G.R. No. L-44748 August 29, 1986

RADIO COMMUNICATIONS OF THE PHILS., INC. (RCPI). petitioner,
vs.
COURT OF APPEALS and LORETO DIONELA, respondents.

O. Pythogoras Oliver for respondents.

PARAS, *J.:*

Before Us, is a Petition for Review by certiorari of the decision of the Court of Appeals, modifying the decision of the trial court in a civil case for recovery of damages against petitioner corporation by reducing the award to private respondent Loreto Dionela of moral damages from P40,000 to Pl5,000, and attorney's fees from P3,000 to P2,000.

The basis of the complaint against the defendant corporation is a telegram sent through its Manila Office to the offended party, Loreto Dionela, reading as follows:

> 176 AS JR 1215PM 9 PAID MANDALUYONG JUL 22-66 LORETO DIONELA CABANGAN LEGASPI CITY
>
> WIRE ARRIVAL OF CHECK FER
>
> LORETO DIONELA-CABANGAN-WIRE ARRIVAL OF CHECK-PER
>
> 115 PM
>
> SA IYO WALANG PAKINABANG DUMATING KA DIYAN-WALA-KANG PADALA DITO KAHIT BULBUL MO
>
> (p. 19, Annex "A")

Plaintiff-respondent Loreto Dionela alleges that the defamatory words on the telegram sent to him not only wounded his feelings but also caused him undue embarrassment and affected adversely his business as well because other people have come to know of said defamatory words. Defendant corporation as a defense, alleges that the additional words in Tagalog was a private joke between the sending and receiving operators and that they were not addressed to or intended for plaintiff and therefore did not form part of the telegram and that the Tagalog words are not defamatory. The telegram sent through its facilities was received in its station at Legaspi City. Nobody other than the operator manned the teletype machine which automatically receives telegrams being transmitted. The said telegram was detached from the machine and placed inside a sealed envelope and delivered to plaintiff, obviously as is. The additional words in Tagalog were never noticed and were included in the telegram when delivered.

The trial court in finding for the plaintiff ruled as follows:

> There is no question that the additional words in Tagalog are libelous. They clearly impute a vice or defect of the plaintiff. Whether or not they were intended for the plaintiff, the effect on the plaintiff is the same. Any person reading the additional words

in Tagalog will naturally think that they refer to the addressee, the plaintiff. There is no indication from the face of the telegram that the additional words in Tagalog were sent as a private joke between the operators of the defendant.

The defendant is sued directly not as an employer. The business of the defendant is to transmit telegrams. It will open the door to frauds and allow the defendant to act with impunity if it can escape liability by the simple expedient of showing that its employees acted beyond the scope of their assigned tasks.

The liability of the defendant is predicated not only on Article 33 of the Civil Code of the Philippines but on the following articles of said Code:

ART. 19.- Every person must, in the exercise of his rights and in the performance of his duties, act with justice, give everyone his due, and observe honesty and good faith.

ART. 20.-Every person who, contrary to law, wilfully or negligently causes damage to another, shall indemnify the latter for the same.

There is sufficient publication of the libelous Tagalog words. The office file of the defendant containing copies of telegrams received are open and held together only by a metal fastener. Moreover, they are open to view and inspection by third parties.

It follows that the plaintiff is entitled to damages and attorney's fees. The plaintiff is a businessman. The libelous Tagalog words must have affected his business and social standing in the community. The Court fixes the amount of P40,000.00 as the reasonable amount of moral damages and the amount of P3,000.00 as attorney's fee which the defendant should pay the plaintiff. (pp. 15-16, Record on Appeal)

The respondent appellate court in its assailed decision confirming the aforegoing findings of the lower court stated:

The proximate cause, therefore, resulting in injury to appellee, was the failure of the appellant to take the necessary or precautionary steps to avoid the occurrence of the humiliating incident now complained of. The company had not imposed any safeguard against such eventualities and this void in its operating procedure does not speak well of its concern for their clientele's interests. Negligence here is very patent. This negligence is imputable to appellant and not to its employees.

The claim that there was no publication of the libelous words in Tagalog is also without merit. The fact that a carbon copy of the telegram was filed among other telegrams and left to hang for the public to see, open for inspection by a third party is sufficient publication. It would have been otherwise perhaps had the telegram been placed and kept in a secured place where no one may have had a chance to read it without appellee's permission.

The additional Tagalog words at the bottom of the telegram are, as correctly found by the lower court, libelous per se, and from which malice may be presumed in the absence of any showing of good intention and justifiable motive on the part of the appellant. The law implies damages in this instance (Quemel vs. Court of Appeals, L-22794, January 16, 1968; 22 SCRA 44). The award of P40,000.00 as moral damages is hereby reduced to P15,000.00 and for attorney's fees the amount of P2,000.00 is awarded. (pp. 22-23, record)

After a motion for reconsideration was denied by the appellate court, petitioner came to Us with the following:

> ASSIGNMENT OF ERRORS
>
> I
>
> The Honorable Court of Appeals erred in holding that Petitioner-employer should answer directly and primarily for the civil liability arising from the criminal act of its employee.
>
> II
>
> The Honorable Court of Appeals erred in holding that there was sufficient publication of the alleged libelous telegram in question, as contemplated by law on libel.
>
> III
>
> The Honorable Court of Appeals erred in holding that the liability of petitioner-company-employer is predicated on Articles 19 and 20 of the Civil Code, Articles on Human Relations.
>
> IV
>
> The Honorable Court of Appeals erred in awarding Atty's. fees. (p. 4, Record)

Petitioner's contentions do not merit our consideration. The action for damages was filed in the lower court directly against respondent corporation not as an employer subsidiarily liable under the provisions of Article 1161 of the New Civil Code in relation to Art. 103 of the Revised Penal Code. The cause of action of the private respondent is based on Arts. 19 and 20 of the New Civil Code (supra). As well as on respondent's breach of contract thru the negligence of its own employees. [1]

Petitioner is a domestic corporation engaged in the business of receiving and transmitting messages. Everytime a person transmits a message through the facilities of the petitioner, a contract is entered into. Upon receipt of the rate or fee fixed, the petitioner undertakes to transmit the message accurately. There is no question that in the case at bar, libelous matters were included in the message transmitted, without the consent or knowledge of the sender. There is a clear case of breach of contract by the petitioner in adding extraneous and libelous matters in the message sent to the private respondent. As a corporation, the petitioner can act only through its employees. Hence the acts of its employees in receiving and transmitting messages are the acts of the petitioner. To hold that the petitioner is not liable directly for the acts of its employees in the pursuit of petitioner's business is to deprive the general public availing of the services of the petitioner of an effective and adequate remedy. In most cases, negligence must be proved in order that plaintiff may recover. However, since negligence may be hard to substantiate in some cases, we may apply the doctrine of RES IPSA LOQUITUR (the thing speaks for itself), by considering the presence of facts or circumstances surrounding the injury.

WHEREFORE, premises considered, the judgment of the appellate court is hereby AFFIRMED.

SO ORDERED.

G.R. No. 84698 February 4, 1992

PHILIPPINE SCHOOL OF BUSINESS ADMINISTRATION, JUAN D. LIM, BENJAMIN P. PAULINO, ANTONIO M. MAGTALAS, COL. PEDRO SACRO and LT. M. SORIANO, petitioners,
vs.
COURT OF APPEALS, HON. REGINA ORDOÑEZ-BENITEZ, in her capacity as Presiding Judge of Branch 47, Regional Trial Court, Manila, SEGUNDA R. BAUTISTA and ARSENIA D. BAUTISTA, respondents.

Balgos and Perez for petitioners.

Collantes, Ramirez & Associates for private respondents.

