict* and is governed by the provisions of this Chapter." (Italics supplied.)

But if the above-quoted provision of law is not sufficient to put the mind of our Court at ease, we wish to invite its attention to the fact the same Civil Code now provides as follows:

> "Art. 20. Every person who, contrary to law, wilfully or *negligently causes damage to another*, shall indemnify the latter for the same." (Italics supplied.)

In the words of the Code Commission, this rule "pervades the entire legal system, and renders it impossible that a person who suffers damages because another has violated some legal provision, should find himself without relief...."[20] All right, *ibi jus ibi remedium*. But not as the Supreme Court would have it.

In this connection, article 2187 of the Civil Code provides:

> "Art. 2187. Manufacturers and processors of foodstuffs, drinks, toilet articles and similar goods shall be liable for death or injuries caused by any noxious or harmful substances used, although no contractual relation exists between them and the consumers."

The obvious difficulty with this provision is that the articles enumerated are only foodstuffs, drinks, toilet articles; and the phrase "similar goods" should be understood *ejusdem generis* to include only goods similar to foodstuffs, etc. An article like a steering knuckle is out of place.

In view of the foregoing, an amendment of article 2187 to include other articles not necessarily foodstuffs, etc. is very much in order. The reason for including foodstuffs equally apply to other objects like vital machine parts, namely, the difficulty of detecting the defect inherent in the article involved, as in the decision under comment.

Premises considered, it is submitted that the requirement laid down by our Court in the *Necesito* decision is rather hard upon the

[20] REPORT OF THE CODE COMMISSION 39 quoted in AQUINO, LAW OF PERSONS AND FAMILY RELATIONS 38 (1958 ed.).

carrier. The need for providing maximum security to human life ought to be properly considered side by side with the progressive requirements of commerce and industry and public convenience. We are not prepared to say that our unanimous Supreme Court was wrong; perhaps, the flux of time and the accompanying developments in technology may bring within the easy reach of transportation companies those necessary "tests" the Court has spoken of for the greater security of the travelling public. By then, the Court shall have every compelling reason to demand of common carriers that the necessary "tests" be applied.

As of now however, we seriously doubt if by requiring the "tests" of common carriers the Court is not asking too much under the circumstances now obtaining. We, also, doubt seriously if the Court's adjustment of the burden of losses on the time-honored principle of *respondeat superior* is justified by the facts and warranted by the law.

We are fully in accord with the Court that human life should be properly safeguarded. This involves, however, questions of degrees. As for the present, we feel satisfied in repeating what one forward-looking local judge said on one occasion:

> "...In the very nature of present-day living, characterized by competition and advances in all fields of human endeavor, everyone is heir to the inconveniences and annoyances occasioned by the wheels of industry and the march of progress...."[21]

PABLO B. BADONG *

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[21] Judge Soriano quoted with approval in Gavino Tesoro v. Jose Rodiga, 51 O.G. 9, 4625, 4626 (1955).

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