

INTENTIONAL TORTS IN PHILIPPINE LAW

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I. INTRODUCTION

Though the Philippine law of torts has made vast strides in the last two decades, its progress has tended to be somewhat lopsided — with undue concentration being focused on only one, albeit crucial, area of local tort law, namely, quasi-delicts. Perhaps this mild aberration can be traced to two reasons, one being interdependent of the other. First, the almost inexhaustible mine of newly-created tort actions found in the chapter on Human Relations of the New Civil Code has not yet been fully assayed and up to the present has remained virtually untapped. It is amazing, for example, that since the effectivity of the New Civil Code in 1950, no definitive case has been made out of Article 26, which is easily, as a distinguished commentator put it, “perhaps one of the most fruitful sources of litigation under the present Code.”¹ This is equally true with respect to Article 20, which, in the words of the Code Commission, “pervades the entire legal system.”² The few cases that have been decided under the other provisions on Human Relations barely scratch the surface of this immensely rich source of tort actions. Second, the nascent but growing proclivity³ of the Supreme Court in borrowing American *intentional* tort principles and injecting the same into our concept of quasi-delict has enlarged the scope of quasi-delict, crowding out other kinds of torts. Quasi-delict,⁴ as embodied in the Civil Code, is civil law in origin, tracing its roots in Roman and Spanish legal precepts, while American tort law is common law.

At present, almost every tort case is treated as a quasi-delict, with the result that quasi-delicts have pre-empted the area of tort law reserved for intentional torts. The differences which distinguish a quasi-delict from an intentional tort are beginning to be eroded. Yet even prior

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¹ TOLENTINO, CIVIL CODE OF THE PHILIPPINES, (1968 ed.) Vol. 1, p. 88.

² Report of the Code Commission, p. 39.

³ *Air France v. Carrascoso*, 18 SCRA 156; *Palisoc v. Brillantes*, 41 SCRA 548; *Zulueta v. Pan Am World Airways*, 49 SCRA 1.

⁴ Article 2176, New Civil Code: “Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.”

to the infusion of American intentional tort principles into quasi-delict, Philippine jurisprudence was already replete with cases wherein intentional torts were decided as if they were quasi-delicts without any discussion as to the differences between the two.⁵ Against this backdrop, lawyers, whenever they are confronted with a tort case, invariably predicate the action on a quasi-delict. As a result of all this, our jurisprudence on torts *other* than quasi-delict has suffered from atrophy and unless interest in these neglected torts is whipped up, our law on torts will be marred by an uneven growth that may eventually lead to a confusing merger of vastly different tort concepts. It is therefore our belief that an inquiry into the nature, origin and scope of the more important newly-created tort actions in the Civil Code, *specifically Articles 20, 21 and 26*, may somehow help to facilitate the utilization of these neglected tort actions. An analysis of the recent cases which have placed intentional torts on the same footing as quasi-delicts will perhaps point out the need to be more discriminating not only in transplanting foreign tort principles in our law but also in choosing the particular type of tort upon which a cause of action should be based.

Classification of Philippine Torts

To provide a broad perspective of the Philippine law of torts, and at the same time to guide us in comparing American and Philippine torts, we shall classify — a necessity which inevitably suggests itself in view of the sheer vastness of this field of law — our tort law into three major groups. Actually there can be many categories into which Philippine tort law may be divided, depending on the particular theory or purpose pursued. For the purpose of this inquiry the general plan shall be to classify torts according to their nature, to wit: (a) Intentional torts, which may be broken down into two: those which were adopted from American jurisprudence, and those which were taken from the codes of civil law jurisdictions; (b) Negligent torts, which may also be divided into two: those which are covered by Article 2176 and those which are not; (c) Strict liability tort, such as the Workmen's Compensation Act, Articles 1711, 2183 and 2187 of the Civil Code. This classification does not purport to be relevant to all possible study of Philippine tort law, but is rather particularly confined to our inquiry of the nature, origin and scope of Articles 20, 21 and 26. A provision of law, however, may

⁵ *Exconde v. Capuno*, 101 Phil. 843; *Araneta v. Arreglado*, 104 Phil. 529; *Belen v. Balce*, 107 Phil. 748; *Mercado v. Court of Appeals*, 108 Phil. 414; *Fuellas v. Cadano*, 3 SCRA 361.

embody more than one category of tort. Thus Article 20 covers both willful and negligent tortious conduct.

To limit the already broad area of this inquiry within manageable bounds, the third group of torts shall not be touched upon. It is nevertheless imperative to keep in mind that the field of strict liability tort is a rapidly growing one, thanks to the lawmaker's policy of shifting the costs of risk to the party most able to bear the same, regardless of fault or negligence. Strict liability tort is gobbling up substantial areas of negligent torts, especially quasi-delicts and this is obviously the reason why employees have ceased to bring actions under Article 2176 for tortious conduct of employers. This only proves that torts which have been for a time moored on one specific ground like negligence, may gradually be anchored on strict liability in response to changing economic and social conditions. Indeed, the law of torts is anything but static. New and nameless torts are bound to be recognized as falling within the purview of the general provisions of law⁶ governing torts. In the future these general provisions will create causes of action where none was recognized before, boldly pushing farther the frontiers of the law of torts.

II. BREACH OF STATUTORY DUTY: INTENTIONAL AND NEGLIGENT TORT FROM CIVIL LAW JURISDICTION

We have reasons to believe that the tort known in legal parlance as breach of a statutory duty, long recognized in many jurisdictions as a distinct tort, was transplanted in this jurisdiction by the New Civil Code in Article 20. Though a fertile source of tort actions, this particular provision has never been delved upon by our commentators, and the Supreme Court has not had the occasion to interpret it.⁷ Yet this article deserves serious consideration not only for its apparent potentialities but also for its rather peculiar rules for applicability. Article 20

⁶ Examples are Articles 26 and 2176.

⁷ In *People's Bank and Trust Co. v. Dahican Lumber Company*, 20 SCRA 84, (1967), the Supreme Court, after declaring that the issues regarding the plaintiff's right to recover, the manner of distribution, etc., are of "a secondary nature as they are already impliedly resolved by what has been said heretofore" (on the main issue of whether "after acquired properties" are covered by the mortgage subject of foreclosure), merely said: "On the question of plaintiff's right to recover damages from the defendants, the law (Articles 1313 and 1314 of the New Civil Code) provides that creditors are protected in cases of contracts intended to defraud them; and that any third person who induces another to violate his contract shall be liable for damages to the other contracting party. Similar liability is demandable under Articles 20 and 21 — which may be given retroactive effect (Arts. 2252-53) — or under Arts. 1902 and 2176 of the Old Civil Code."

provides that "[E]very person who, contrary to law, willfully or negligently causes damage to another, shall indemnify the latter for the same." The Code Commission wrote that this article "pervades the entire legal system, and renders it impossible that a person who suffers damage because another has violated some legal provision should find himself without relief."⁸ Indeed, at first blush this provision appears to be so pervasive that it is extremely difficult to locate its boundary lines. To cut this aura of pervasiveness down to size, we shall grapple with two questions. First, does this provision apply to all violations of law, regardless of the nature and purpose of the law violated? Second, does the sanction cover all violations irrespective of whether the particular law violated provides for its own civil remedy or not? We believe that tracing the origin of this provision, and inquiring into the peculiar construction given it by the courts of the jurisdiction from which it originated, as well as the construction given to similar concepts by courts of other jurisdictions, will help guide us in the proper application of this novel provision. Such inquiry will reveal that breach of statutory duty as a tort has certain rules which appear to be universally accepted — a fact that would assume a compelling persuasive force in construing Article 20.

The tort principle laid down in Article 20 was borrowed⁹ from Article 823 of the German Civil Code.¹⁰ Article 823 of the German Code contains two general clauses: the first provides a sanction to willful or negligent injuries to the plaintiff's person, liberty, property or any other right while the second furnishes a sanction to violations of a law intended for the benefit of another. The first clause enunciates the

⁸ Report of the Code Commission, p. 39.

⁹ Tolentino and Francisco mention Article 1714 of the California Civil Code as another source of Article 20. Article 1714 of the California Civil Code provides: "Everyone is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief." It seems, however, that this article is the *general* formulation in the California Civil Code for civil liability arising from tortious conduct. In fact California jurisprudence does not require any violation of a law for the application of this article. (See 9 ALR 364, notes on right of victim of practical joke to recover from its perpetrator; 68 ALR 1400, custom as standard of care; 46 ALR 1111, 58 ALR 136, duty or liability respecting condition of store or shop.)

¹⁰ This article provides: "He who willfully or negligently injures another in his person, his liberty, his property, or in any other right, shall be obliged to indemnify for the damages caused to the latter.

"A person who infringes a statutory provision intended for the protection of others, is liable to pay compensation for any damage arising from his violation. If in accordance with such law a violation without fault is possible, the obligation to indemnify arises only when fault exists."

general formulation in the German Civil Code for civil liability arising from tortious conduct. There is no single article in our Civil Code that rivals this clause in scope and effect although the combined application of Articles 26 and 2176 of our Code just about emulate its efficacy. The second clause asserts the German formulation of the tort known as breach of statutory duty. It is from this latter clause, strictly speaking, that our Article 20 was derived. As Article 20 is worded, the willful or negligent act causing the damage must be *contrary to law*. But, as raised earlier, does the seemingly long arm of Article 20 extend to violations of all laws or only *particular* laws? For some guidelines in the interpretation and construction of Article 20, an inquiry into German jurisprudence on the application of this second clause shall be resorted to.

The application of Article 823, paragraph two, of the German Civil Code is woven like fine grillwork around five essential elements. First, there must be an infringement of a statutory provision intended for the protection of another. Great difficulties have arisen in defining the words "statutory provision intended for the protection of another." The German Supreme Court, however, has repeatedly held that in order to come within the purview of this clause, a statute must be intended to protect either one or several individuals or a class of individuals to which the plaintiff belongs, though it may also be intended to protect the public at large in addition to protecting individuals or a class of individuals. But if the law is primarily intended for the protection of the public at large, it is not covered by the section although such law also indirectly benefits private individuals.¹¹ Second, the defendant's act must have been the legal cause of the injury. Third, the violation of the statutory duty which caused the injury must have been "unlawful". This is not mere tautology. There are instances when a violation of a statute is lawful, as when it is done in self-defense or to protect others or to avoid a greater injury.¹² Fourth, the injury must have been caused negligently or willfully. Fifth, the injury must of course have been caused by the defendant.¹³

¹¹ Examples of laws which are primarily intended to protect the public at large or the state although they may indirectly benefit private individuals are penal laws on high treason, opposition against the power of the state, violation of the constitution, etc. ENNECCERUS, KIPP AND WOLFF, 11 DERECHO DE OBLIGACIONES, TRADUCION DE LA 35A EDICION ALEMANIA CON ESTUDIOS DE COMPARACION Y ADAPTACION A LA LEGISLACION Y JURISPRUDENCIA ESPAÑOLAS POR BLAS PEREZ GONZALES Y JOSE ALGUER. p. 662.

¹² By virtue of the express language of Article 823 of the German Civil Code, if a violation without fault is possible, the obligation to indemnify arises only when fault exists. ENNECCERUS, KIPP AND WOLFF, p. 660.

¹³ MANUAL OF GERMAN LAW, (1951) Edited by the Foreign Office (London: His Majesty's Stationery Office) Vol. 1, pp. 101-102.

Statutory Provision for the Protection of Another

The first requirement, which apparently looms crucial for the purpose of this inquiry, confines along burrowed legal pathways the application of this type of tort to laws which have been enacted for the protection or benefit of a particular individual or class of persons.¹⁴ For the plaintiff to bring an action for a violation of statute, he must establish that he belongs to the class of persons sought to be protected by the statute, otherwise his action cannot prosper. This rule is strikingly similar to the rule regulating breach of statutory duty in Anglo-American jurisdictions.¹⁵

English courts, like their German counterparts, draw a sharp distinction between a legal duty "owed primarily to the State or community and only incidentally to the individual, or primarily to the individual or class of individuals and only incidentally to the state or community."¹⁶ If the statute imposes a duty for the protection of a particular class of persons, it creates at the same time a correlative right vested in those persons. Consequently, such persons possess the ordinary civil remedy for the enforcement of that right, that is, an action for damages for any loss or injury occasioned by the violation thereof. If the statutory duty is owed to the public at large and not to individuals, then the correlative right vests in the public and not in private persons, even though the latter may suffer special damage. In such a case the duty shall be enforced by way of a criminal prosecution or injunction instituted by the State or its officers.¹⁷ With similar rigorous exactness, the wheel of American tort law turns around the same well-defined groove. American courts uniformly rule that for a violation of statute to be actionable, the statute must be designed to protect a class of persons which includes the person whose interest is invaded.¹⁸

¹⁴ Examples are laws against the unlawful installation of buildings or the destruction of works which threaten neighbors, and laws prohibiting the impairment of the hacienda to the detriment of the mortgagee. ENNECERUS, KIPP AND WOLFF, p. 661, footnote 4.

¹⁵ Scottish law on breach of statutory duty also bears a strong resemblance to the foregoing rule. Under Scottish law, the plaintiff must aver and prove a number of requisites before he can succeed. First, there should be in force a statutory duty, incumbent on the defendant and intended to protect the plaintiff. Second, the statutory duty must be intended to protect the plaintiff's interest by civil action. Third, the interest protected must be against the risk of the kind of harm which has resulted. Fourth, the breach is due to non-compliance with the standard of care required by the act. Fifth, the breach causes the harm complained of. WALKER, *THE LAW OF DELICT IN SCOTLAND*, (1966) Vol. 1, p. 306.