PADILLA, *J.:*

A stabbing incident on 30 August 1985 which caused the death of Carlitos Bautista while on the second-floor premises of the Philippine School of Business Administration (PSBA) prompted the parents of the deceased to file suit in the Regional Trial Court of Manila (Branch 47) presided over by Judge (now Court of Appeals justice) Regina Ordoñez-Benitez, for damages against the said PSBA and its corporate officers. At the time of his death, Carlitos was enrolled in the third year commerce course at the PSBA. It was established that his assailants were not members of the school's academic community but were elements from outside the school.

Specifically, the suit impleaded the PSBA and the following school authorities: Juan D. Lim (President), Benjamin P. Paulino (Vice-President), Antonio M. Magtalas (Treasurer/Cashier), Col. Pedro Sacro (Chief of Security) and a Lt. M. Soriano (Assistant Chief of Security). Substantially, the plaintiffs (now private respondents) sought to adjudge them liable for the victim's untimely demise due to their alleged negligence, recklessness and lack of security precautions, means and methods before, during and after the attack on the victim. During the proceedings *a quo*, Lt. M. Soriano terminated his relationship with the other petitioners by resigning from his position in the school.

Defendants *a quo* (now petitioners) sought to have the suit dismissed, alleging that since they are presumably sued under Article 2180 of the Civil Code, the complaint states no cause of action against them, as jurisprudence on the subject is to the effect that *academic institutions*, such as the PSBA, are beyond the ambit of the rule in the afore-stated article.

The respondent trial court, however, overruled petitioners' contention and thru an order dated 8 December 1987, denied their motion to dismiss. A subsequent motion for reconsideration was similarly dealt with by an order dated 25 January 1988. Petitioners then assailed the trial court's disposition before the respondent appellate court which, in a decision ***** promulgated on 10 June 1988, affirmed the trial court's orders. On 22 August 1988, the respondent appellate court resolved to deny the petitioners' motion for reconsideration. Hence, this petition.

At the outset, it is to be observed that the respondent appellate court primarily anchored its decision on the law of*quasi-delicts*, as enunciated in Articles 2176 and 2180 of the Civil Code. [1] Pertinent portions of the appellate court's now assailed ruling state:

> Article 2180 (formerly Article 1903) of the Civil Code is an adoption from the old Spanish Civil Code. The comments of Manresa and learned authorities on its meaning should give way to present day changes. The law is not fixed and flexible (*sic*); it must be dynamic. In fact, the greatest value and significance of law as a rule of conduct in (*sic*) its flexibility to adopt to changing social conditions and its capacity to meet the new challenges of progress.
>
> Construed in the light of modern day educational system, Article 2180 cannot be construed in its narrow concept as held in the old case of *Exconde vs*. *Capuno* [2] and *Mercado vs*. *Court of Appeals*; [3]hence, the ruling in the *Palisoc* [4] case that it should apply to all kinds of educational institutions, academic or vocational.
>
> At any rate, the law holds the teachers and heads of the school staff liable unless they relieve themselves of such liability pursuant to the last paragraph of Article 2180 by "proving that they observed all the diligence to prevent damage." This can only be done at a trial on the merits of the case. [5]

While we agree with the respondent appellate court that the motion to dismiss the complaint was correctly denied and the complaint should be tried on the merits, we do not however agree with the premises of the appellate court's ruling.

Article 2180, in conjunction with Article 2176 of the Civil Code, establishes the rule of *in loco parentis*. This Court discussed this doctrine in the afore-cited cases of *Exconde, Mendoza, Palisoc* and, more recently, in *Amadora vs*.*Court of Appeals*. [6] In all such cases, it had been stressed that the law (Article 2180) plainly provides that the damage should have been caused or inflicted by *pupils or students* of he educational institution sought to be held liable for the acts of its pupils or students while in its custody. However, this material situation does not exist in the present case for, as earlier indicated, the assailants of Carlitos *were not students of the PSBA,* for whose acts the school could be made liable.

However, does the appellate court's failure to consider such material facts mean the exculpation of the petitioners from liability? It does not necessarily follow.

When an academic institution accepts students for enrollment, there is established a *contract* between them, resulting in bilateral obligations which both parties are bound to comply with. [7] For its part, the school undertakes to provide the student with an education that would presumably suffice to equip him with the necessary tools and skills to pursue higher education or a profession. On the other hand, the student covenants to abide by the school's academic requirements and observe its rules and regulations.

Institutions of learning must also meet the implicit or "built-in" obligation of providing their students with an atmosphere that promotes or assists in attaining its primary undertaking of imparting knowledge. Certainly, no student can absorb the intricacies of physics or higher mathematics or explore the realm of the arts and other sciences when bullets are flying or grenades exploding in the air or where there looms around the school premises a constant threat to life and limb. Necessarily, the school must ensure that adequate steps are taken to maintain peace and order within the campus premises and to prevent the breakdown thereof.

Because the circumstances of the present case evince a contractual relation between the PSBA and Carlitos Bautista, the rules on quasi-delict do not really govern. **8** A perusal of Article 2176 shows that obligations arising from quasi-delicts or tort, also known as extra-contractual obligations, arise only between parties not otherwise bound by contract, whether express or implied. However, this

impression has not prevented this Court from determining the existence of a tort even when there obtains a contract. In *Air France vs*. *Carrascoso* (124 Phil. 722), the private respondent was awarded damages for his unwarranted expulsion from a first-class seat aboard the petitioner airline. It is noted, however, that the Court referred to the petitioner-airline's liability as one arising from tort, not one arising from a contract of carriage. In effect, *Air France*is authority for the view that liability from tort may exist even if there is a contract, for the act that breaks the contract may be also a tort. (Austro-America S.S. Co. vs. Thomas, 248 Fed. 231).

This view was not all that revolutionary, for even as early as 1918, this Court was already of a similar mind. In*Cangco vs*. *Manila Railroad* (38 Phil. 780), Mr. Justice Fisher elucidated thus:

> The field of non-contractual obligation is much broader than that of contractual obligation, comprising, as it does, the whole extent of juridical human relations. These two fields, figuratively speaking, concentric; that is to say, the mere fact that a person is bound to another by contract does not relieve him from extra-contractual liability to such person. When such a contractual relation exists the obligor may break the contract under such conditions that *the same act which constitutes a breach of the contract would have constituted the source of an extra-contractual obligation had no contract existed between the parties*.

Immediately what comes to mind is the chapter of the Civil Code on Human Relations, particularly Article 21, which provides:

> Any person who *wilfully* causes loss or injury to another in a manner *that is contrary to morals, good custom or public policy* shall compensate the latter for the damage. (emphasis supplied).

Air France penalized the racist policy of the airline which emboldened the petitioner's employee to forcibly oust the private respondent to cater to the comfort of a white man who allegedly "had a better right to the seat." In *Austro-American*, *supra*, the public embarrassment caused to the passenger was the justification for the Circuit Court of Appeals, (Second Circuit), to award damages to the latter. From the foregoing, it can be concluded that should the act which breaches a contract be done in bad faith and be violative of Article 21, then there is a cause to view the act as constituting a quasi-delict.

In the circumstances obtaining in the case at bar, however, there is, as yet, no finding that the contract between the school and Bautista had been breached thru the former's negligence in providing proper security measures. This would be for the trial court to determine. And, even if there be a finding of negligence, the same could give rise generally to a breach of contractual obligation only. Using the test of *Cangco*, *supra*, the negligence of the school would not be relevant absent a contract. In fact, that negligence becomes material only because of the contractual relation between PSBA and Bautista. In other words, a contractual relation is a condition *sine qua non*to the school's liability. The negligence of the school cannot exist independently of the contract, unless the negligence occurs under the circumstances set out in Article 21 of the Civil Code.