¹⁶ SALMOND, *THE LAW OF TORTS*, (12th ed.), p. 467.

¹⁷ *Ibid.*, pp. 467-468.

¹⁸ 57 Am. Jur. 2d § 238.

To illustrate this rule, a hypothetical case with a local flavor shall be given. Suppose an ordinance is passed delineating the routes to be plied by buses exclusively, and those to be plied by jeepneys exclusively. The avowed intention of the ordinance is solely to afford jeepney drivers the chance to earn an adequate income to support their families for unless certain routes are reserved for them exclusively, competition from buses will cut deeply into their meagre earnings. A recalcitrant bus, however, plies the route reserved for jeepneys and while negotiating the same recklessly runs over a child. Can the victim's parents recover under Article 20 for breach of statutory duty? Although there is a violation of a legal duty on the part of the carrier, there is no violation of the victim's right recognized by the ordinance. The duty to refrain from plying certain routes is owed by the carrier to the jeepney drivers, *not* to the child. The child does not belong to the class of persons sought to be protected by the ordinance and therefore Article 20 is inapplicable. The remedy of the child's parents is obviously to bring an action under quasi-delict. On the other hand, can the jeepney drivers, for the same act, sue the carrier for violation of a legal duty owed by the latter to the former? There appears no reason to deny them the action, provided they prove loss or injury as result of the violation. Article 20 applies in this instance because the ordinance confers upon the jeepney drivers a benefit, namely, the exclusive use of certain routes and bus operators are duty bound to refrain from competing with jeepneys along such routes. The interest protected — prohibition of ruinous competition to safeguard the livelihood of jeepney drivers — is the very one that was invaded by the act of the carrier.

Invasion of the Particular Interest or Harm Safeguarded

A statute may have been intended to protect only a particular interest of the class of persons for whose protection the statute was enacted. Consequently, even though the plaintiff belongs to the class of persons intended to be benefited by the statute, an action for damages will not lie if the interest invaded is not what the statute sought to guard against.¹⁹ To shed light on this distinction, upon which many successful actions for breach of statutory duty may hinge, an illustration shall be given. An ordinance is enacted requiring landlords to keep buildings in good repair. A leases his building to B who sets up a store therein. A fails to repair a sagging roof. As a result the roof caves in, injuring C, a salesgirl of B. The fall of the roof forces the store to close temporarily for repairs, depriving D, another salesgirl of B, of her employ-

¹⁹ *Ibid.*

ment. A is liable under the statute for the injuries sustained by C, but not to D for the loss of her employment.

A statute, moreover, may have been intended to protect a particular class of persons from a *particular hazard*.²⁰ Unless the injury sustained by the plaintiff is caused by his exposure to the hazard sought to be avoided by the statute, he cannot recover from one who violates such statute. Thus, an ordinance may require all apartment buildings to be equipped with good and strong fire escape ladders. A tenant can recover under the ordinance for injuries sustained by him, when, during a fire, the ladder breaks while he is using it. He cannot, however, recover from injuries sustained while using the defective ladder as a secret entrance to the apartment house.

In American jurisdictions, an action for breach of statutory duty does not lie when the purpose of the statute is to (1) protect the interest of the state or any subdivision thereof, (2) secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, (3) impose upon the actor the performance of a service which the state or any subdivision thereof undertakes to give to the public, (4) protect a class of persons other than the one whose interests are invaded and, (5) guard against any other hazard than that from which the harm resulted.²¹

Notwithstanding the outstanding parallelism between the rules governing German and Anglo-American breach of statutory duty, there remains one conspicuous variance. The German tort may be committed either willfully or negligently while the Anglo-American tort may be committed only through negligence. In American jurisdictions, depending on the doctrine followed by a court, the violation of a statute may itself constitute negligence *per se*, or create a presumption of negligence, or may be taken only as evidence of negligence. The difference in the manner of committing the tort does not, however, affect the type of law to which both the German and Anglo-American concepts of breach of statutory duty apply. In either case, the statute violated must be intended for the protection of a class of persons to which the plaintiff belongs and the resulting harm must be that which the statute seeks to guard against.

Rules Governing Article 20

Bearing in mind that Article 20 unequivocally expresses a tort principle, we confront ourselves with this decisive question: Are the fore-

²⁰ *Ibid.*

²¹ Restatement, Torts 2d § 288.

going rules applicable to Article 20 or does this provision provide a *carte-blanche* sanction to all violations of law irrespective of the nature of the right transgressed? To our mind, there are cogent reasons for limiting the application of Article 20 in accordance with the above-mentioned rules. To insist that one who invokes the violation of a statutory duty must show that the statute was enacted for his benefit is inexorably logical in tort law. The rationale for establishing such a statutory purpose is to demonstrate that the statute creates a right in the plaintiff's favor and imposes a correlative obligation on another to refrain from encroaching upon such right. If the statute is not designed for the plaintiff's benefit, then it neither creates a personal right in his favor nor does it impose a correlative duty on another. In such a case violation of the statute does not result in an infringement of a legal duty owed by the violator to the plaintiff since no such duty is owing in the first place. It is elementary in breach of statutory duty that tortious conduct consists in the failure to perform a duty *owed to someone*, if it is one involving negligence, or in the commission or omission of a willful act contrary to a duty *owed to someone*, if it is an intentional tort. Thus, in the absence of a duty owed to an individual or a class of persons as distinguished from a duty owed to the community, there can be no tortious conduct known as breach of statutory duty. In tort the interest invaded is a private one for which an ordinary civil action for damages is the remedy; while in criminal offenses the interest prejudiced is that of the public and the remedy therefor is a criminal prosecution by the State. The statute may merely impose a duty on the public in general, in which case the correlative right to enforce the duty belongs to the public and not to any class of persons. A duty owed to the public at large is enforceable only by the beneficiary of such duty — the public — through the instrumentality of the State. No single individual can be allowed to claim that the duty is owed to himself personally as a member of a class, and thereby appropriate the right to enforce the same through an action for damages in case of breach thereof. Such an eventually could not have been intended by the legislature, which could have easily so provided had it decided to grant such right to an individual or class of persons.

The failure to satisfy the requirements of Article 20 will not necessarily consign an injured person to a legal limbo. The loss or injury suffered may still be redressed by resorting to other types of torts, like quasi-delict should negligence be involved, or Article 21 if the act or omission was willful, or Article 26 in proper cases. These articles, *inter*

alia, provide an ironclad guarantee that all loopholes in the erstwhile sieve-like tort law have been plugged. In fact a violation of a statute which does not fulfill the requisites for breach of statutory duty will invariably fall under other torts recognized by the Civil Code. There is no danger then of leaving a hiatus in the law — the very thing that the newly-created tort actions in the chapter on Human Relations were designed to eliminate.

Several provisions in the Civil Code prescribe that a class of persons shall be accorded certain rights and at the same time impose a correlative duty on someone not to violate such rights. An example is Article 853 which declares that apprentices shall be treated humanely. Apprentices are thus the class of persons enjoying the legal right to be so protected. On the other hand the article imposes upon employers of apprentices a correlative duty to treat the latter humanely. If an employer treats apprentices with cruelty, he violates the legal duty incumbent on him and under Article 20, he is liable for any loss or injury sustained by the latter.

Statutes Providing for Liability

Turning to the next question we shall wrestle with on the applicability of Article 20, we inquire: Does this provision furnish a sanction to all violations irrespective of whether the particular law violated provides for its own civil remedy or not?²² A different problem arises in case the law violated contains a provision for civil liability, as distinguished from penal liability. Is the remedy therein provided exclusive, or can we not consider Article 20 as providing an alternative or even a cumulative remedy? We believe that the rules of statutory construction will restrict an injured person to the specific remedy laid down in the statute. In this regard, Article 18 of the Civil Code, which makes the provisions of the Code suppletory to special laws when the latter are deficient, surges to the forefront. An old case, decided under the old Civil Code, held that "when there is no deficiency in the special law the provisions of the Civil Code should not and cannot apply."²³ This was later reiterated in another case which held that on a specific matter the general law shall be resorted to only when it may become necessary

²² Caguioa subscribes to the view that Article 20 serves as a sanction to all violations of right which cause damage to another irrespective of whether the particular law that is violated provides for damages or not. (COMMENTS AND CASES ON CIVIL LAW, (1967 ed.), Vol. 1, p. 32. Tolentino, however, would limit the sanction to provisions of law which do not especially provide for their own sanction. TOLENTINO, p. 65.

²³ Ramos v. de la Rama, 15 Phil. 554.

to cover deficiencies.²⁴ It seems therefore that Article 20 furnishes a sanction to all violations of *applicable* laws where the latter do *not* themselves provide for indemnification for damages arising from such violations. If the law provides for such indemnification, then Article 20 cannot be utilized as a ground for the recovery of damages. The framework of this opinion is reinforced by the rule of statutory construction that where an act creates an obligation and enforces the performance in a specific manner, performance cannot be enforced in any other manner. We must, nevertheless, draw a line between a sanction in the form of monetary penalties like fines and one in the form of indemnification to the injured party. Monetary penalties accrue to the State while indemnification is recoverable by the person who suffered the injury. Moreover, monetary penalties are imposed to redress the invasion of a public interest, while indemnification operates to redress the breach of a private interest. The violation of a law which provides only for monetary penalties or imprisonment, or both, does not preclude a person injured by such violation from recovering civil liability for damages resulting from the invasion of his private interest. The injured party may thus bring an action based on tort despite the imposition of monetary penalties. But if the monetary penalty is payable to the person whose interest is invaded, the recovery of the penalty is the exclusive remedy of such person, unless of course a contrary statutory intention appears.

Violations of Criminal Statutes

To construe Article 20 as formulating the tort known as breach of statutory duty will not break the legal fabric finely spun around Articles 10 and 100 of the Revised Penal Code in conjunction with Rule 111 of the Revised Rules of Court. Article 100 makes every person who is criminally liable for a felony also civilly liable and, under Article 10, the provisions of the Penal Code are supplementary to special laws which punish offenses not covered by the Code unless such laws shall especially provide the contrary.²⁵ Insofar as the Penal Code is concerned there is no question that Article 100, in connection with Rule 111, governs civil liability arising from a felony.²⁶ Article 100 does not require that

²⁴ *Leyte A & M Oil Co. v. Block*, 52 Phil. 430.

²⁵ See dissenting opinion of Justice Perfecto in *People v. Gonzales*, 82 Phil. 307, 309.

²⁶ It is submitted that Rule 111 of the Revised Rules of Court has not affected Articles 31, 32, 33, 34 and 2177 of the Civil Code allowing an independent civil action entirely separate and distinct from the criminal action. Reservation in the criminal case is not required since the law itself makes the reservation. *Tactaquin v. Palileo*, 21 SCRA 1431; *Formento v. Court of Appeals*, 29 SCRA 439; *Azucena v. Potenceano*, L-14028, June 30, 1962; *Meneses v. Tuat*, L-18116, Nov. 28, 1964.

before civil liability may be imposed there must be a conviction; it is well-settled in this jurisdiction that a civil action for damages may be instituted even if no criminal action has been filed.²⁷ Special laws which punish certain offenses and provide for civil liability arising from such offenses are affected neither by Article 100 of the Penal Code nor by Article 20 of the Civil Code. Where the special criminal law does not specially provide for recovery of civil liability, what provision of law shall govern — Article 20 of the Civil Code or Article 100 of the Penal Code? It is submitted that there is no irreconcilable repugnancy between the two articles in question and either one can be availed of depending on which provision of law the plaintiff decides to base his action on. Of course if the law in question does not satisfy the requirements for the application of Article 20, then Article 100 of the Penal Code in conjunction with Rule 111 will have to be resorted to. Embodying the foregoing discussion in capsule form, we can say that with the exception of laws which especially grant civil indemnity for damages resulting from breach thereof, Article 20 applies to all appropriate laws, whether criminal or otherwise.

Excused Violations

It is not an exercise in tautology to state that the violation of a statutory duty must be unlawful. A willful or negligent act which, contrary to law, causes damages to another, may be committed under circumstances which will excuse the defendant from liability. The violation may be reasonable because of the actor's incapacity, or the actor may be unaware of the occasion for compliance. Not too infrequently, the actor may be unable, after reasonable diligence or care, to comply, or he may be confronted by an emergency not due to his own misconduct. Compliance may even involve a greater risk of harm to the actor or to others.²⁸ For example, an ordinance may provide that all vehicles shall be driven on the right side of the road. A car proceeding at normal speed is forced to swerve to the left side of the road when a child suddenly darts across the street. The car collides with another vehicle that is coming on the opposite direction. Although the driver acted intentionally in bringing his car to the left side of the road in violation of the ordinance, still he could not be held liable under the ordinance for the resulting damage to the other vehicle because it would be a crime

²⁷ *Alba v. Acuna and Frial*, 53 Phil. 380; and *Lu Chu Sing and Lu Tian Cheong v. Lu Tiong*, 76 Phil. 669; *Tolentino v. Carlos*, 66 Phil. 140.

²⁸ Restatement, Torts 2d § 288 A (2).

to obey the literal letter of the ordinance. Had the driver proceeded on the right lane in obeisance to the strict letter of the ordinance, he would have run over the child.

Vicarious Liability Under Article 20: Defense of Due Diligence

Under the German Code, one may be vicariously liable for breach of statutory duty committed by persons for whom one is responsible.²⁹ This vicarious liability is conspicuously similar to Article 2180 of our Civil Code. An employer in German law is liable for damages caused by his employee's violation of a statutory duty while in the performance of work.³⁰ The employer is, however, relieved from responsibility if he exercises ordinary care in the selection or supervision of the employee or if the damage arises notwithstanding the exercise of such care. The burden of proving the exercise of due diligence is on the employer, just as in Article 2180 of our Code. Persons who are exercising supervision over minors or mentally or physically deficient persons are also similarly liable³¹ for violations of statutory duties by the other. We believe that the same vicarious liability of employers and guardians exists under Article 20. The principle underlying Article 2180 of our Code may be extended to breach of statutory duty without in any way straining the rules of statutory construction. In fact the Supreme Court has deemed it proper and desirable to apply the principle of vicarious liability to cases involving intentional wrongdoing.^{31a}

The liability of employers and guardians, either under breach of statutory duty or quasi-delict, is based on their own negligence and not on any supposed imputation of the employee's or ward's tortious conduct.³² That is why in this jurisdiction the foundation of vicarious liability is negligence. Once the person sought to be held vicariously liable refutes the presumption of negligence, he is absolved from any

²⁹ MANUAL OF GERMAN LAW, p. 105.

³⁰ *Ibid.*, p. 106.

³¹ MANUAL OF GERMAN LAW, p. 107.

^{31a} *Salen and Salbamera v. Balce*, 57 O.G. No. 37, p. 6603; *Fuellas v. Cadano*, G.R. No. L-14409, October 31, 1961. For the same reason the principle of vicarious liability found in Article 2180 of the Code may also be applied to Articles 21 and 26.

³² In American jurisdictions, the rule is that the employer, although without any wrongful conduct of his own, is liable for injuries caused by the tortious conduct of his employees acting within the scope of their employment. Several reasons have been advanced for the master's vicarious liability for the servant's tortious conduct, but "[W]hat has emerged as the modern justification for the liability is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise are placed upon that enterprise itself, as a cost of doing business." PROSSER AND SMITH, *CASES AND MATERIALS ON TORTS*, (1971) p. 623.

liability. Vicarious liability under Article 20 may be distinguished from vicarious liability under Article 2176 in that the former recognizes two ways in which the tort of the employee or the ward may be committed, either willfully or through negligence, while in the latter the tort of the employee or the ward may be committed only through negligence, that is, by means of a quasi-delict. In either case the responsibility of the employer or guardian is premised on his failure to exercise due diligence. When an employee's negligent act violates a statutory duty, can the injured person institute an action based on quasi-delict inasmuch as the requisites for a quasi-delict likewise exist? It is submitted that a breach of statutory duty, although it may coincidentally constitute a quasi-delict, should be regulated by Article 20, this being the provision which specifically governs such type of torts. Thus, an ordinance may provide that all passenger buses shall be equipped with good and strong doors. The operator who installs such a door on his bus, but whose employee carelessly or inadvertently fails to tighten up the bolts which have turned loose due to constant use, may be liable if a passenger, leaning against the door, falls out of the bus when the door is ripped off. The action of the plaintiff should be based on Article 20 and not on Article 2176. There is in this case a failure on the part of the carrier, through negligence, to perform a duty imposed upon him by law for the protection of passengers — a clear case of breach of statutory duty. But suppose when the door is ripped off, it strikes a pedestrian, on what article shall the injured pedestrian base his action — Article 20 or 2176? This second tort committed by the carrier is a quasi-delict. Article 20 ceases to govern since the pedestrian does not belong to the class of persons intended to be protected by the ordinance.

III. ARTICLE 21: WILLFUL ACTS CONTRARY TO MORALS, GOOD CUSTOMS OR PUBLIC POLICY — INTENTIONAL TORT FROM CIVIL LAW JURISDICTION

Perhaps more than any article in the Civil Code, Article 21 comes closest to prescribing moral norms as a legal standard of conduct. This article provides: "Any person who willfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage." Just what is the effect of this provision on our civil law in general, and tort law in particular? It will not be far-fetched to speculate that the courts can utilize Article 21 to build up a whole system of case law, moderating if not

completely negating, the rigidity of the Civil Code. The wide swath cut by this provision may furnish a catch-all sanction to every conceivable unreasonable conduct, but its scope can also be very easily stretched to the breaking point. It is perhaps, among all the causes of action recognized by the Code, the most susceptible to abuse. The Code Commission justified the incorporation of this article into our law in this wise:

"But it may be asked, would not this article obliterate the boundary line between morality and law? The answer is that, in the last analysis, every good law draws its breath of life from morals, from those principles which are written with word of fire in the conscience of man. If this premise is admitted, then the rule is a prudent earnest of justice in the face of the impossibility of enumerating, one by one, all wrongs which cause damage. When it is reflected that while codes of law and statutes have changed from age to age, the conscience of man has remained fixed to its ancient moorings, one cannot but feel that it is safe and salutary to transmute, as far as may be, moral norms into legal rules, thus imparting to every legal system that enduring quality which ought to be one of its superlative attributes.

"Furthermore, there is no belief of more baneful consequences upon the social order than that a person may with impunity cause damage to his fellowmen so long as he does not break any law of the State, though he may be defying the most sacred postulates of morality. What is more, the victim loses faith in the ability of the government to afford him protection or relief.

"A provision similar to the one under consideration is embodied in Article 825 of the German Civil Code.

"The same observations may be made concerning injurious acts that are contrary to public policy but are not forbidden by statute. There are countless acts of such character, but have not been foreseen by the lawmakers. Among these are many business practices that are unfair or oppressive, and certain acts of landholders and employers affecting their tenants and employees which contravene the public policy of social justice."³³

Under this article, acts or omissions which are perfectly legitimate may still give rise to liability if they are contrary to morals, good customs or public policy. The willful acts or omissions may be directed against the person or property of another, or both. The loss or injury sustained may pertain to the plaintiff's rights, or to his property, reputation, or economic relations with others. Violations of statutes which do not fall under Article 20 may create a cause of action under this provision.

³³ Report of the Code Commission, pp. 40-41.

Thus where a creditor, taking advantage of his knowledge that insolvency proceedings would be instituted by the debtor if the creditors failed to agree on the manner of distribution of the insolvent's assets, schemed and effected the transfer of its credits to its sister corporation in the United States where the debtor's aircraft was situated and by that swift and unsuspected operation efficaciously disposed of said insolvent's property, depriving the latter and the assignee of the opportunity to recover the plane, said creditor violated Article 19 of the Code and is liable under Article 21, the provision which implements the former Article.³⁴ It is worthwhile to note that our Supreme Court in this case did not use Article 20 as the sanction for the violation of Article 19. The latter provision prescribes a standard of conduct for the protection of *everyone* and hence violation thereof does not constitute breach of statutory duty under Article 20.³⁵ Violation of Article 19, however, fits into the scheme of Article 21 since abuse of right under the former provision is decidedly against public policy, being a business practice that is manifestly unfair and opprobrious.

Element of Malice

Like many a provision of law the interpretation of which depends on certain key words that imperceptively shade off from one meaning to another in accordance with their historical milieu or place in the general scheme of the law, Article 21 contains a word that could either make it a veritable tool of oppression or a laudable source of relief for justly aggrieved persons. Article 21 speaks of a person "who *willfully* causes loss or injury to another. . . ." (Emphasis supplied). Does a "willful" act require malice or deceit, or is it sufficient that the act be done with knowledge of its injurious effect?³⁶ It is significant that the Code uses the motive-laden word "willfully" rather than the comparatively weaker word "intentionally." An act which is "willful" connotes an evil or malicious motive,^{36a} while an act which is merely intentional has ordinarily no such implication. In American tort law, an intentional act is one done with the belief or knowledge that the result is substantially certain to follow from the act. Neither malice nor ill will

³⁴ Velayo v. Shell, 100 Phil. 186.

³⁵ Tolentino is of the opinion that Article 19 can find sanction in Article 20 "because every abuse of right would now be contrary to law, the law in this case being Article 19 of the Code." TOLENTINO, p. 64.

³⁶ Tolentino defines a willful act under Article 21 as one "done with knowledge of its injurious effect." TOLENTINO, p. 67. Caguioa defines a willful act in the same vein. CAGUIOA, p. 33.

^{36a} The word "willful" in Article 2220 of the Civil Code appears to have a similar meaning. Francisco v. GSIS, 7 SCRA 577; Martinez v. Gonzales, 6 SCRA 331.

is essential.³⁷ But in construing Article 826 of the German Civil Code (from which our Article 21 originated), German courts require that the damage sustained by the plaintiff must have been brought about *deceitfully*. It is immaterial, however, whether the deceitful act which produces the damage is directed against the defendant or against another. Thus a person who burns the house of A with the purpose of prejudicing the insurance company is liable to A for an act contrary to good customs.³⁸

It is submitted that a willful act under Article 21 requires malice or deceit as an essential element. In the natural course of events, even a prudent and well-meaning person may, without negligence, commit an act which offends or injures another in a manner contrary to morals and good customs. To hold him liable for an innocent act which he commits with neither malice nor negligence will not only put a premium on litigation, but will also terrorize him and place him at the mercy of extortionists. This opinion draws support from Supreme Court decisions (involving breach of promise to marry) which, in applying Article 21, emphasize the element of deceit.³⁹ Even in *Velayo v. Shell*,⁴⁰ which allowed recovery under Article 21, the element of deceit, although not expressly declared by the Court to be a condition for the application of Article 21, was clearly patent from the act of the defendant in scheming to transfer its credit to its sister corporation in the United States, thereby efficaciously disposing of the insolvent's property and depriving the latter and the assignee later appointed of the opportunity to recover the plane which was situated in the United States. Such an act, said the Court, constituted "bad faith" and a "betrayal of (the) confidence" of the other creditors of the insolvent.

In *Wassmer v. Velez*,⁴¹ the Supreme Court allowed a frustrated bride-to-be to recover damages under Article 21 from the defaulting promissor. The Court said that it is "palpably and unjustifiably contrary to good customs" to formally set a wedding and go through all the necessary preparation and publicity only to walk out of it when the wedding is about to be celebrated. Although the Court, as in *Velayo v. Shell*,⁴² did not expressly state that malice or deceit is an element of the action, the facts clearly demonstrate that the defendant's act was heavily tinged

³⁷ PROSSER ON TORTS, (1957 ed.) p. 93.

³⁸ ENNECCERUS, KIPP AND WOLFF, p. 666.

³⁹ *Hermosisima v. Court of Appeals*, 109 Phil. 629; *Estopa v. Piansay; Pe v. Pe*, 5 SCRA 200; *Galang v. Court of Appeals*, L-17248, January 29, 1962; *Tanjanco v. Court of Appeals*, 18 SCRA 994.

⁴⁰ *Supra*.

⁴¹ 12 SCRA 648.

⁴² *Supra*.

with ill will. In fact the Court declared, in allowing exemplary damages, that the defendant acted in a "wanton x x x , reckless [and] oppressive manner."

Concepts of Morals and Good Customs

Whereas prior to the New Civil Code only violations of positive law were actionable, now even a breach of those principles of right conduct called morals, hitherto cognizable only by the conscience, may give rise to an action for damages. The principles of right conduct, being highly variable among men, easily lend themselves to infringement, frequently without any consciousness as to the immorality of the act. As long as the act is willful, however, the defendant is liable even if he is not conscious of the immorality of the act.

In this age of permissiveness and rapidly changing ethical values, morality has become a rubber band to be stretched whenever the circumstances deem it appropriate. What may be immoral today may even be extolled a few years hence. Moreover, the principles of right conduct may vary radically from one group to another. What may be a virtue to a Muslim may be a vice to a Christian, or vice versa. It is therefore impossible to define with exactness the Delphic term "morals" as used in Article 21. What can probably be done is to silhouette its nature and scope against the variegated sentiments of society. Morals should refer to those principles of right conduct which are known to the average Filipino, and not as understood by a particularly strict or lax class.

Customs, on the other hand, are usages or practices of the people which, by common adoption and acquiescence, and by long and unvarying habit, have become compulsory with respect to the place or subject matter to which they relate.⁴³ The Code qualifies customs by the word "good". This must refer to those customs which are not contrary to law, public order or public policy.⁴⁴ Customs are either general or local. General customs are those which prevail throughout a country while local customs are those which prevail only in some particular district or locality. Does the term "customs" in Article 21 refer to both general and local customs? To avoid absurd results and injustice, the term should be confined to general customs. Inclusion of local customs which do not find acceptance, much less acquiescence, among the great majority of the public may lead to a compartmentalization of tort law, a

⁴³ BLACK'S LAW DICTIONARY (4th ed.), p. 461.

⁴⁴ Article 11, New Civil Code: "Customs which are contrary to law, public order or public policy shall not be countenanced."

situation that is plainly tragic. The question of whether an act is contrary to good customs is to be resolved neither according to the doctrines of a philosophical system nor according to the opinions of unique groups or parties, but in accordance with the general popular conscience. Nevertheless, the values of interested groups may also be taken into account, like the commercial usages of business groups, but only if such values are not contrary to the general popular conscience.⁴⁵ The Supreme Court has had occasions to define "customs." According to the Court, for a custom to exist the following requisites must be satisfied: (1) plurality of acts, or various resolutions of a judicial question raised repeatedly on life; (2) uniformity or identity of the acts or various solutions to the judicial question; (3) general practice by the great mass of social group; (4) continued performance of these acts for a long period of time; (5) general conviction that the practice corresponds to a judicial necessity or that it is obligatory; (6) the practice must not be contrary to law, morals or public order.⁴⁶

Cases Under Article 21

A few cases involving breach of promise to marry, *coupled* with a violation of Article 21, have been decided by the Supreme Court since the effectivity of the present Code.⁴⁷ In this jurisdiction, mere breach of promise to marry is not actionable.⁴⁸ But if the breach is accompanied by circumstances which constitute an infringement of Article 21, then damages, both actual and moral,⁴⁹ may be recovered. It must be observed that breach of promise to marry, accompanied by a violation of Article 21, gives rise to a recovery of not only actual but also of moral damages. The reason for this is Article 2219 of the Civil Code which grants recovery of moral damages in cases falling under Article 21. In the absence of a violation of Article 21, breach of promise to marry, accompanied by abuse of right or quasi-delict not causing physical injuries, may only give rise to a recovery of actual damages.⁵⁰

⁴⁵ ENNECCERUS, KIPP AND WOLFF, p. 666.