This Court is not unmindful of the attendant difficulties posed by the obligation of schools, above-mentioned, for conceptually a school, like a common carrier, cannot be an insurer of its students against *all* risks. This is specially true in the populous student communities of the so-called "university belt" in Manila where there have been reported several incidents ranging from gang wars to other forms of hooliganism. It would not be equitable to expect of schools to anticipate *all* types of violent trespass upon their premises, for notwithstanding the security measures installed, the same may still fail against an individual or group determined to carry out a nefarious deed inside school premises and environs. Should this be the case, the school may still avoid liability by proving that the breach of

its contractual obligation to the students was not due to its negligence, here statutorily defined to be the omission of that degree of diligence which is required by the nature of the obligation and corresponding to the circumstances of persons, time and place. [9]

As the proceedings *a quo* have yet to commence on the substance of the private respondents' complaint, the record is bereft of all the material facts. Obviously, at this stage, only the trial court can make such a determination from the evidence still to unfold.

WHEREFORE, the foregoing premises considered, the petition is DENIED. The court of origin (RTC, Manila, Br. 47) is hereby ordered to continue proceedings consistent with this ruling of the Court. Costs against the petitioners.

SO ORDERED.

G.R. No. L-12219 March 15, 1918

AMADO PICART, plaintiff-appellant,
vs.
FRANK SMITH, JR., defendant-appellee.

Alejo Mabanag for appellant.
G. E. Campbell for appellee.

STREET, *J.*:

In this action the plaintiff, Amado Picart, seeks to recover of the defendant, Frank Smith, jr., the sum of P31,000, as damages alleged to have been caused by an automobile driven by the defendant. From a judgment of the Court of First Instance of the Province of La Union absolving the defendant from liability the plaintiff has appealed.

The occurrence which gave rise to the institution of this action took place on December 12, 1912, on the Carlatan Bridge, at San Fernando, La Union. It appears that upon the occasion in question the plaintiff was riding on his pony over said bridge. Before he had gotten half way across, the defendant approached from the opposite direction in an automobile, going at the rate of about ten or twelve miles per hour. As the defendant neared the bridge he saw a horseman on it and blew his horn to give warning of his approach. He continued his course and after he had taken the bridge he gave two more successive blasts, as it appeared to him that the man on horseback before him was not observing the rule of the road.

The plaintiff, it appears, saw the automobile coming and heard the warning signals. However, being perturbed by the novelty of the apparition or the rapidity of the approach, he pulled the pony closely up against the railing on the right side of the bridge instead of going to the left. He says that the reason he did this was that he thought he did not have sufficient time to get over to the other side. The bridge is shown to have a length of about 75 meters and a width of 4.80 meters. As the automobile approached, the defendant guided it

toward his left, that being the proper side of the road for the machine. In so doing the defendant assumed that the horseman would move to the other side. The pony had not as yet exhibited fright, and the rider had made no sign for the automobile to stop. Seeing that the pony was apparently quiet, the defendant, instead of veering to the right while yet some distance away or slowing down, continued to approach directly toward the horse without diminution of speed. When he had gotten quite near, there being then no possibility of the horse getting across to the other side, the defendant quickly turned his car sufficiently to the right to escape hitting the horse alongside of the railing where it as then standing; but in so doing the automobile passed in such close proximity to the animal that it became frightened and turned its body across the bridge with its head toward the railing. In so doing, it as struck on the hock of the left hind leg by the flange of the car and the limb was broken. The horse fell and its rider was thrown off with some violence. From the evidence adduced in the case we believe that when the accident occurred the free space where the pony stood between the automobile and the railing of the bridge was probably less than one and one half meters. As a result of its injuries the horse died. The plaintiff received contusions which caused temporary unconsciousness and required medical attention for several days.

The question presented for decision is whether or not the defendant in maneuvering his car in the manner above described was guilty of negligence such as gives rise to a civil obligation to repair the damage done; and we are of the opinion that he is so liable. As the defendant started across the bridge, he had the right to assume that the horse and the rider would pass over to the proper side; but as he moved toward the center of the bridge it was demonstrated to his eyes that this would not be done; and he must in a moment have perceived that it was too late for the horse to cross with safety in front of the moving vehicle. In the nature of things this change of situation occurred while the automobile was yet some distance away; and from this moment it was not longer within the power of the plaintiff to escape being run down by going to a place of greater safety. The control of the situation had then passed entirely to the defendant; and it was his duty either to bring his car to an immediate stop or, seeing that there were no other persons on the bridge, to take the other side and pass sufficiently far away from the horse to avoid the danger of collision. Instead of doing this, the defendant ran straight on until he was almost upon the horse. He was, we think, deceived into doing this by the fact that the horse had not yet exhibited fright. But in view of the known nature of horses, there was an appreciable risk that, if the animal in question was unacquainted with automobiles, he might get exited and jump under the conditions which here confronted him. When the defendant exposed the horse and rider to this danger he was, in our opinion, negligent in the eye of the law.

The test by which to determine the existence of negligence in a particular case may be stated as follows: Did the defendant in doing the alleged negligent act use that person would have used in the same situation? If not, then he is guilty of negligence. The law here in effect adopts the standard supposed to be supplied by the imaginary conduct of the discreet paterfamilias of the Roman law. The existence of negligence in a given case is not determined by reference to the personal judgment of the actor in the situation before him. The law considers what would be reckless, blameworthy, or negligent in the man of ordinary intelligence and prudence and determines liability by that.

The question as to what would constitute the conduct of a prudent man in a given situation must of course be always determined in the light of human experience and in view of the facts involved in the particular case. Abstract speculations cannot here be of much value but this much can be profitably said: Reasonable men govern their conduct by the circumstances which are before them or known to them. They are not, and are not supposed to be, omniscient of the future. Hence they can be expected to take care only when there is something before them to suggest or warn of danger. Could a prudent man, in the case under consideration, foresee harm as a result of the course actually pursued? If so, it was the duty of the actor to take precautions to guard against that harm. Reasonable foresight of harm, followed by ignoring of the suggestion born of this prevision, is always necessary before negligence can be held to exist. Stated in these terms, the proper

criterion for determining the existence of negligence in a given case is this: Conduct is said to be negligent when a prudent man in the position of the tortfeasor would have foreseen that an effect harmful to another was sufficiently probable to warrant his foregoing conduct or guarding against its consequences.

Applying this test to the conduct of the defendant in the present case we think that negligence is clearly established. A prudent man, placed in the position of the defendant, would in our opinion, have recognized that the course which he was pursuing was fraught with risk, and would therefore have foreseen harm to the horse and the rider as reasonable consequence of that course. Under these circumstances the law imposed on the defendant the duty to guard against the threatened harm.

It goes without saying that the plaintiff himself was not free from fault, for he was guilty of antecedent negligence in planting himself on the wrong side of the road. But as we have already stated, the defendant was also negligent; and in such case the problem always is to discover which agent is immediately and directly responsible. It will be noted that the negligent acts of the two parties were not contemporaneous, since the negligence of the defendant succeeded the negligence of the plaintiff by an appreciable interval. Under these circumstances the law is that the person who has the last fair chance to avoid the impending harm and fails to do so is chargeable with the consequences, without reference to the prior negligence of the other party.

The decision in the case of Rkes vs. Atlantic, Gulf and Pacific Co. (7 Phil. Rep., 359) should perhaps be mentioned in this connection. This Court there held that while contributory negligence on the part of the person injured did not constitute a bar to recovery, it could be received in evidence to reduce the damages which would otherwise have been assessed wholly against the other party. The defendant company had there employed the plaintiff, as a laborer, to assist in transporting iron rails from a barge in Manila harbor to the company's yards located not far away. The rails were conveyed upon cars which were hauled along a narrow track. At certain spot near the water's edge the track gave way by reason of the combined effect of the weight of the car and the insecurity of the road bed. The car was in consequence upset; the rails slid off; and the plaintiff's leg was caught and broken. It appeared in evidence that the accident was due to the effects of the typhoon which had dislodged one of the supports of the track. The court found that the defendant company was negligent in having failed to repair the bed of the track and also that the plaintiff was, at the moment of the accident, guilty of contributory negligence in walking at the side of the car instead of being in front or behind. It was held that while the defendant was liable to the plaintiff by reason of its negligence in having failed to keep the track in proper repair nevertheless the amount of the damages should be reduced on account of the contributory negligence in the plaintiff. As will be seen the defendant's negligence in that case consisted in an omission only. The liability of the company arose from its responsibility for the dangerous condition of its track. In a case like the one now before us, where the defendant was actually present and operating the automobile which caused the damage, we do not feel constrained to attempt to weigh the negligence of the respective parties in order to apportion the damage according to the degree of their relative fault. It is enough to say that the negligence of the defendant was in this case the immediate and determining cause of the accident and that the antecedent negligence of the plaintiff was a more remote factor in the case.

A point of minor importance in the case is indicated in the special defense pleaded in the defendant's answer, to the effect that the subject matter of the action had been previously adjudicated in the court of a justice of the peace. In this connection it appears that soon after the accident in question occurred, the plaintiff caused criminal proceedings to be instituted before a justice of the peace charging the defendant with the infliction of serious injuries (lesiones graves). At the preliminary investigation the defendant was discharged by the magistrate and the proceedings were dismissed. Conceding that the acquittal of the defendant at the trial upon the merits in a criminal prosecution for the offense mentioned would be res adjudicata upon the question of his civil liability arising from negligence -- a point upon which it is unnecessary to express an

opinion -- the action of the justice of the peace in dismissing the criminal proceeding upon the preliminary hearing can have no effect. (See U. S. vs. Banzuela and Banzuela, 31 Phil. Rep., 564.)

From what has been said it results that the judgment of the lower court must be reversed, and judgment is her rendered that the plaintiff recover of the defendant the sum of two hundred pesos (P200), with costs of other instances. The sum here awarded is estimated to include the value of the horse, medical expenses of the plaintiff, the loss or damage occasioned to articles of his apparel, and lawful interest on the whole to the date of this recovery. The other damages claimed by the plaintiff are remote or otherwise of such character as not to be recoverable. So ordered.

G.R. No. 121413 January 29, 2001

PHILIPPINE COMMERCIAL INTERNATIONAL BANK (formerly INSULAR BANK OF ASIA AND AMERICA),petitioner,
vs.
COURT OF APPEALS and FORD PHILIPPINES, INC. and CITIBANK, N.A., respondents.

G.R. No. 121479 January 29, 2001

FORD PHILIPPINES, INC., petitioner-plaintiff,
vs.
COURT OF APPEALS and CITIBANK, N.A. and PHILIPPINE COMMERCIAL INTERNATIONAL BANK,respondents.

G.R. No. 128604 January 29, 2001

FORD PHILIPPINES, INC., petitioner,
vs.
CITIBANK, N.A., PHILIPPINE COMMERCIAL INTERNATIONAL BANK and COURT OF APPEALS, respondents.

QUISUMBING, *J.*:

These consolidated petitions involve several fraudulently negotiated checks.

The original actions *a quo* were instituted by Ford Philippines to recover from the drawee bank, CITIBANK, N.A. (Citibank) and collecting bank, Philippine Commercial International Bank (PCIBank) [formerly Insular Bank of Asia and America], the value of several checks payable to the Commissioner of Internal Revenue, which were embezzled allegedly by an organized syndicate.

G.R. Nos. 121413 and 121479 are twin petitions for review of the March 27, 1995 Decision[1] of the Court of Appeals in CA-G.R. CV No. 25017, entitled "Ford Philippines, Inc. vs. Citibank, N.A. and Insular Bank of Asia and

America (now Philipppine Commercial International Bank), and the August 8, 1995 Resolution,[2] ordering the collecting bank, Philippine Commercial International Bank, to pay the amount of Citibank Check No. SN-04867.

In G.R. No. 128604, petitioner Ford Philippines assails the October 15, 1996 Decision[3] of the Court of Appeals and its March 5, 1997 Resolution[4] in CA-G.R. No. 28430 entitled "Ford Philippines, Inc. vs. Citibank, N.A. and Philippine Commercial International Bank," affirming *in toto* the judgment of the trial court holding the defendant drawee bank, Citibank, N.A., solely liable to pay the amount of P12,163,298.10 as damages for the misapplied proceeds of the plaintiff's Citibanl Check Numbers SN-10597 and 16508.*1âwphi1.nêt*

I. G.R. Nos. 121413 and 121479

The stipulated facts submitted by the parties as accepted by the Court of Appeals are as follows:

> "On October 19, 1977, the plaintiff Ford drew and issued its Citibank Check No. SN-04867 in the amount of P4,746,114.41, in favor of the Commissioner of Internal Revenue as payment of plaintiff;s percentage or manufacturer's sales taxes for the third quarter of 1977.
>
> The aforesaid check was deposited with the degendant IBAA (now PCIBank) and was subsequently cleared at the Central Bank. Upon presentment with the defendant Citibank, the proceeds of the check was paid to IBAA as collecting or depository bank.
>
> The proceeds of the same Citibank check of the plaintiff was never paid to or received by the payee thereof, the Commissioner of Internal Revenue.
>
> As a consequence, upon demand of the Bureau and/or Commissioner of Internal Revenue, the plaintiff was compelled to make a second payment to the Bureau of Internal Revenue of its percentage/manufacturers' sales taxes for the third quarter of 1977 and that said second payment of plaintiff in the amount of P4,746,114.41 was duly received by the Bureau of Internal Revenue.
>
> It is further admitted by defendant Citibank that during the time of the transactions in question, plaintiff had been maintaining a checking account with defendant Citibank; that Citibank Check No. SN-04867 which was drawn and issued by the plaintiff in favor of the Commissioner of Internal Revenue was a crossed check in that, on its face were two parallel lines and written in between said lines was the phrase "Payee's Account Only"; and that defendant Citibank paid the full face value of the check in the amount of P4,746,114.41 to the defendant IBAA.
>
> It has been duly established that for the payment of plaintiff's percentage tax for the last quarter of 1977, the Bureau of Internal Revenue issued Revenue Tax Receipt No. 18747002, dated October 20, 1977, designating therein in Muntinlupa, Metro Manila, as the authorized agent bank of Metrobanl, Alabang branch to receive the tax payment of the plaintiff.
>
> On December 19, 1977, plaintiff's Citibank Check No. SN-04867, together with the Revenue Tax Receipt No. 18747002, was deposited with defendant IBAA, through its Ermita Branch. The latter accepted the check and sent it to the Central Clearing House for clearing on the samd day, with the indorsement at the back "all prior indorsements and/or lack of indorsements guaranteed." Thereafter, defendant IBAA presented the check for payment to defendant Citibank on same date, December 19, 1977, and the latter paid the face value of the check in the amount of P4,746,114.41. Consequently, the amount of P4,746,114.41 was debited in plaintiff's account with the defendant Citibank and the check was returned to the plaintiff.