⁴⁶ *Patriarcha v. Orate*, 7 Phil. 390; *Yamada v. Manila Railroad*, 33 Phil. 8.

⁴⁷ Breach of promise to marry may also be accompanied by quasi-delict, unjust enrichment or abuse of right, in which cases damages are also recoverable. *Garcia v. Del Rosario*, 38 Phil. 189; *Domalagan v. Bolifer*, 33 Phil. 471. With respect to recovery of moral damages, see Article 2219, New Civil Code.

⁴⁸ *Hermosisima v. Court of Appeals*, 109 Phil. 629; *Galang v. Court of Appeals*, L-17248, January 29, 1962.

⁴⁹ Article 2219, New Civil Code: "Moral damages may be recovered in the following and analogous cases:

(10) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34 and 35.

⁵⁰ Article 2219, New Civil Code.

Breach of promise to marry which results in sexual intercourse with a woman over eighteen years of age will not fall under Article 21 unless the defendant seduces the girl. Thus, if for one whole year a woman of adult age maintains intimate sexual relations with the defendant, with repeated acts of intercourse, there is voluntariness and mutual passion negating the idea of seduction.⁵¹ To constitute seduction there must in all cases be some sufficient promise or inducement and the woman must yield because of the promise or other inducement. If she consents merely from carnal lust and the intercourse emanates from mutual desire, there is no seduction.⁵² The family of the seduced girl may also recover damages from the defendant.⁵³ A defendant who wins the affection of a girl and succeeds in seducing her through an ingenious scheme is liable to the girl's family under Article 21 in conjunction with Article 2219.⁵⁴ The gist of the action in cases of seduction falling under Article 21 is the immoral "defloration" of the girl,⁵⁵ which may be effected through any form of deceitful promise or scheme. Mere sexual intercourse which does not result in pregnancy, and where there is neither deceit nor crime, is not actionable.⁵⁶

Refusal of a wife to perform her wifely duties, her denial of consortium and desertion of her husband may constitute a willful infliction of injury upon the husband's feelings in a manner "contrary to morals, good customs or public policy."⁵⁷ In *Ramirez-Cuaderno v. Cuaderno*,⁵⁸ the Court ruled that while marriage entitles both parties to cohabitation, the sanction therefor is the spontaneous and mutual affection between husband and wife and not any legal or court order. In this case the lower court admonished the spouses to resume cohabitation when both, specifically the husband, had declared that cohabitation was impossible. It seems that if a wife unjustifiably refuses to cohabit and engage in sexual intercourse with the husband, the remedy of the aggrieved husband is not to compel the wife to perform her marital obligations but to bring an action for damages under Article 21.^{58a}

⁵¹ *Tanjanco v. Court of Appeals*, 18 SCRA 994.

⁵² *U.S. v. Buenaventura*, 27 Phil. 212, cited in *Tanjanco v. Court of Appeals*, *supra*.

⁵³ The last two paragraphs of Article 2219 provide: "The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.

"The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named."

⁵⁴ *Pe v. Pe*, 5 SCRA 200.

⁵⁵ *Balane v. Yu Ching (C.A.)*, 54 O.G. 6871.

⁵⁶ *Estopa v. Piansay, Jr.*, L-14732 September 30, 1960, 109 Phil. 640.

⁵⁷ *Tenchavez v. Escaño*, 17 SCRA 674.

⁵⁸ 12 SCRA 505.

^{58a} *Tenchavez v. Escaño*, *supra*.

IV. ARTICLE 26: INTENTIONAL TORTS ADOPTED FROM AMERICAN JURISPRUDENCE

Prior to the effectivity of the New Civil Code, our tort law resembled a flyswatter with a yawning hole in the middle: too many wrongdoings escaped with effortless ease when the inadequate law was called upon to stamp them out. There was no provision of law expressly adopting the American concept of intentional tort and, as a consequence of the Philippines being a civil law country, the courts then could not recognize a cause of action for any intentional tort unless there was some provision of law allowing the same. Intentional interferences with one's person or property were not actionable unless the acts constituted a crime, in which case the plaintiff could either recover damages in the criminal action from the person responsible for the felony⁵⁹ or maintain a separate suit for damages provided the right to institute the same had been reserved.⁶⁰ Numerous injurious intentional acts which fell short of being crimes could not be the basis of civil liability, although the Supreme Court in a few instances recognized the right to recover damages for intentional interference with contractual relations.⁶¹ There was thus an abysmal gap in the law which left victims of acts which neither amounted to crimes nor constituted quasi-delicts, without any legal remedy. With the incorporation of American tort principles into the New Civil Code, notably in Articles 26, 32 and 1314, a large portion of this legal hiatus had bridged. Whatever gaps remained were plugged by Articles 19, 20, 21, 23, 27 and 28 which were drawn from the codes of civil law jurisdictions.

Although up to the present it has remained sorely neglected, perhaps one of the most fertile sources of tort action in the Civil Code is Article 26, which practically incorporates a large portion of American tort law. This article provides:

"Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

- (1) Prying into the privacy of another's residence;
- (2) Meddling with or disturbing the private life or family relations of another;

⁵⁹ Article 100, Revised Penal Code: "Every person criminally liable for a felony is also civilly liable."

⁶⁰ Rule 107 (now Rule 111) of the old Rules of Court laid down no exception to the rule that after the criminal action has been commenced, no civil action can be instituted until final judgment has been rendered in the former action.

⁶¹ *Gilchrist v. Cuddy*, 29 Phil. 542; *Daywalt v. Corporacion de P.P. Agustinos Recoletos*, 39 Phil. 587.

- (3) Intriguing to cause another to be alienated from his friends;
- (4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition."

The enumeration contained in this article is merely illustrative. It extends to "similar acts", regardless of whether they constitute a criminal offense or not. Thus, the prohibition in No. 1 is not limited to invasion of the "privacy of residence; encroachment on one's personal privacy is included."⁶² The principal rights covered by the protective mantle of this provision are the following: (1) the right to personal dignity; (2) the right to personal security; (3) the right to family relations; (4) the right to social intercourse; (5) the right to privacy and, (6) the right to peace of mind.⁶³ Explaining the inclusion of Article 26 in the New Civil Code, the Code Commission said:

"The present laws, criminal or civil, do not adequately cope with the interferences and vexations mentioned in Article 26.

"The privacy of one's home is an inviolable right. Yet the laws in force do not squarely and effectively protect this right.

"The act referred to in No. 2 are multifarious, and yet many of them are not within the purview of the law in force. Alienation of the affection of another's wife or husband, unless it constituted adultery or concubinage, is not condemned by the law, much as it may shock society. There are numerous acts, short of criminal unfaithfulness, whereby the husband or wife breaks the marital vows, thus causing untold moral suffering to the other spouse. Why should not these acts be the subject matter of a civil action for moral damages? In American law, they are.

"Again, there is the meddling of so-called friends who poison the mind of one or more members of the family against the other members. In this manner many a happy family is broken up or estranged. Why should not the law try to stop this by creating a civil action for damages?

"Of the same nature is that class of acts specified in No. 3: intriguing to cause another to be alienated from his friends.

"No less serious are the acts mentioned in No. 4: vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect or other personal

⁶² MEMORANDUM OF THE CODE COMMISSION: RE: AMENDMENTS PROPOSED BY JUSTICE J.B.L. REYES, December 18, 1950, p. 1.

⁶³ TOLENTINO, p. 89.

condition. The penal laws against defamation and unjust vexation are glaringly inadequate.

"Religious freedom does not authorize anyone to heap obloquy and disrepute upon another by reason of the latter's religion.

"Not a few of the rich people treat the poor with contempt because of the latter's lowly station in life. To a certain extent this is inevitable, from the nature of the social make-up, but there ought to be a limit somewhere, even when the penal laws against defamation and unjust vexation are not transgressed. In a democracy, such a limit must be established. The courts will recognize it in each case. Social equality is not sought by the legal provision under consideration, but due regard for decency and propriety.

"Place of birth, physical defect and other personal conditions are too often the pretext of humiliation cast upon other persons. Such tampering with human personality, even though the penal laws are not violated, should be the cause of civil action.

"The article under study denounces "similar acts" which could readily be named, for they occur with unpleasant frequency."⁶⁴

It is said that the sanction for the violation of the rights enunciated above is the "catch-all"⁶⁵ provision of Article 20.^{65a} To our mind, Article 26 provides for its own sanction in case of breach thereof. The article itself expressly states in no uncertain terms that acts which violate the rights embodied therein "shall produce a cause of action for damages, prevention and other relief." And Article 20 has no room for interplay not only because Article 26 carries its own sanction but also because Article 20 refers to a violation of a law intended for the protection of a class of persons to which the plaintiff belongs. Article 20 is inapplicable where the law violated is for the protection of the public at large, as Article 26 definitely is. The sanction allowed by Article 26 may include moral damages,⁶⁶ injunction against the act complained of, and other reliefs, such as a bond to keep the peace.

At the time Article 26 was lifted by the Code Commission from American jurisprudence, many of the rights embodied therein were not yet widely accepted by American courts, and in fact even now at least

⁶⁴ Report of the Code Commission, pp. 32-33.

⁶⁵ SANGCO, PHILIPPINE LAW ON TORTS AND DAMAGES (1973), p. 305.

^{65a} TOLENTINO, p. 89.

⁶⁶ Article 2219, New Civil Code: "Moral damages may be recovered in the following and analogous cases:

(7) Libel, slander or any other form of defamation;

(8) Acts and actions referred to in articles 21, 26, 27, 28, 29, 30, 32, 34, and 35."

one, the right of privacy, is still struggling to gain recognition in some states.⁶⁷ While we have been quick to leapfrog American state decisions in recognizing such rights, we have, however, been painfully slow in galvanizing the same in actual cases. To date Article 26 stands almost as a mere decorative provision in our statutes, but it may be harnessed fruitfully anytime.

The Right to Personal Dignity

Violation of the right to personal dignity is analogous to the American law concept of defamation, made up of the twin torts of libel and slander. Defamation is an invasion of a person's right to enjoy a reputation and good name unimpaired by false attacks which tend to diminish the esteem in which a person is held by men whose standard of opinion the court can properly recognize.⁶⁸ The reputation that is protected is the opinion of others. Libel⁶⁹ consists of the "publication of defamatory matter by written or printed words, by its embodiment in physical form, or by any other form of communication which has the potentially harmful qualities characteristic of written or printed words. All other defamation is slander."⁷⁰ As may be gleaned from this definition, there is a gray area separating libel, which is a crime in American law, and slander, which is not. And in the majority of American jurisdictions, some kinds of libel are treated like slander, making the whole law on this matter confusing. At any rate, libel, even though punishable as a crime, is an actionable tort.

The gist of an action for libel or slander is the injury to the plaintiff's reputation. The defamatory matter is actionable as long as it is communicated or "published", intentionally or negligently, to one other than the person defamed.⁷¹ Publication does not necessarily mean that it must be printed or written. It may be oral or by means of gesture.⁷² The utterance of defamatory remarks, whether read from a

⁶⁷ PROSSER AND SMITH, p. 1059.

⁶⁸ *Swede v. Pasaic Daily News*, 30 NJ 320, 153 A2d 36; *Phoenix Printing Co. v. Robertson*, 80 Okla 191, 195 P 487.

⁶⁹ In American law, "[L]ibel was originally written defamation, while slander was oral; the present tendency is to make the distinction on the basis of permanence of form, or potentiality of harm, similar to writing or printing.

"According to the older view, all libel is actionable without proof that damage has occurred. Some kinds of slander are actionable without proof of damage, namely, (a) the imputation of a serious crime; (b) the imputation of certain loathsome diseases; (c) imputations affecting the plaintiff in his business, trade, profession or office; (d) in some jurisdictions, the imputation of unchastity to a woman." PROSSER, p. 584-585.

⁷⁰ Restatement, Torts, § 568.

⁷¹ PROSSER, p. 596.

⁷² *Schultz v. Frankfort Marine, Accident & Plate Glass Ins. Co.*, 139 N.W. 386.

manuscript⁷³ or not,⁷⁴ into a radio microphone and broadcasted, constitutes publication of libel. Where such publication is established, the majority of American courts holds that the publisher is strictly liable, regardless of any intent or negligence as to the form of the particular statement, its reference to the plaintiff, its defamatory meaning, its falsity, or the harm resulting to the plaintiff.⁷⁵ Intention, motive, or negligence has nothing to do with the case. Since intent or negligence is immaterial, the torts of libel and slander attach a strict liability.

In this jurisdiction, both libel and slander are crimes. Unlike in American law, our Revised Penal Code requires malice as an element of defamation.⁷⁶ For a criminal prosecution to prosper, malice or ill will either must be shown by proof of ill will, hatred or purpose to injure, or may be taken for granted in view of the grossness of the imputation.⁷⁷ Is malice essential for a tort action based on a violation of the right to personal dignity under Article 26? It is submitted that inasmuch as Article 26 was adopted from American jurisprudence, which does not require malice in cases of tort actions based on libel and slander, the plaintiff need not prove any malicious intent on the part of the defendant to recover damages under Article 26. There is, nevertheless, one exception to this. Malice or ill will remains important where the exercise of a qualified privilege is in question. But it is not at all essential in cases of unprivileged defamation,⁷⁸ although it may affect the measure of damages to be imposed.