Upon verification, plaintiff discovered that its Citibank Check No. SN-04867 in the amount of P4,746,114.41 was not paid to the Commissioner of Internal Revenue. Hence, in separate letters dated October 26, 1979, addressed to the defendants, the plaintiff notified the latter that in case it will be re-assessed by the BIR for the payment of the taxes covered by the said checks, then plaintiff shall hold the defendants liable for reimbursement of the face value of the same. Both defendants denied liability and refused to pay.

In a letter dated February 28, 1980 by the Acting Commissioner of Internal Revenue addressed to the plaintiff - supposed to be Exhibit "D", the latter was officially informed, among others, that its check in the amount of P4, 746,114.41 was not paid to the government or its authorized agent and instead encashed by unauthorized persons, hence, plaintiff has to pay the said amount within fifteen days from receipt of the letter. Upon advice of the plaintiff's lawyers, plaintiff on March 11, 1982, paid to the Bureau of Internal Revenue, the amount of P4,746,114.41, representing payment of plaintiff's percentage tax for the third quarter of 1977.

As a consequence of defendant's refusal to reimburse plaintiff of the payment it had made for the second time to the BIR of its percentage taxes, plaintiff filed on January 20, 1983 its original complaint before this Court.

On December 24, 1985, defendant IBAA was merged with the Philippine Commercial International Bank (PCI Bank) with the latter as the surviving entity.

Defendant Citibank maintains that; the payment it made of plaintiff's Citibank Check No. SN-04867 in the amount of P4,746,114.41 "was in due course"; it merely relied on the clearing stamp of the depository/collecting bank, the defendant IBAA that "all prior indorsements and/or lack of indorsements guaranteed"; and the proximate cause of plaintiff's injury is the gross negligence of defendant IBAA in indorsing the plaintiff's Citibank check in question.

It is admitted that on December 19, 1977 when the proceeds of plaintiff's Citibank Check No. SN-048867 was paid to defendant IBAA as collecting bank, plaintiff was maintaining a checking account with defendant Citibank."[5]

Although it was not among the stipulated facts, an investigation by the National Bureau of Investigation (NBI) revealed that Citibank Check No. SN-04867 was recalled by Godofredo Rivera, the General Ledger Accountant of Ford. He purportedly needed to hold back the check because there was an error in the computation of the tax due to the Bureau of Internal Revenue (BIR). With Rivera's instruction, PCIBank replaced the check with two of its own Manager's Checks (MCs). Alleged members of a syndicate later deposited the two MCs with the Pacific Banking Corporation.

Ford, with leave of court, filed a third-party complaint before the trial court impleading Pacific Banking Corporation (PBC) and Godofredo Rivera, as third party defendants. But the court dismissed the complaint against PBC for lack of cause of action. The course likewise dismissed the third-party complaint against Godofredo Rivera because he could not be served with summons as the NBI declared him as a "fugitive from justice".

On June 15, 1989, the trial court rendered its decision, as follows:

"Premises considered, judgment is hereby rendered as follows:

"1. Ordering the defendants Citibank and IBAA (now PCI Bank), jointly and severally, to pay the plaintiff the amount of P4,746,114.41 representing the face value of plaintiff's Citibank Check No. SN-04867, with interest thereon at the legal rate starting January 20, 1983, the date when the original complaint was filed until the amount is fully paid, plus costs;

"2. On defendant Citibank's cross-claim: ordering the cross-defendant IBAA (now PCI Bank) to reimburse defendant Citibank for whatever amount the latter has paid or may pay to the plaintiff in accordance with next preceding paragraph;

"3. The counterclaims asserted by the defendants against the plaintiff, as well as that asserted by the cross-defendant against the cross-claimant are dismissed, for lack of merits; and

"4. With costs against the defendants.

SO ORDERED."[6]

Not satisfied with the said decision, both defendants, Citibank and PCIBank, elevated their respective petitions for review on certiorari to the Courts of Appeals. On March 27, 1995, the appellate court issued its judgment as follows:

"WHEREFORE, in view of the foregoing, the court AFFIRMS the appealed decision with modifications.

The court hereby renderes judgment:

1. **Dismissing** the complaint in Civil Case No. 49287 insofar as defendant Citibank N.A. is concerned;

2. **Ordering** the defendant IBAA now PCI Bank to pay the plaintiff the amount of P4,746,114.41 representing the face value of plaintiff's Citibank Check No. SN-04867, with interest thereon at the legal rate starting January 20, 1983, the date when the original complaint was filed until the amount is fully paid;

3. Dismissing the counterclaims asserted by the defendants against the plaintiff as well as that asserted by the cross-defendant against the cross-claimant, for lack of merits.

Costs against the defendant IBAA (now PCI Bank).

IT IS SO ORDERED."[7]

PCI Bank moved to reconsider the above-quoted decision of the Court of Appeals, while Ford filed a "Motion for Partial Reconsideration." Both motions were denied for lack of merit.

Separately, PCIBank and Ford filed before this Court, petitions for review by certiorari under Rule 45.

In G.R. No. 121413, PCIBank seeks the reversal of the decision and resolution of the Twelfth Division of the Court of Appeals contending that it merely acted on the instruction of Ford and such casue of action had already prescribed.

PCIBank sets forth the following issues for consideration:

I. Did the respondent court err when, after finding that the petitioner acted on the check drawn by respondent Ford on the said respondent's instructions, it nevertheless found the petitioner liable to the said respondent for the full amount of the said check.

II. Did the respondent court err when it did not find prescription in favor of the petitioner.[8]

In a counter move, Ford filed its petition docketed as G.R. No. 121479, questioning the same decision and resolution of the Court of Appeals, and praying for the reinstatement *in toto* of the decision of the trial court which found both PCIBank and Citibank jointly and severally liable for the loss.

In G.R. No. 121479, appellant Ford presents the following propositions for consideration:

I. Respondent Citibank is liable to petitioner Ford considering that:

1. As drawee bank, respondent Citibank owes to petitioner Ford, as the drawer of the subject check and a depositor of respondent Citibank, an absolute and contractual duty to pay the proceeds of the subject check only to the payee thereof, the Commissioner of Internal Revenue.

2. Respondent Citibank failed to observe its duty as banker with respect to the subject check, which was crossed and payable to "Payee's Account Only."

3. Respondent Citibank raises an issue for the first time on appeal; thus the same should not be considered by the Honorable Court.

4. As correctly held by the trial court, there is no evidence of gross negligence on the part of petitioner Ford.[9]

II. PCI Bank is liable to petitioner Ford considering that:

1. There were no instructions from petitioner Ford to deliver the proceeds of the subject check to a person other than the payee named therein, the Commissioner of the Bureau of Internal Revenue; thus, PCIBank's only obligation is to deliver the proceeds to the Commissioner of the Bureau of Internal Revenue.[10]

2. PCIBank which affixed its indorsement on the subject check ("All prior indorsement and/or lack of indorsement guaranteed"), is liable as collecting bank.[11]

3. PCIBank is barred from raising issues of fact in the instant proceedings.[12]

4. Petitioner Ford's cause of action had not prescribed.[13]

II. G.R. No. 128604

The same sysndicate apparently embezzled the proceeds of checks intended, this time, to settle Ford's percentage taxes appertaining to the second quarter of 1978 and the first quarter of 1979.

The facts as narrated by the Court of Appeals are as follows:

Ford drew Citibank Check No. SN-10597 on July 19, 1978 in the amount of P5,851,706.37 representing the percentage tax due for the second quarter of 1978 payable to the Commissioner of Internal Revenue. A BIR Revenue Tax Receipt No. 28645385 was issued for the said purpose.

On April 20, 1979, Ford drew another Citibank Check No. SN-16508 in the amount of P6,311,591.73, representing the payment of percentage tax for the first quarter of 1979 and payable to the Commissioner of Internal Revenue. Again a BIR Revenue Tax Receipt No. A-1697160 was issued for the said purpose.

Both checks were "crossed checks" and contain two diagonal lines on its upper corner between, which were written the words "payable to the payee's account only."

The checks never reached the payee, CIR. Thus, in a letter dated February 28, 1980, the BIR, Region 4-B, demanded for the said tax payments the corresponding periods above-mentioned.

As far as the BIR is concernced, the said two BIR Revenue Tax Receipts were considered "fake and spurious". This anomaly was confirmed by the NBI upon the initiative of the BIR. The findings forced Ford to pay the BIR a new, while an action was filed against Citibank and PCIBank for the recovery of the amount of Citibank Check Numbers SN-10597 and 16508.

The Regional Trial Court of Makati, Branch 57, which tried the case, made its findings on the *modus operandi* of the syndicate, as follows:

> "A certain Mr. Godofredo Rivera was employed by the plaintiff FORD as its General Ledger Accountant. As such, he prepared the plaintiff's check marked Ex. 'A' [Citibank Check No. Sn-10597] for payment to the BIR. Instead, however, fo delivering the same of the payee, he passed on the check to a co-conspirator named Remberto Castro who was a pro-manager of the San Andres Branch of PCIB.* In connivance with one Winston Dulay, Castro himself subsequently opened a Checking Account in the name of a fictitious person denominated as 'Reynaldo reyes' in the Meralco Branch of PCIBank where Dulay works as Assistant Manager.
>
> After an initial deposit of P100.00 to validate the account, Castro deposited a worthless Bank of America Check in exactly the same amount as the first FORD check (Exh. "A", P5,851,706.37) while this worthless check was coursed through PCIB's main office enroute to the Central Bank for clearing, replaced this worthless check with FORD's Exhibit 'A' and accordingly tampered the accompanying documents to cover the replacement. As a result, Exhibit 'A' was cleared by defendant CITIBANK, and the fictitious deposit account of 'Reynaldo Reyes' was credited at the PCIB Meralco Branch with the total amount of the FORD check Exhibit 'A'. The same method was again utilized by the syndicate in profiting from Exh. 'B' [Citibank Check No. SN-16508] which was subsequently pilfered by Alexis Marindo, Rivera's Assistant at FORD.
>
> From this 'Reynaldo Reyes' account, Castro drew various checks distributing the sahres of the other participating conspirators namely (1) CRISANTO BERNABE, the mastermind who formulated the method for the embezzlement; (2) RODOLFO R. DE LEON a customs broker who negotiated the initial contact between Bernabe, FORD's Godofredo Rivera and PCIB's Remberto Castro; (3) JUAN VASTILLO who assisted de Leon in the initial arrangements; (4) GODOFREDO RIVERA, FORD's accountant who passed on the first check (Exhibit "A") to Castro; (5) REMERTO CASTRO, PCIB's pro-manager at San Andres who performed the switching of checks in the clearing process and opened the fictitious Reynaldo Reyes account at the PCIB Meralco Branch; (6) WINSTON DULAY, PCIB's Assistant Manager at its Meralco Branch, who assisted Castro in switching the checks in the clearing process and facilitated

the opening of the fictitious Reynaldo Reyes' bank account; (7) ALEXIS MARINDO, Rivera's Assistant at FORD, who gave the second check (Exh. "B") to Castro; (8) ELEUTERIO JIMENEZ, BIR Collection Agent who provided the fake and spurious revenue tax receipts to make it appear that the BIR had received FORD's tax payments.

Several other persons and entities were utilized by the syndicate as conduits in the disbursements of the proceeds of the two checks, but like the aforementioned participants in the conspiracy, have not been impleaded in the present case. The manner by which the said funds were distributed among them are traceable from the record of checks drawn against the original "Reynaldo Reyes" account and indubitably identify the parties who illegally benefited therefrom and readily indicate in what amounts they did so."[14]

On December 9, 1988, Regional Trial Court of Makati, Branch 57, held drawee-bank, Citibank, liable for the value of the two checks while adsolving PCIBank from any liability, disposing as follows:

"WHEREFORE, judgment is hereby rendered sentencing defendant CITIBANK to reimburse plaintiff FORD the total amount of P12,163,298.10 prayed for in its complaint, with 6% interest thereon from date of first written demand until full payment, plus P300,000.00 attorney's fees and expenses litigation, and to pay the defendant, PCIB (on its counterclaim to crossclaim) the sum of P300,000.00 as attorney's fees and costs of litigation, and pay the costs.

SO ORDERED."[15]

Both Ford and Citibank appealed to the Court of Appeals which affirmed, *in toto*, the decision of the trial court. Hence, this petition.

Petitioner Ford prays that judgment be rendered setting aside the portion of the Court of Appeals decision and its resolution dated March 5, 1997, with respect to the dismissal of the complaint against PCIBank and holding Citibank solely responsible for the proceeds of Citibank Check Numbers SN-10597 and 16508 for P5,851,706.73 and P6,311,591.73 respectively.

Ford avers that the Court of Appeals erred in dismissing the complaint against defendant PCIBank considering that:

I. Defendant PCIBank was clearly negligent when it failed to exercise the diligence required to be exercised by it as a banking insitution.

II. Defendant PCIBank clearly failed to observe the diligence required in the selection and supervision of its officers and employees.

III. Defendant PCIBank was, due to its negligence, clearly liable for the loss or damage resulting to the plaintiff Ford as a consequence of the substitution of the check consistent with Section 5 of Central Bank Circular No. 580 series of 1977.

IV. Assuming *arguedo* that defedant PCIBank did not accept, endorse or negotiate in due course the subject checks, it is liable, under Article 2154 of the Civil Code, to return the money which it admits having received, and which was credited to it its Central bank account.[16]

The main issue presented for our consideration by these petitions could be simplified as follows: Has petitioner Ford the right to recover from the collecting bank (PCIBank) and the drawee bank (Citibank) the value of the checks intended as payment to the Commissioner of Internal Revenue? Or has Ford's cause of action already prescribed?

Note that in these cases, the checks were drawn against the drawee bank, but the title of the person negotiating the same was allegedly defective because the instrument was obtained by fraud and unlawful means, and the proceeds of the checks were not remitted to the payee. It was established that instead of paying the checks to the CIR, for the settlement of the approprite quarterly percentage taxes of Ford, the checks were diverted and encashed for the eventual distribution among the mmbers of the syndicate. As to the unlawful negotiation of the check the applicable law is Section 55 of the Negotiable Instruments Law (NIL), which provides:

> "When title defective -- The title of a person who negotiates an instrument is defective within the meaning of this Act when he obtained the instrument, or any signature thereto, by fraud, duress, or fore and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as amount to a fraud."

Pursuant to this provision, it is vital to show that the negotiation is made by the perpetator in breach of faith amounting to fraud. The person negotiating the checks must have gone beyond the authority given by his principal. If the principal could prove that there was no negligence in the performance of his duties, he may set up the personal defense to escape liability and recover from other parties who. Though their own negligence, alowed the commission of the crime.

In this case, we note that the direct perpetrators of the offense, namely the embezzlers belonging to a syndicate, are now fugitives from justice. They have, even if temporarily, escaped liability for the embezzlement of millions of pesos. We are thus left only with the task of determining who of the present parties before us must bear the burden of loss of these millions. It all boils down to thequestion of liability based on the degree of negligence among the parties concerned.

Foremost, we must resolve whether the injured party, Ford, is guilty of the "imputed contributory negligence" that would defeat its claim for reimbursement, bearing ing mind that its employees, Godofredo Rivera and Alexis Marindo, were among the members of the syndicate.