The Right to Personal Security

Violation of the right to personal security may be the basis of a tort action under Article 26. Such an action is identical with the American intentional torts of battery and assault. Battery is the "unlawful touching or striking of the person of another by the aggressor himself or by any other substance put in motion by him, done with the intention of bringing about a harmful or offensive contact or apprehension thereof which is not legally consented to by the other and not otherwise privileged."⁷⁹ In short, battery is the actual and willful infliction of

⁷³ *Gibber v. Houston Post Co.*, 310 S.W. 2d 377.

⁷⁴ *Shor v. Billingsley*, 158 N.Y.S. 2d 476.

⁷⁵ PROSSER, p. 810.

⁷⁶ Article 353, Revised Penal Code: "A libel is a public and malicious imputation of a crime, or of a vice or defect, real or imaginary, or any act, omission, condition, status, or circumstances tending to cause the dishonor, discredit, or contempt of a natural or juridical person, or to blacken the memory of one who is dead"; *People v. Monton*, 2 SCRA 842.

⁷⁷ *People v. Andrada*, (C.A.) 37 O.G. 1783; *U.S. v. Montalvo*, 29 Phil. 595.

⁷⁸ PROSSER, p. 816.

⁷⁹ 6 Am. Jur. 2d § 5.

any unlawful or unauthorized violence on the person of another,⁸⁰ irrespective of its degree. The interest protected by this action is the freedom from intentional and unpermitted contacts with the plaintiff's person. The term "person" includes any part of the body, or anything attached to it and practically identified with it. Accordingly, the slightest contact with the plaintiff's clothes or anything attached to his person constitutes battery.⁸¹ No harm or actual damage of any kind is required. Thus, the slightest touching of another, if done in a rude, insolent or angry manner, is battery.⁸² Malice or hostile intent is not essential in battery. Liability may attach even where only a joke, or a compliment, is intended, as when an unappreciative woman is kissed without her consent.⁸³ But a person is presumed to consent to ordinary contacts allowed by social custom or usage, in which case there is no battery.

Assault is the "intentional, unlawful offer of physical injury to another by force unlawfully directed toward the person of another, under such circumstances as to create a well-founded fear of imminent battery, coupled with the apparent present ability to effectuate the attempt if not prevented."⁸⁴ Assault may be distinguished from battery in that the former is the actual offer to use force to the injury of another person, while the latter is the use of it.⁸⁵ The presence or absence of an assault depends more upon the apprehension created in the mind of the person assaulted than upon the undisclosed intentions of the person committing the assault.⁸⁶ Pointing a gun at the plaintiff and threatening to shoot him constitute an assault even though the gun is not loaded.⁸⁷ The interest protected by this action is the freedom from apprehension of a harmful or offensive contact with the person, as distinguished from the contact itself. No actual contact is necessary, and the plaintiff is protected against a purely mental disturbance of his personal integrity.⁸⁸ Thus, it is an assault to shake, in a threatening manner, one's fist under another's nose,⁸⁹ or to chase him in a belligerent manner.⁹⁰ There is no assault, however, where the defendant is too far away to inflict any harm, as when he is a hundred yards away from the

⁸⁰ BLACK'S LAW DICTIONARY, p. 193.

⁸¹ Perkins v. Stein, 94 Ky 433, 22 SW 649.

⁸² Newman v. Christensen, 149 Neb 471, 31 N.W. 2d 417.

⁸³ Ragsdale v. Ezell 49 S.W. 775; Craker v. Chicago & N.W. R. Co., 36 Wis. 657, 17 Am Rep. 504.

⁸⁴ Western Union Telegraph Co. v. Hill, 25 Ala. App. 540, 150 So. 709.

⁸⁵ BLACK'S LAW DICTIONARY, p. 133.

⁸⁶ Howell v. Winters, 58 Wash. 436.

⁸⁷ Lowry v. Standard Oil Co., 63 Cal. App. 2d 1, 146 P2d 57.

⁸⁸ PROSSER, p. 34.

⁸⁹ Howell v. Winters, *supra*; Stockwell v. Gee, 121 Okl. 207.

⁹⁰ State v. Neely, 74 N.C. 425, 21 Am. Rep. 496.

plaintiff at whom he throws rocks.⁹¹ Where there is no apprehension of a battery because the plaintiff does not know that a gun is being aimed at him with intent to shoot until it is all over,⁹² there is no assault. Although mere words, no matter how violent, are held not to amount to an assault, they may be coupled with physical movements which give rise to an assault.

The defendant must have intended to interfere with the plaintiff's personal integrity to hold him liable for assault. In short, he must have intended to bring about an assault or a battery.⁹³ If one touches another on the hand or arm during a conversation, it is no assault, there being no intention to assault. Assault therefore cannot be committed through negligence. But the intent need not be to inflict physical harm, it being sufficient that there is an intent to arouse apprehension,⁹⁴ as when the defendant fires a gun in the air for the purpose of frightening the plaintiff.⁹⁵

The Right to Social Relations

The right to social relations embodied in Article 26 imposes liability for "intriguing to cause another to be alienated from his friends." (Emphasis supplied). The cause of action created by this provision is quite unique and seems to have no exact parallel in American law.⁹⁶ Perhaps this may be subsumed under the twin torts of libel and slander in American law since the defendant in effect diminishes the esteem in which the plaintiff is held or creates adverse feelings of opinion against him. The intrigue must result in alienating the plaintiff from his friends and not from the members of his own family, otherwise the act will fall under interference with family relations. The word intrigue implies malice or ill will, coupled with some scheme or secret plot to bring about the desired purpose, that is, to alienate one from his friends. We do not think, however, that the right to social relations can be violated only through malicious acts; simple intentional acts are sufficient where the violation does not assume the form of an intrigue, as when a person

⁹¹ *State v. Davis*, 1 Ired. (23 N.C.) 125, 35 Am. Dec. 735.

⁹² *State v. Barry* 45 Mont. 598, 124 P 775.

⁹³ PROSSER, p. 36.

⁹⁴ *Ibid.*, p. 37.

⁹⁵ *Burgess v. Commonwealth*, 118 S.E. 273.

⁹⁶ Interferences with prospective advantage in case of non-commercial expectancies, where there is no high degree of probability, is akin to this action. In *Déon v. Kerby Lumber Co.* 111 SO 55, 52 A.L.R. 1023, loss of prospective social relations, rather than economic ones, was held compensable. This case, however, appears to be a rare exception as almost all cases on this type of tort are based on interferences with economic relations.

is unreasonably barred from joining a social club although he possesses the necessary qualifications. The act of intrigue may also constitute the crime of intriguing against honor,⁹⁷ in which case the act may fall under the generic meaning of defamation thus making Article 33 of the Civil Code applicable.⁹⁸ In such a situation a separate and independent action for damages may be brought by the plaintiff against the defendant notwithstanding the fact that the act of the latter constitutes a crime.

The Right to Family Relations

a. Husband and Wife

There are several provisions in the New Civil Code which swept into the dustbin the concept of unity of persons between husband and wife — a concept which previously strongly influenced the law on family relations. In many instances the wife may sue or be sued without the need of joining the husband as a party.⁹⁹ The law expressly recognizes the right of either spouse to sue the other without any limitations as to the subject matter of litigation. The right to family relations enshrined in Article 26 may consequently be a source of tort actions between the husband and wife.^{99a}

Under existing American statutes giving married women a separate legal identity, actions between husband and wife are generally permitted for torts involving property. Such statutes destroy the unity of persons and place the husband and the wife on equal footing. In a few American jurisdictions, statutes expressly provide that the husband and wife shall be liable to each other for torts on the *person or character* of the other.¹⁰⁰ The majority of American courts, however, holds that neither spouse may maintain an action against the other for assault and battery or for any other personal injury inflicted by one on the other during the marriage. Hence, no liability attaches to a spouse for infecting the other with venereal disease.¹⁰¹ This non-liability even retroacts to torts

⁹⁷ Article 364, Revised Penal Code.

⁹⁸ In fact under Article 33 of the Civil Code, a separate and independent civil action for damages may be instituted for violation of personal security or dignity even though such violation constitutes a crime. Article 33 may also find application in cases of breach of statutory duty resulting in physical injuries. For the meaning of the words "defamation" and "physical injuries" as used in Article 33, see *Capuno et al. v. Pepsi-Cola*, G.R. No. L-19331, April 30, 1965; *Carandang v. Santiago et al.* 51 O.G. 2878; *Mainit et al. v. Carriedo et al.*, (C.A.) 59 O.G. 3800.

⁹⁹ Article 113, New Civil Code; Rule 3, sec. 4, Revised Rules of Court.

^{99a} Report of the Code Commission, see note 64.

¹⁰⁰ 41 Am. Jur. 2d § 523.

¹⁰¹ *Schultz v. Christopher*, 65 Was. 496, 118 P 629.

committed before the marriage. The main reason relied upon for this limitation is that personal tort actions between husband and wife will disrupt the peace and harmony of the home. This argument has rightly been severely criticized. After a husband has beaten his wife to pulp, is there a state of peace and harmony left to be disturbed?¹⁰² There seems to be no reason to refuse "to find any disruption of domestic tranquility if the wife sues the husband for a tort to her property or bring a criminal prosecution against him"¹⁰³ and to declare that such a disruption exists in case the tort is a personal one. A minority of American courts, increasing in recent years, has rejected the supposed policy and has permitted personal tort actions between husband and wife. The minority view dovetails into the new policies running through the provisions of the present Code. The traditional concept of unity of persons between husband and wife, embodied in the old Code, has now given way to the separate personality theory. The doctrine of marital authority, based on the putative inferiority and incapacity of the wife, has yielded to the theory of unity of direction, under which the spouses enjoy legal equality,¹⁰⁴ although a certain power of decision has been left to the husband.¹⁰⁵ Litigations between members of the same family are expressly allowed by the Code as long as earnest efforts towards a compromise have been made.^{105a} Moreover, the Code defines family relations as including those between husband and wife. It is therefore our belief that in this jurisdiction a personal tort action, like battery, can be maintained by a wife against her husband, or vice versa. In this respect Philippine tort law has marched ahead of American law in protecting the right to family relations.

b. *Interferences by Third Persons*

The right to family relations includes the right to consortium and to recover damages in case of breach thereof. A spouse's interest in his relation with the other spouse is known as *consortium*. Consortium is made up of a bundle of legal rights, namely: services, society, sexual intercourse, and conjugal affection.^{105b} The gist of a husband's cause of action for loss of his wife's consortium is such loss sustained by him

¹⁰² PROSSER, p. 674.

¹⁰³ *Ibid.*, p. 674.

¹⁰⁴ TOLENTINO, pp. 307-308; Women's libbers in the Philippines may add this to their growing arsenal of arguments in favor of equality between the sexes.

¹⁰⁵ See Articles 61, 110, 112, 117, 165, and 320 of the New Civil Code.

^{105a} Article 222, New Civil Code.

^{105b} PROSSER, p. 683.

and not the damage sustained by her.¹⁰⁶ The loss of services, essential at the beginning of the development of this tort, is no longer necessary. The several rights comprising consortium all stand alike, with the consequence that encroachment upon any one of them creates a cause of action.¹⁰⁷

A form of interference with the interest of the husband is adultery with the wife, which in American tort law is styled as criminal conversation. The husband may maintain an action not only where the intercourse is the result of rape, but also where the wife consents to it, or where she herself seduces the defendant.¹⁰⁸ The bases of recovery are the defilement of the marriage bed, the invasion of the exclusive right to marital intercourse, and the suspicion cast upon the legitimacy of the offspring.¹⁰⁹

Another form of interference is alienation of affection. The gist of the tort is the interference with the wife's affection and mental attitude toward the husband. Adultery, improper relations or loss of household services is not necessary to an action for alienation of affection. Pecuniary loss likewise is immaterial since the injury is inflicted on a personal right. The attempt to alienate, however, must be successful to be actionable. Affirmative action on the part of the defendant is required in order that he may be liable for interference with the marriage relation. The defendant cannot be held liable if there is no wrongful conduct on his part, as when he remains entirely passive and indifferent yet the plaintiff's wife still falls in love with him.¹¹⁰ But any active inducement or encouragement on his part, no matter how slight, is sufficient to hold him liable even though other factors may have contributed in driving the wife to his arms. That the initiative comes from the wife is immaterial so long as the defendant's conduct causes harm to the marital relation. And although the defendant need not be motivated by spite or ill will toward the plaintiff, the tort must nevertheless be an intentional one, directed at the relation itself.¹¹¹

The rationale underlying the husband's right of action for criminal conversation applies with equal force to the wife's right of action against a woman who engages in sexual intercourse with the husband. The humili-

¹⁰⁶ 41 Am. Jur. 2d § 448; Consequently, the wife may bring a separate and distinct action for injuries inflicted on her. 41 Am. Jur. 2d § 460.

¹⁰⁷ *Ibid.*, § 448.

¹⁰⁸ PROSSER, pp. 684-85.

¹⁰⁹ *Ibid.*, p. 685; 41 Am. Jur. 2d § 476.

¹¹⁰ *McQuarters v. Ducote*, 234 S.W. 2d 433.