Citibank points out that Ford allowed its very own employee, Godofredo Rivera, to negotiate the checks to his co-conspirators, instead of delivering them to the designated authorized collecting bank (Metrobank-Alabang) of the payee, CIR. Citibank bewails the fact that Ford was remiss in the supervision and control of its own employees, inasmuch as it only discovered the syndicate's activities through the information given by the payee of the checks after an unreasonable period of time.

PCIBank also blames Ford of negligence when it allegedly authorized Godofredo Rivera to divert the proceeds of Citibank Check No. SN-04867, instead of using it to pay the BIR. As to the subsequent run-around of unds of Citibank Check Nos. SN-10597 and 16508, PCIBank claims that the proximate cause of the damge to Ford lies in its own officers and employees who carried out the fradulent schemes and the transactions. These circumstances were not checked by other officers of the company including its comptroller or internal auditor. PCIBank contends that the inaction of Ford despite the enormity of the amount involved was a sheer negligence and stated that, as between two innocent persons, one of whom must suffer the consequences of a breach of trust, the one who made it possible, by his act of negligence, must bear the loss.

For its part, Ford denies any negligence in the performance of its duties. It avers that there was no evidence presented before the trial court showing lack of diligence on the part of Ford. And, citing the case of *Gempesaw vs. Court of Appeals,*[17] Ford argues that even if there was a finding therein that the drawer was negligent, the drawee bank was still ordered to pay damages.

Furthermore, Ford contends the Godofredo rivera was not authorized to make any representation in its behalf, specifically, to divert the proceeds of the checks. It adds that Citibank raised the issue of imputed negligence against Ford for the first time on appeal. Thus, it should not be considered by this Court.

On this point, jurisprudence regarding the imputed negligence of employer in a master-servant relationship is instructive. Since a master may be held for his servant's wrongful act, the law imputes to the master the act of the servant, and if that act is negligent or wrongful and proximately results in injury to a third person, the negligence or wrongful conduct is the negligence or wrongful conduct of the master, for which he is liable.[18] The general rule is that if the master is injured by the negligence of a third person and by the concuring contributory negligence of his own servant or agent, the latter's negligence is imputed to his superior and will defeat the superior's action against the third person, asuming, of course that the contributory negligence was the **proximate cause** of the injury of which complaint is made.[19]

Accordingly, we need to determine whether or not the action of Godofredo Rivera, Ford's General Ledger Accountant, and/or Alexis Marindo, his assistant, was the proximate cause of the loss or damage. AS defined, proximate cause is that which, in the natural and continuous sequence, unbroken by any efficient, intervening cause produces the injury and without the result would not have occurred.[20]

It appears that although the employees of Ford initiated the transactions attributable to an organized syndicate, in our view, their actions were not the proximate cause of encashing the checks payable to the CIR. The degree of Ford's negligence, if any, could not be characterized as the proximate cause of the injury to the parties.

The Board of Directors of Ford, we note, did not confirm the request of Godofredo Rivera to recall Citibank Check No. SN-04867. Rivera's instruction to replace the said check with PCIBank's Manager's Check was not in theordinary course of business which could have prompted PCIBank to validate the same.

As to the preparation of Citibank Checks Nos. SN-10597 and 16508, it was established that these checks were made payable to the CIR. Both were crossed checks. These checks were apparently turned around by Ford's emploees, who were acting on their own personal capacity.

Given these circumstances, the mere fact that the forgery was committed by a drawer-payor's confidential employee or agent, who by virtue of his position had unusual facilities for perpertrating the fraud and imposing the forged paper upon the bank, does notentitle the bank toshift the loss to the drawer-payor, in the absence of some circumstance raising estoppel against the drawer.[21] This rule likewise applies to the checks fraudulently negotiated or diverted by the confidential employees who hold them in their possession.

With respect to the negligence of PCIBank in the payment of the three checks involved, separately, the trial courts found variations between the negotiation of Citibank Check No. SN-04867 and the misapplication of total proceeds of Checks SN-10597 and 16508. Therefore, we have to scrutinize, separately, PCIBank's share of negligence when the syndicate achieved its ultimate agenda of stealing the proceeds of these checks.

G.R. Nos. 121413 and 121479

Citibank Check No. SN-04867 was deposited at PCIBank through its Ermita Branch. It was coursed through the ordinary banking transaction, sent to Central Clearing with the indorsement at the back "all prior indorsements and/or lack of indorsements guaranteed," and was presented to Citibank for payment. Thereafter PCIBank, instead of remitting the proceeds to the CIR, prepared two of its Manager's checks and enabled the syndicate to encash the same.

On record, PCIBank failed to verify the authority of Mr. Rivera to negotiate the checks. The neglect of PCIBank employees to verify whether his letter requesting for the replacement of the Citibank Check No. SN-04867 was duly authorized, showed lack of care and prudence required in the circumstances.

Furthermore, it was admitted that PCIBank is authorized to collect the payment of taxpayers in behalf of the BIR. As an agent of BIR, PCIBank is duty bound to consult its principal regarding the unwarranted instructions given by the payor or its agent. As aptly stated by the trial court, to wit:

> "xxx. Since the questioned crossed check was deposited with IBAA [now PCIBank], which claimed to be a depository/collecting bank of BIR, it has the responsibility to make sure that the check in question is deposited in Payee's account only.
>
> xxx xxx xxx
>
> As agent of the BIR (the payee of the check), defendant IBAA should receive instructions only from its principal BIR and not from any other person especially so when that person is not known to the defendant. It is very imprudent on the part of the defendant IBAA to just rely on the alleged telephone call of the one Godofredo Rivera and in his signature considering that the plaintiff is not a client of the defendant IBAA."

It is a well-settled rule that the relationship between the payee or holder of commercial paper and the bank to which it is sent for collection is, in the absence of an agreement to the contrary, that of principal and agent.[22] A bank which receives such paper for collection is the agent of the payee or holder.[23]

Even considering *arguendo,* that the diversion of the amount of a check payable to the collecting bank in behalf of the designated payee may be allowed, still such diversion must be properly authorized by the payor. Otherwise stated, the diversion can be justified only by proof of authority from the drawer, or that the drawer has clothed his agent with apparent authority to receive the proceeds of such check.

Citibank further argues that PCI Bank's clearing stamp appearing at the back of the questioned checks stating that ALL PRIOR INDORSEMENTS AND/OR LACK OF INDORSEMENTS GURANTEED should render PCIBank liable because it made it pass through the clearing house and therefore Citibank had no other option but to pay it. Thus, Citibank had no other option but to pay it. Thus, Citibank assets that the proximate cause of Ford's injury is the gross negligence of PCIBank. Since the questione dcrossed check was deposited with PCIBank, which claimed to be a depository/collecting bank of the BIR, it had the responsibility to make sure that the check in questions is deposited in Payee's account only.

Indeed, the crossing of the check with the phrase "Payee's Account Only," is a warning that the check should be deposited only in the account of the CIR. Thus, it is the duty of the collecting bank PCIBank to ascertain that the check be deposited in payee's account only. Therefore, it is the collecting bank (PCIBank) which is bound to scruninize the check and to know its depositors before it could make the clearing indorsement "all prior indorsements and/or lack of indorsement guaranteed".