¹¹¹ PROSSER, p. 687.

liation and mental anguish are, after all, as keenly felt by her as by the husband. The wife may recover for criminal conversation even though the husband does not desert the family home. It is no defense that the husband himself is the seducer of the other woman, so long as there is encouragement on her part.

In the same manner the wife has a cause of action for the alienation of her husband's affection inasmuch as the right of a wife to the husband's consortium is a legal right entitled to protection.¹¹² The rules regulating the husband's action apply to that of the wife's, including particularly the necessity that the defendant act for the purpose of affecting the relation and that he be a substantial factor in causing the alienation.¹¹³

There are several defenses that may be interposed against alienation of affection. The most obvious defense is that there were no "affections" to be alienated,¹¹⁴ as when there was absolute divorce. In case of mere separation, recovery has been allowed for "deprivation of whatever chance there might be of reconciliation,"¹¹⁵ in which case "the existing estrangement merely operates to mitigate the damages."¹¹⁶ This view is applicable in this jurisdiction since the Civil Code allows only relative divorce, keeping intact the marriage bond. Whether for better or for worse, the law keeps the door always open to a marital reconciliation, irrespective of the severity of the marital discord.

As a consequence of the policy of preserving the marriage bond, the all important obligation of mutual fidelity subsists, in this jurisdiction, even after the decree of legal separation. Thus the husband retains his two alternative remedies in case the wife engages in sexual intercourse with another after the legal separation: first, he may bring a criminal prosecution for adultery against the wife and the lover¹¹⁷ and recover damages¹¹⁸ from both; second, he may institute a tort action against the lover for criminal conversation. By the same token, the wife too enjoys the same remedies, with the difference that in case of a tort action, neither concubinage nor adultery with a married woman by the husband is necessary as it is in a criminal prosecution; mere sexual

¹¹² 41 Am. Jur. 2d § 465.

¹¹³ PROSSER, pp. 691-92.

¹¹⁴ *Ibid.*, p. 688.

¹¹⁵ *Olson v. Erickson*, 152 Wash. 633, 278 P. 692.

¹¹⁶ PROSSER, p. 688: Citing *Ruble v. Ruble*, 281 N.W. 529; *Scott v. Bontekoe*, 233 N.W. 215; *Hollingshavsén v. Ade*, 233 S.W. 39; *Clark v. Orr*, 173 So. 155; *Amellin v. Leone*, 159 A. 293.

¹¹⁷ Article 341, Revised Penal Code.

¹¹⁸ Articles 100, 107, Revised Penal Code; Articles 1161 and 2219, New Civil Code.

intercourse with an unmarried woman is sufficient provided that the marital relation is harmed by such conduct. For a mere sexual intercourse then by the husband with an unmarried woman, no criminal liability attaches¹¹⁹ but such an act may be the basis of a tort action by the wife against the second woman. The exercise of one remedy does not necessarily bar the exercise of the other unless the first remedy is a criminal prosecution and the plaintiff-spouse has recovered damages therein.¹²⁰

Consent or connivance of the plaintiff to the adultery of the spouse and the defendant or to the alienation of affection is a total defense. But the plaintiff's forgiveness or condonation of the spouse's offenses *after* they have occurred does not bar recovery against the interfering defendant and is considered only in reducing the damages to be awarded.¹²¹ Neither is the consent of the plaintiff's wife to her own defilement by the defendant a defense to the husband's action.¹²² Although in this jurisdiction condonation by the innocent spouse bars an action for legal separation,^{122a} it is submitted that such condonation does not preclude a tort action against the interfering defendant for the same offense. Consent of the spouse, however, to the adultery or concubinage bars both legal separation and tort action against either the guilty spouse or the lover.

American cases reveal that in torts involving alienation of affection, the defendant has more frequently been the meddling mother-in-law than the wicked lover. The mother-in-law, nevertheless, can interpose the defense of privilege. "The interest of parents in advising and protecting their children, even after marriage, is recognized by a privilege to alienate the affections of the wife, or to induce her to leave her husband, where it is done to advance what they reasonably believe to be her welfare."¹²³ This privilege is not absolute. A parent may be liable for alienation of affection resulting from his own malicious conduct, as where without justification and for improper motives, he coaxes the child to desert his or her spouse.¹²⁴ The same limited privilege has been extended to near relatives, such as brothers and sisters, uncles and aunts, step-parents, guardians, or brothers- and sisters-in-law.¹²⁵

¹¹⁹ See dissenting opinion of Justice Moreland in *People v. Topino and Guzman*, 35 Phil. 901, 916.

¹²⁰ 41 Am. Jur. 2d § 479.

¹²¹ *Smith v. Hockenberry*, 109 N.W. 23.

¹²² *Powell v. Strickland*, 163 N.C. 393, 19 S.E. 872.

^{122a} Article 100, New Civil Code.

¹²³ PROSSER, p. 689.

¹²⁴ 41 Am. Jur. 2d § 471.

¹²⁵ PROSSER, p. 689.

In *Tenchavez v. Escañó*,¹²⁶ our Supreme Court adopted the view that parents enjoy a qualified privilege to interest themselves in the marital affairs of their child. The Court, in disallowing the husband's action for alienation of affection, said: "[A]n action for alienation of affections against the parents of one consort does not lie in the absence of proof of malice or unworthy motives on their part." This issue was resolved without any reference to the causes of action recognized in Article 26.

The Civil Code recognizes several instances¹²⁷ when interference with marital relations may be lawful. Article 252 imposes upon the family council, when duly constituted, the duty to advise the spouses on important family questions. The members of the family council may even include non-relatives of the spouses.¹²⁸ Parents, by virtue of their relation with their children, may continue to advise and counsel the latter even after parental authority ceases. Children, even though emancipated, are still obliged to respect their parents.¹²⁹ Grandparents are to be consulted by all members of the family on all important family questions,¹³⁰ in accordance with Filipino tradition.¹³¹

c. *Parent and Child*

On the basis of a putative policy of preserving domestic harmony, the majority of American courts has refused to allow personal tort actions between parent and child.¹³² But tort actions involving property have been permitted,¹³³ just like the rule between husband and wife. And as in personal torts between husband and wife, a growing minority of American courts has broken away from the older rules to permit personal tort actions between parent and child.¹³⁴

Although our jurisprudence is sprinkled with a few cases involving a child filing a criminal suit against the parent, as in rape by a father of his own daughter, there is no decided case of a tort action by a child

¹²⁶ 15 SCRA 355.

¹²⁷ See Article 252, New Civil Code.

¹²⁸ Article 253, New Civil Code.

¹²⁹ Article 311, New Civil Code.

¹³⁰ Article 312, New Civil Code.

¹³¹ Report of the Code Commission, p. 22.

¹³² 39 Am. Jur. § 89.

¹³³ *Mckern v. Beck* 126 NE 641; *Preston v. Preston*, 102 Conn. 96, 128 A. 292.

¹³⁴ PROSSER, p. 906. The decisions have been influenced largely by the presence of liability insurance, since the presence of such insurance means that the defendant will not have to pay out of his pocket. The family coffers are thus left unimpaired.

against the parent, or vice-versa. If ever a minor child can sue a parent for tort, the former will of course need the assistance of the parent who is not being sued, or a guardian *ad litem* if both parents are being sued. But does a minor child possess the right to bring the action? The old Civil Code contained a provision which expressly stated that incapacitated persons "are susceptible of rights."¹³⁵ This provision was omitted in the present Code, although under Article 357, incapacitated persons are burdened with certain obligations.¹³⁶ Other provisions of the Code, however, recognize that incapacitated persons enjoy certain rights — like the right to support,¹³⁷ the right to inherit,¹³⁸ and the right to damages for injuries inflicted on them.¹³⁹ Under Articles 2181 and 2182, minors are liable for quasi-delicts and they are, under Article 101 of the Revised Penal Code, also civilly liable for crimes committed by them even if they are exempt from criminal liability. The fact that the parents may be civilly liable for the children's torts¹⁴⁰ does not relieve the latter from liability.¹⁴¹ Thus the law places minors on almost equal footing as capacitated persons insofar as civil liability for crimes and quasi-delicts is concerned. This being the case, it certainly is unjust to deny minors the right to recover damages when they are at the receiving end of tortious acts, whether from third persons or from family relations. It should be noted that nowhere in our law is there a prohibition against a child suing the parent. And if a minor daughter is allowed to file a complaint for rape against her father, and recover civil liability therefrom,¹⁴² there seems to be no reason why the same minor cannot bring a personal tort action against the father for the same offense under Article 26. The daughter may not wish to see the father incarcerated, and if she does not file a complaint, the father cannot be prosecuted.¹⁴³ Why deny her the right to bring a tort action, liability for which is considerably less severe than a criminal prosecution for rape?

Under Article 316 of the Civil Code parents are given the power to correct unemancipated children and to punish them moderately. When parents punish the child with excessive harshness,¹⁴⁴ they may become criminally liable and therefore civilly liable to the child. Can

¹³⁵ Article 32, Old Civil Code.

¹³⁶ TOLENTINO, pp. 155-56.

¹³⁷ Article 291, New Civil Code.

¹³⁸ Article 887, New Civil Code.

¹³⁹ Articles 20, 21 and 26 of the New Civil Code.

¹⁴⁰ Article 2180, New Civil Code.

¹⁴¹ 39 Am. Jur. § 55.

¹⁴² Article 100, Revised Penal Code.

¹⁴³ Article 323, Revised Penal Code.

¹⁴⁴ Article 332, New Civil Code.

the child bring a tort action for the injuries inflicted on him by the parent? We think so. If parents can be held answerable to a greater penalty for excessive corporal punishment of the child, why cannot they be held answerable to a lesser penalty for the very same act in a tort action by the child against them? The child may wish to capitalize on the advantages of a tort action over a criminal prosecution, and there is no reason to deny him this. Moreover, when parents punish the child excessively, they violate Article 316, a provision which is clearly intended to protect minors from excessive corporal punishment by parents. Under Article 20, the parents may become liable for damages to the child.

On the other hand, can a parent institute a personal tort action against the child under Article 26, like an action for assault or battery? On the same reason as that on which a child is disallowed from suing the parents on a personal tort, American law prohibits a parent from maintaining such a suit against the child. Notwithstanding this limitation, a child may be liable to third persons for his own tortious conduct. Both in American^{144a} and Philippine^{144b} jurisdictions there is no question as to the liability of minors for their own tortious conduct. In the former jurisdiction, however, a minor does not incur civil liability for tortious conduct against its *parent*. We believe that we cannot hew to this rule in this jurisdiction. We do not have any law which prohibits a parent from suing his own child on a personal tort; the latter of course will have to be represented either by the other parent or by a guardian *ad litem*. If as advanced earlier a child can sue the parent upon a personal tort, by parity of reasoning the parent must also be allowed the same action against the child.¹⁴⁵

Other types of personal tort actions may be brought by a parent against the child, as when the latter who is under parental authority fails to obey the former. Article 311 imposes upon children the obligation to obey their parents so long as they are under parental authority, and to observe respect and reverence toward them always. This duty of obedience lasts only while the children are unemancipated, while the duty of reverence lasts for the whole lifetime of parent and child.¹⁴⁶ Violation of these duties may, under Article 20, be the basis of a tort action. The twin duties of obedience and respect are obviously for the benefit of parents, hence the requirement for the applicability of Article 20 is

^{144a} *Garrat v. Dailey*, 46 Wash. 2d 197, 279 P2d 1091.

^{144b} Articles 2180 and 2182, New Civil Code.

¹⁴⁵ In *People v. Manos*, 36 SCRA 457, the Supreme Court held that indemnity to the mother, as well as to the brothers and sisters of one accused for killing his own father, is proper.

¹⁴⁶ TOLENTINO, p. 613.

satisfied. This opinion on the parent's right to bring a tort action against the child is buttressed by the fact that under Act No. 4002,¹⁴⁷ a minor guilty of disrespect and disobedience to his parents incurs criminal liability upon complaint of the parent. Since the parent can institute a criminal suit against a disobedient and disrespectful child and even recover civil liability therefor under Articles 10 and 100 of the Revised Penal Code, there is therefore no reason to withhold from him the right to bring a tort action against the child for the very same act. The liability for a tort action is actually less severe than that for a criminal action and the remedy it affords is included in that of the latter.

d. *Enticement*

Under Article 26, a parent may institute a tort action against a person who entices a child away from home. In American law, loss of the child's services, whether actual or as a matter of right, must be established as a foundation of the action.¹⁴⁸ A growing number of courts, however, no longer requires proof of loss of services, adopting the modern view that in torts like this the real cause of action is the interference with the relation, and that damages other than loss of services suffice as a ground for action.¹⁴⁹ The latter view appears to be in consonance with our law. The Civil Code gives parents the right to the custody of unemancipated children.¹⁵⁰ This right has been upheld by the Supreme Court in several cases involving a petition for a writ of *habeas corpus* to obtain custody of a minor in the company of the defendant, regardless of the minor's consent to live with the latter.¹⁵¹ The right to family relations is quite broad, and includes within its embrace the right of parents to the custody of the child. Hence, intruding upon the parents' right to the child's custody is an actionable tort under Article 26. Such an action can prosper without proving loss of services since the substance of the action is interference with family relations. In fact there are several disturbances of family relations, like alienation of affection, which do not require loss

¹⁴⁷ Act No. 4002 provides: "Section 1. Any minor guilty of disrespect and disobedience to his parents, guardians or persons having charge of such minor shall be punished by *arresto menor* in its minimum degree.

"If he be less than eighteen years of age, the provisions of Article eighty of Act numbered Thirty-eight hundred and fifteen known as the Revised Penal Code, shall be observed.

"Section 2. No action shall be instituted for violation of this Act except upon a complaint signed and filed by the aggrieved parent, guardians or persons having charge of the minor."

¹⁴⁹ PROSSER, p. 693.

¹⁵⁰ Article 316, New Civil Code.

¹⁵¹ *Salvana v. Gaeta*, 55 Phil. 680; *Canua v. Zalameda*, O.G. Supp. Sept. 20, 1941, p. 297.

of services, inasmuch as the interference with companionship and affection is the core of the action. The requirement in American jurisdictions that there must be loss of services grew out of the obsolete common law concept that children, as well as the wife, are just a shade better than the servants of the husband, and an action to recover damages for enticing them away must be based on deprivation of their "services." Certainly such an anachronistic concept does not deserve a niche in our jurisprudence.

Does the right to family relations enunciated in Article 26 give the child a cause of action against a person for enticing his mother away from home? A hypothetical case may be given. Suppose the mother runs away with paramour X. Y, the husband, due to indifference does not bring any action. Can the child Z, through a guardian *ad litem*, bring an action against X for interference with family relations under Article 26? In American law, the child is given no protection against interference with parental relation. The reason for this, as in other cases involving interference with family relations where the right of action has been denied, is historical. There was never any common law right of a child to the "services" of a parent; hence the deprivation of the parent does not result in loss of services upon which the child's action may be based.¹⁵² In this jurisdiction, fortunately, we are not shackled to such an obsolete legal concept. Though Article 26 was adopted from American jurisprudence, the development of our tort law must not be weighed down by historical vestiges in the form of outworn common law principles. The ghost of archaic common law doctrines, however, continues to stalk American courts. In this jurisdiction, the child in the foregoing example should have the right to bring the action since the basis thereof is not loss of services of the mother as in American law, but interference with family relations. And family relations include those between ascendants and descendants.¹⁵³ Moreover, a child has a right to an undisturbed family life. He has an interest in the family honor and reputation for after all he is part of the family and he will carry the family honor and reputation as he grows up. When the mother is enticed away from the family home, the child is deprived of the right to be educated by the parent,¹⁵⁴ which includes the moral and spiritual upbringing of the child, such as the guidance of his conscience, the development of family affection and formation of his character.¹⁵⁵ Besides, how many children have suffered permanent psychological malady as a result of their mother's

¹⁵² PROSSER, p. 696.

¹⁵³ Article 217, New Civil Code.

¹⁵⁴ Article 316, New Civil Code.

¹⁵⁵ TOLENTINO, p. 627.

abandoning the husband and the family home in favor of wicked lovers? Those who coax a child's mother to desert the family home should be liable to the child for deprivation of maternal care and affection.

The Right of Privacy

The right of privacy has been concisely defined as "the right to be let alone."¹⁵⁶ The right of privacy was unknown in ancient common law and it was only in 1890 that English and American courts began granting relief expressly based upon the invasion of such right.¹⁵⁷ Most American courts, upon the prodding of legal writers,¹⁵⁸ have now recognized the existence of a right of privacy independently of the common law rights of property, contract, reputation and physical integrity. The interference of the right, to be actionable, must be "serious and outrageous, or beyond the limits of common ideas of decent conduct."¹⁵⁹ Invasion of the right of privacy involves four distinct types of tort: (1) intrusion upon the plaintiff's physical and mental solitude; (2) public disclosure of private facts; (3) placing the plaintiff in false light in the public eye; (4) and the commercial appropriation of the plaintiff's name or likeness.¹⁶⁰ But the right of privacy does not prohibit the publication of materials which are of legitimate public or general interest.¹⁶¹ Surprisingly, a few American courts at present still refuse to recognize the right, but their number is fast dwindling.

The right of privacy is expressly recognized in this jurisdiction in Article 26.¹⁶² This is another instance of our tort law forging ahead of the tort laws of some American jurisdictions. Our jurisprudence on the matter is, unfortunately, barren. For an understanding therefore of this important right resort to American jurisprudence is again inevitable. Physical intrusion upon the plaintiff's solitude or seclusion, such as barging into a woman's stateroom on a steamboat,¹⁶³ or searching a woman's shopping bag in a store,¹⁶⁴ constitutes an invasion of privacy. This right is purely personal which juridical persons cannot possess.¹⁶⁵ It does not

¹⁵⁶ COOLEY, *THE LAW OF TORTS*, (2d Ed.) p. 29.

¹⁵⁷ PROSSER, p. 635.

¹⁵⁸ See Warren and Brandeis, *The Right to Privacy*, 4 *Harvard Law Review* 193. This is an outstanding example of the influence of legal periodicals on American courts.

¹⁵⁹ PROSSER, p. 635.

¹⁶⁰ *Hamberger v. Eastman*, 106 N.H. 107, 106 A. 2d 239.

¹⁶¹ *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 L.R.A. 101 *Hillman v. Star Pub. Co.*, 64 Wash. 691, 117 P 594.

¹⁶² See also Article 32, New Civil Code; Article IV, Sec. 4 (1), (2) Constitution of the Philippines.

¹⁶³ *Byfield v. Candler*, 33 Ga. App. 275, 125 S.E. 905.

¹⁶⁴ *Sutherland v. Kroger Co.*, 110 S.E. 2d 716.

¹⁶⁵ *Vassar College v. Loose-Wiles Biscuit Co.*, 197 F. 982.

exist where the person himself publishes the objectionable material, or consents thereto, or where a person is so prominent that he dedicates his life to the public and thereby waives the right of privacy.¹⁶⁶ There can be no privacy in that which is already public. The right is not recognized in the dissemination of news and news events, nor in the discussion of events of the life of a person in whom the public has a rightful interest, nor where the information is of public interest, as in the case of a candidate for public office.¹⁶⁷ It has been frequently held that those who unwillingly court public attention, through association with crime or other interesting events, become reluctant public figures and "until they have reverted to the lawful and unexciting life led by the great bulk of the community, they are subject to the privileges which publishers have to satisfy the curiosity of the public as to their leaders, heroes, villains and victims."¹⁶⁸

A substantial number of American privacy cases involves the appropriation of an element of the plaintiff's personality for commercial use, like the use of the plaintiff's picture in connection with an advertisement appearing in a newspaper,¹⁶⁹ the use of the plaintiff's name in the title of a corporation,¹⁷⁰ the use of a picture illustrating "man hungry" woman,¹⁷¹ or the use of a picture of an embracing couple illustrating an article on the "wrong kind of love."¹⁷²

What must be appropriated is the value of the plaintiff's name rather than the name itself. Hence there is no liability for the mere use of a name which happens to be the same as that of the plaintiff's.¹⁷³ Intrusion into private affairs other than physical invasion is covered by the right. Accordingly, unauthorized prying into the plaintiff's private bank account,¹⁷⁴ or peeping into the plaintiff's windows,¹⁷⁵ is an infringement of the right of privacy.

Right to Peace of Mind

Violation of the right to peace of mind under Article 26 is akin to the American tort of intentional infliction of mental distress, which is

¹⁶⁶ *Cohen v. Marx*, 211 P.2d 320; *Martin v. Dorton*, 50 So. 2d 931.

¹⁶⁷ *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91.

¹⁶⁸ Restatement, Torts Sec. 867, Comment C

¹⁶⁹ *Flake v. Greensboro News Co.* 212 N.C. 780, 195 S.E. 55.

¹⁷⁰ *Edison v. Edison Polyform & Mfg. Co.* 73 N.J. Eq. 136, 67 A. 392.

¹⁷¹ *Martin v. Johnson Pub. Co.*, 157 N.Y.S. 2d 409.

¹⁷² *Gill v. Curtis Pub. Co.*, 239 P. 2d 630.

¹⁷³ *Nebb v. Bell Syndicate*, 41 F. Supp. 929; *Sevacker v. Wright*, 277 N.Y.S. 296.

¹⁷⁴ *Zimmermann v. Wilson*, 81 F. 2d 247.

¹⁷⁵ *Bednarik v. Bednarik*, 18 N.J. Misc. 633, 16 A2d 80.

now recognized by American courts as a distinct tort.¹⁷⁶ So far liability has been limited to words or acts which are gross and highly offensive to a reasonable man. Thus casual solicitation of illicit intercourse from a woman does not give rise to a cause of action,¹⁷⁷ upon the theory perhaps that there is no harm in asking.¹⁷⁸ But when the indecent proposals are persistently continued over a considerable length of time through phone calls at night, the defendant is liable even though no physical illness results.¹⁷⁹

Most cases which have recognized intentional infliction of mental distress involved physical illness suffered by the plaintiff as a result of the offensive words or acts. A handful of decisions, however, have granted recovery on the ground of extreme outrage without any showing of physical illness.¹⁸⁰ The view that physical illness is immaterial in infliction of mental distress appears to be applicable in this jurisdiction since Article 26 itself creates a cause of action for violation of the right to "peace of mind." Violation of the right in itself constitutes a legal injury sufficient to support the action. Physical illness is material only as a circumstance of aggravation which will serve to increase the damages recoverable.

Intentional infliction of mental distress has been impliedly recognized in this jurisdiction without being labelled as a tort,¹⁸¹ and where it was found to be a tort, there was doubt from what article of the code it draws life.¹⁸² In *Tenchavez v. Escaño*,^{182a} the Supreme Court, without

¹⁷⁶ The first case that ever allowed recovery for intentional infliction of mental distress as a distinct tort was *Wilkinson v. Downtown*, 2Q.B. 57 (1897). Defendant, a practical joker, amused himself by telling the plaintiff that the latter's husband had met a terrible accident and had broken both legs. The shock to her nervous system caused serious physical illness with permanent after-effects. The defendant was held liable. PROSSER AND SMITH, p. 52.

¹⁷⁷ *Davis v. Richardson*, 76 Ark. 348, 89 S.W. 318.

¹⁷⁸ See Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 *Harvard Law Review* 1033.

¹⁷⁹ *Samms v. Eccles*, 11 Utah 2d 289, 358 P 2d 344; The action was also allowed where the defendant buried a pot of metal and induced a mentally deficient plaintiff to dig for it, under extreme public humiliation, deluding the hapless plaintiff to believe that the pot contained gold. (*Nickerson v. Hodges*, 1146 La. 735, 84 So. 37). Recovery was likewise granted where the defendant circulated a rumor that the plaintiff's son had hanged himself. (*Bielitski v. Obadik*, 15 Lask 153, 61 Dom L. Rep. 494). The defendant was held liable where he threatened to charge a resident alien with espionage unless she turned over to him certain private letters in her possession. (*Janvier v. Sweeney*, 2 K.B. 316, 88 L.J.K.B. 1231). A defendant creditor who hounded the plaintiff with letters and telephone calls at all hours of the day was also held liable. (*Duty v. General Finance Co.*, 154 Tex 16, 273 S.W. 2d 64).

¹⁸⁰ *Savage v. Boies*, 77 Ariz 355, 272 P. 2d 349; *Barnett v. Collection Service Co.*, 214 Iowa 1303, 242 N.W. 25.

¹⁸¹ *Tenchavez v. Escaño*, *Supra*.

¹⁸² *Equitable Banking Corporation v. The Rural Insurance & Surety Co., Inc.*, et al, 11 CAR 774.

^{182a} *Supra*.

a trace of allusion to Article 26, much less calling the defendant's act a tort, said:

"Plaintiff Tenchavez, in falsely charging Vicenta's parents with racial and social discrimination and with having exerted efforts and pressured her to seek annulment and divorce, unquestionably caused them unrest and anxiety, entitling them to recover damages."

In *Equitable Banking Corporation v. Rural Insurance & Surety Co., Inc., et al.*,^{182b} a Court of Appeals decision, several demand letters were sent to a music teacher even after the latter had informed the bank employees that she was not the one who executed the promissory note mentioned in the letters. To aggravate matters, the bank even included the music teacher as a co-defendant in its complaint for collection. Justice Martin, *ponente*, held the bank liable on the ground that its act was "analogous to item (2) of Article 26." Justice Gatmaitan believed that the bank's act fell within the scope Article 21 while Justice Lucero opined that recovery could be granted under Articles 21 and 26.

Torts of this type committed by employees of enterprises catering to the public are governed by a special rule¹⁸³ holding the enterprise itself liable. This special rule had its genesis from common carriers, whose relations with passengers involve special and peculiar obligations and duties, differing in kind and degree from those of almost every other contractual or legal obligation. On account of the peculiar relations of the parties, the law implies a promise and imposes upon the carrier the duty of protection and courteous treatment. The carrier is under the absolute duty of protecting its passengers from assault or insult by its employees.¹⁸⁴ The duty of courtesy seems to be an implied term of the contract of carriage. There are cases, nonetheless, which hold the carrier liable even in the absence of such contract, as when the insult is hurled at a prospective passenger who has not yet bought a ticket in a station waiting room.¹⁸⁵ It does not appear material whether the insult relates to non-carrier operations.¹⁸⁶ This special rule has been extended to innkeepers¹⁸⁷ and telegraph companies.¹⁸⁸ Though there seems to be

^{182b} *Equitable Banking Corporation v. The Rural Insurance & Surety Co., Inc., et al., supra.*

¹⁸³ This rule was first enunciated in *Chamberlain v. Chandler*, 5 Fed. Cas. No. 2575, where the captain of the ship insulted and mistreated his passenger.

¹⁸⁴ *Lipman v. Atlantic Coast Line Railroad Co.*, 108 S.C. 151, 93 S.E. 714.

¹⁸⁵ *St. Louis-San Francisco R. Co. v. Clark*, 104 Okl. 24, 299 P. 779.

¹⁸⁶ *Malczewski v. New Orleans Ry. & Light Co.*, 156 La 830, 101 Sc. 213.

¹⁸⁷ *Emmke v. Silva*, 293 F. 17.

¹⁸⁸ *Buchman v. Western Union Tel. Co.*, 115 S.C. 433, 106 S.E. 159; The company was held liable for an indecent proposal made by a messenger to a woman at her home.

a tendency to apply the rule to other public utilities, there is a reluctance to extend the coverage to include owners of places open to the public.¹⁸⁹

The liability of common carriers for this type of intentional tort committed by employees has unfortunately been confused in this jurisdiction as one springing from a quasi-delict. In a case involving a common carrier,¹⁹⁰ recovery was allowed under Articles 2176 and 2180 although the words and acts of the employee were clearly intentional. Fault or negligence is and has always been the foundation of quasi-delict ever since this type of tort was introduced in this jurisdiction. Yet in *Air France v. Carrascoso*,¹⁹¹ our Supreme Court, after citing two American cases,¹⁹² each involving an intentional infliction of mental distress committed by the employee of a common carrier, held that the act of an airline employee in insulting and compelling the plaintiff to give up his first class seat and transferring him to the tourist class constituted a "quasi-delict" for which the carrier was responsible.

V. INTENTIONAL TORTS AND QUASI-DELICTS

At a time when new and salient tort principles are beginning to take root in Philippine jurisprudence, perhaps it is an opportune moment to examine the applicability of these principles in our tort law. As we had occasion to state at the introduction of this inquiry, there is a need to distinguish intentional torts from quasi-delicts for the simple reason that the principles applicable to one may not be relevant to the other. An intentional act in American tort law is one done with the belief that the result is substantially certain to follow from the act. Neither hostile intent nor desire to do any harm is necessary.¹⁹³

A quasi-delict, on the other hand, requires the presence of fault or negligence. Fault, in civil law, is an improper act or omission, injurious to another, and transpiring through negligence, rashness or ignorance.¹⁹⁴ Negligence is the failure to observe that degree of care, precaution and vigilance that the circumstances justly demand, whereby another suffers injury.¹⁹⁵ The existence of negligence in a given case is not determined by reference to the personal judgment of the actor

¹⁸⁹ *Sclocum v. Food Fair Stores of Florida*, 100 So. 2d 376: The employee, in reply to the plaintiff's inquiry as to the price of an item, remarked: "If you want to know the price, you will have to find out the best way you can... you stink to me."

¹⁹⁰ *Air France v. Carrascoso*, *supra*.

¹⁹¹ *Supra*.

¹⁹² *Lipman v. Atlantic*, *supra*: *Austro-Am SS v. Thomas*, 248 Fo 231.

¹⁹³ PROSSER, p. 40.

¹⁹⁴ BLACK'S LAW DICTIONARY, p. 738.

¹⁹⁵ U.S. Barrias, 23 Phil. 434.

in the situation before him. The law considers that which would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that.¹⁹⁶ In this jurisdiction, the foundation of quasi-delict, as Article 2176 of the present Code and Article 1902 of the old Code starkly bear out, has always been fault or negligence. Quasi-delict, as understood by modern civil law writers and jurists, means negligent wrongdoing.¹⁹⁷ Intentional torts do not form part of quasi-delict and are entirely different from the latter. In American law intentional torts include assault and battery which in this jurisdiction may constitute felonies.

The Supreme Court, nonetheless, has taken to equating intentional torts with quasi-delicts.¹⁹⁸ Thus in *Air France v. Carrascoso*¹⁹⁹ the Court ruled that an air carrier committed a "quasi-delict" when its manager ousted a Filipino, holder of a first class ticket, from his seat and gave it to a white man. With due deference to the Court, we are inclined to believe that the tort committed by the air carrier was not a quasi-delict but an intentional tort involving a violation of the right to peace of mind. The act of the manager in ousting the Filipino passenger was willful; there was neither fault nor negligence in the manager's action. In fact the Court admitted and even underscored this when it said:

"The responsibility of an employee for the tortious act of its employees need not be essayed. It is well settled in law. For the *willful malevolent* act of petitioner's manager, petitioner (the air carrier), his employer, must answer."

The Court then went on to cite Article 21 as the basis for the recovery of damages for the air carrier's tort. To our mind, the basis for the carrier's liability should be Article 26 inasmuch as the "*willful malevolent* act" of the manager caused mental distress to the Filipino passenger. As mentioned earlier, the Court cited two American cases, both of which involved intentional torts called intentional infliction of mental distress. The first American case cited, *Autro-American SS v. Thomas*,²⁰⁰ involved a woman who, travelling with her daughter aboard a steamship from Trieste to New York, had bought her tickets with a

¹⁹⁶ Picart v. Smith, 37 Phil. 809.

¹⁹⁷ This modern understanding of *quasi-delict* is, however, a marked departure from the Roman Law concept of *quasi ex delicto*. The *obligationes quasi ex delicto* mentioned by Justinian (Institutes of Justinian IV, 5, 3, 1) were in truth cases of strict liability, or cases in which the law drew an inference of fault from the event and consequently imposed liability independently of proof of fault. WALKER, p. 21.

¹⁹⁸ See notes 3 and 5.

¹⁹⁹ 18 SCRA 155.

²⁰⁰ 248 F. 231 (1917).

check. The purser of the steamship notified her that the check was worthless, and that she must forthwith pay the passage money or be ejected from the vessel. This demand was made in the presence of several people. The check of the woman was actually good and was paid in due course. It turned out that the purser's demand was the result of false information. The Court held that the order to go ashore constituted not only a breach of contract but also a tort since the demand resulted in "mental distress and suffering" to the woman. The carrier thus failed to protect a passenger from insulting and injurious language by its employee. This American case clearly illustrates the tort known as intentional infliction of mental distress although at the time this case was decided such a kind of tort had not yet been recognized as a *distinct tort*.

In the second case, *Lipman v. Atlantic Coast Line*,²⁰¹ the train conductor told the plaintiff, in a rude and angry manner and in the presence of other passengers, that he (the plaintiff) was a lunatic and his place was in a lunatic asylum. The conductor added that he would be glad to give the plaintiff two black eyes if he were off duty. The Supreme Court of Carolina held that the carrier was liable for the "mental suffering" inflicted upon the passenger by the conductor. *Lipman* today is often cited by American authorities as an early example of intentional infliction of mental distress although at the time the case was decided such a tort was not yet recognized.²⁰²

Another case wherein an intentional tort was unceremoniously treated as a quasi-delict is *Palisoc v. Brillantes*.²⁰³ The deceased Dominador Palisoc and the defendant Virgilio Daffon were classmates, and while the two were in the laboratory room during recess time, Daffon remarked that Palisoc was acting like a foreman. Because of this remark, Palisoc slapped Daffon on the face. The latter retaliated by striking Palisoc with a strong blow on the face, followed by other fist blows on the stomach. Palisoc, in trying to avoid the blows, stumbled on an engine block which caused him to fall face downward. Palisoc died as a result of the fist blows. The Supreme Court called Daffon's conduct a "quasi-delict" under Article 2176. We believe that the case properly falls under Article 26 since Daffon acted willfully in beating Palisoc to death. From the facts of the case it is patent that there was neither fault nor negligence in the conduct of Daffon.

²⁰¹ *Supra.* . .

²⁰² See PROSSER AND SMITH, p. 46.

²⁰³ *Supra.*, note 3.

In *Zulueta v. Pan Am World Airways, Inc.*,²⁰⁴ the plaintiff, a passenger in a plane that had stopped over at Wake Island, went to a secluded area in the beach near the terminal building to answer a call of nature since the toilets in the terminal were filled. When the plaintiff returned to the plane, the captain remonstrated at him in an intemperate and arrogant manner for having delayed the departure of the plane. The plaintiff answered back in the same vein. The captain then ordered that the plaintiff, his wife and daughter, as well as their luggage, be off-loaded from the plane. The Court held that the case involved a breach of contract "as well as a quasi-delict," notwithstanding its own pronouncement that the act causing the damage was caused "intentionally by an employee" of the airline carrier.

Pre-Existing Contractual Relations

One query often raised in cases involving quasi-delicts is the effect of the presence of contractual relations between the parties. What does Article 2176 mean when it says "[S]uch fault or negligence, if there is no pre-existing contractual relation between the parties, is called a quasi-delict"? Does this imply that when there is an existing contract between the parties, as between a carrier and a passenger, there can be no quasi-delict? The second sentence of Article 2176 did not appear in Article 1902 of the old Code, the provision which governed quasi-delicts under the old law. Under the old Code, it was repeatedly held that the existence of a contract between the parties did not bar the commission of a tort by the one against the other and the consequent recovery of damages therefore.²⁰⁵ And notwithstanding the addition of the second sentence in Article 2176 of the present Code, the Supreme Court has not changed its view.²⁰⁶ It has been said that the second sentence was added in the present Code for better "clarity" without changing the essence of the precept contained in Article 1902 of the old law.²⁰⁷ If that was the purpose, then not only did the second sentence fail miserably in its purpose, it also confused the concept of quasi-delict. Article 2176 would definitely have been a lot clearer without this desultory illumination with the klieg lights of clarity.

We are disposed to think that the second sentence did not add any

²⁰⁴ 49 SCRA 1.

²⁰⁵ *Cangco v. Manila Railroad*, 38 Phil. 768; *Yamada v. Manila Railroad*, 33 Phil. 8.

²⁰⁶ *Air France v. Carrascoso*, *supra.*; *Singson v. Bank of the Philippine Islands*, 23 SCRA 1117; *But see Flores v. Miranda*, 105 Phil. 266; *Verzosa v. Baytan*, L-14092, April 29, 1960; *Martinez v. Gonzales*, 6 SCRA 331.

²⁰⁷ JARENCIO, *TORTS AND DAMAGES IN PHILIPPINE LAW*, (1972), p. 16.

requirement to those already recognized under the old law for the existence of a quasi-delict. The second sentence can best be explained as an attempt to distinguish an action based on quasi-delict from one founded on breach of contract, particularly in cases where a quasi-delict is *coincident* with a breach of contract. An action under Article 2176 may lie although the relation between the parties which gives rise to the quasi-delict emanates from a contract, as when the defendant through negligence violates a legal duty which arises when the contract is made but which legal duty is not identical with the contract obligation. For example, a borrower of a car is under a *contractual* duty²⁰⁸ to return it and if he fails to do so he may be liable for breach of contract. The fact that he possesses another's property imposes upon him the *legal* duty to exercise due diligence to protect the interest of the owner, so that if the car is damaged through his negligence, he commits a quasi-delict. And if he does commit a quasi-delict, a breach of contract simultaneously results since he can no longer return the car in the condition that it ought to be. Though the relation between the parties springs from the contract (called *commodatum*), the legal duty to exercise proper care, upon which the quasi-delict is founded, is independent of the contractual obligation to return the car. We may conclude therefore that if a legal duty exists between the parties, separate and independent from that imposed by the contract, a quasi-delict may lie for violation of such legal duty notwithstanding a concurrent breach of the contractual obligation.

This rule applies also to an intentional tort committed simultaneously with a breach of contract. In *Air France v. Carrascoso*,²⁰⁹ the Court pointed out that a common carrier has a general duty to the public aside from its contractual obligation to its passengers. Said the Court:

"A contract to transport passengers is quite different in kind and degree from any other contractual relation. And this because of the relation which an air carrier sustains with the public. Its business is mainly with the travelling public. It invites people to avail of the comforts and advantages it offers. The contract of air carrier, therefore generates a relation attended with a public duty. Neglect or malfeasance of the carrier's employees, naturally, could give ground for an action for damages.

"Passengers do not contract merely for transportation. They have a right to be treated by the carrier's employees with kindness, respect, courtesy and due consideration. They are entitled to be protected against personal misconduct, injurious lan-

²⁰⁸ See Articles 1933 and 1935, New Civil Code.

²⁰⁹ *Supra*.

guage, indignities and abuses from such employees. So it is, that any rule or discourteous conduct on the part of employees towards a passenger gives the latter an action for damages against the carrier."

Thus the carrier, in ousting the Filipino passenger from his first class seat, violated a legal duty separate and independent from its violation of the contract obligation. The willful act of the manager occasioned two violations — violation of a duty imposed by law and violation of an obligation imposed by contract. The first violation constitutes an intentional tort, while the second involves a breach of contract. In short, it may be said that the act that breaks the contract may also be a tort.

VI. CONCLUSIONS

The creeping encroachment of quasi-delict upon the area reserved for intentional torts has not escaped the attention of our commentators on tort law.²¹⁰ It has often been noted that the boundary line separating Philippine quasi-delict from Anglo-American intentional tort is rapidly disappearing. Quasi-delict is beginning to assume a catch-all sanction to all tortious conduct irrespective of the presence or absence of negligence.

In the foregoing discussion we have attempted to demonstrate that various intentional torts are now wedded into our tort law and are simply waiting to be harnessed in actual litigations. The need to inject intentional tort principles into quasi-delict in order to furnish a remedy to injuries that otherwise may be written off as *damnum absque injuria* no longer exists, as it existed prior to the New Civil Code. With the protective mantle provided by Articles 20, 21 and 26, *inter alia*, it is inconceivable that intentional acts which fall short of being crimes will be left unredressed. Intentional torts, then, must not be allowed to gravitate closer to quasi-delict for the latter was designed to govern only *negligent* wrongdoing. Instead the immensely rich source of tort actions found in the chapter on Human Relations, presently suffering from a benign neglect, should be religiously exploited and applied to intentional wrongdoing.

²¹⁰ SANGCO, p. 8.