In *Banco de Oro Savings and Mortgage Bank vs. Equitable Banking Corporation,*[24] we ruled:

> "Anent petitioner's liability on said instruments, this court is in full accord with the ruling of the PCHC's Board of Directors that:
>
> 'In presenting the checks for clearing and for payment, the defendant made an express guarantee on the validity of "all prior endorsements." Thus, stamped at the back of the checks are the defedant's clear warranty: ALL PRIOR ENDORSEMENTS AND/OR LACK OF ENDORSEMENTS GUARANTEED. Without such warranty, plaintiff would not have paid on the checks.'
>
> No amount of legal jargon can reverse the clear meaning of defendant's warranty. As the warranty has proven to be false and inaccurate, the defendant is liable for any damage arising out of the falsity of its representation."[25]

Lastly, banking business requires that the one who first cashes and negotiates the check must take some percautions to learn whether or not it is genuine. And if the one cashing the check through indifference or othe circumstance assists the forger in committing the fraud, he should not be permitted to retain the proceeds of the check from the drawee whose sole fault was that it did not discover the forgery or the defect in the title of the person negotiating the instrument before paying the check. For this reason, a bank which cashes a check drawn upon another bank, without requiring proof as to the identity of persons presenting it, or making inquiries with regard to them, cannot hold the proceeds against the drawee when the proceeds of the checks were afterwards diverted to the hands of a third party. In such cases the drawee bank has a right to believe that the cashing bank (or the collecting bank) had, by the usual proper investigation, satisfied itself of the authenticity of the negotiation of the checks. Thus, one who encashed a check which had been forged or diverted and in turn received payment thereon from the drawee, is guilty of negligence which proximately contributed to the success of the fraud practiced on the drawee bank. The latter may recover from the holder the money paid on the check.[26]

Having established that the collecting bank's negligence is the proximate cause of the loss, we conclude that PCIBank is liable in the amount corresponding to the proceeds of Citibank Check No. SN-04867.

G.R. No. 128604

The trial court and the Court of Appeals found that PCIBank had no official act in the ordinary course of business that would attribute to it the case of the embezzlement of Citibank Check Numbers SN-10597 and 16508, because PCIBank did not actually receive nor hold the two Ford checks at all. The trial court held, thus:

> "Neither is there any proof that defendant PCIBank contributed any official or conscious participation in the process of the embezzlement. This Court is convinced that the switching operation (involving the checks while in transit for "clearing") were the clandestine or hidden actuations performed by the members of the syndicate in their own personl, covert and private capacity and done without the knowledge of the defendant PCIBank…"[27]

In this case, there was no evidence presented confirming the conscious particiapation of PCIBank in the embezzlement. As a general rule, however, a banking corporation is liable for the wrongful or tortuous acts and declarations of its officers or agents within the course and scope of their employment.[28] A bank will be held liable for the negligence of its officers or agents when acting within the course and scope of their employment. It may be liable for the tortuous acts of its officers even as regards that species of tort of which

malice is an essential element. In this case, we find a situation where the PCIBank appears also to be the victim of the scheme hatched by a syndicate in which its own management employees had particiapted.

The pro-manager of San Andres Branch of PCIBank, Remberto Castro, received Citibank Check Numbers SN-10597 and 16508. He passed the checks to a co-conspirator, an Assistant Manager of PCIBank's Meralco Branch, who helped Castro open a Checking account of a fictitious person named "Reynaldo Reyes." Castro deposited a worthless Bank of America Check in exactly the same amount of Ford checks. The syndicate tampered with the checks and succeeded in replacing the worthless checks and the eventual encashment of Citibank Check Nos. SN 10597 and 16508. The PCIBank Ptro-manager, Castro, and his co-conspirator Assistant Manager apparently performed their activities using facilities in their official capacity or authority but for their personal and private gain or benefit.

A bank holding out its officers and agents as worthy of confidence will not be permitted to profit by the frauds these officers or agents were enabled to perpetrate in the apparent course of their employment; nor will t be permitted to shirk its responsibility for such frauds, even though no benefit may accrue to the bank therefrom. For the general rule is that a bank is liable for the fraudulent acts or representations of an officer or agent acting within the course and apparent scope of his employment or authority.[29] And if an officer or employee of a bank, in his official capacity, receives money to satisfy an evidence of indebetedness lodged with his bank for collection, the bank is liable for his misappropriation of such sum.[30]

Moreover, as correctly pointed out by Ford, Section 5[31] of Central Bank Circular No. 580, Series of 1977 provides that any theft affecting items in transit for clearing, shall be for the account of sending bank, which in this case is PCIBank.

But in this case, responsibility for negligence does not lie on PCIBank's shoulders alone.

The evidence on record shows that Citibank as drawee bank was likewise negligent in the performance of its duties. Citibank failed to establish that its payment of Ford's checjs were made in due course and legally in order. In its defense, Citibank claims the genuineness and due execution of said checks, considering that Citibank (1) has no knowledge of any informity in the issuance of the checks in question (2) coupled by the fact that said checks were sufficiently funded and (3) the endorsement of the Payee or lack thereof was guaranteed by PCI Bank (formerly IBAA), thus, it has the obligation to honor and pay the same.

For its part, Ford contends that Citibank as the drawee bank owes to Ford an absolute and contractual duty to pay the proceeds of the subject check only to the payee thereof, the CIR. Citing Section 62[32] of the Negotiable Instruments Law, Ford argues that by accepting the instrument, the acceptro which is Citibank engages that it will pay according to the tenor of its acceptance, and that it will pay only to the payee, (the CIR), considering the fact that here the check was crossed with annotation "Payees Account Only."

As ruled by the Court of Appeals, Citibank must likewise answer for the damages incurred by Ford on Citibank Checks Numbers SN 10597 and 16508, because of the contractual relationship existing between the two. Citibank, as the drawee bank breached its contractual obligation with Ford and such degree of culpability contributed to the damage caused to the latter. On this score, we agree with the respondent court's ruling.

Citibank should have scrutinized Citibank Check Numbers SN 10597 and 16508 before paying the amount of the proceeds thereof to the collecting bank of the BIR. One thing is clear from the record: the clearing stamps at the back of Citibank Check Nos. SN 10597 and 16508 do not bear any initials. Citibank failed to notice and verify the absence of the clearing stamps. Had this been duly examined, the switching of the worthless checks to Citibank Check Nos. 10597 and 16508 would have been discovered in time. For this reason, Citibank had

indeed failed to perform what was incumbent upon it, which is to ensure that the amount of the checks should be paid only to its designated payee. The fact that the drawee bank did not discover the irregularity seasonably, in our view, consitutes negligence in carrying out the bank's duty to its depositors. The point is that as a business affected with public interest and because of the nature of its functions, the bank is under obligation to treat the accounts of its depositors with meticulous care, always having in mind the fiduciary nature of their relationship.[33]

Thus, invoking the doctrine of comparative negligence, we are of the view that both PCIBank and Citibank failed in their respective obligations and both were negligent in the selection and supervision of their employees resulting in the encashment of Citibank Check Nos. SN 10597 AND 16508. Thus, we are constrained to hold them equally liable for the loss of the proceeds of said checks issued by Ford in favor of the CIR.

Time and again, we have stressed that banking business is so impressed with public interest where the trust and confidence of the public in general is of paramount umportance such that the appropriate standard of diligence must be very high, if not the highest, degree of diligence.[34] A bank's liability as obligor is not merely vicarious but primary, wherein the defense of exercise of due diligence in the selection and supervision of its employees is of no moment.[35]

Banks handle daily transactions involving millions of pesos.[36] By the very nature of their work the degree of responsibility, care and trustworthiness expected of their employees and officials is far greater than those of ordinary clerks and employees.[37] Banks are expected to exercise the highest degree of diligence in the selection and supervision of their employees.[38]

On the issue of prescription, PCIBank claims that the action of Ford had prescribed because of its inability to seek judicial relief seasonably, considering that the alleged negligent act took place prior to December 19, 1977 but the relief was sought only in 1983, or seven years thereafter.

The statute of limitations begins to run when the bank gives the depositor notice of the payment, which is ordinarily when the check is returned to the alleged drawer as a voucher with a statement of his account,[39] and an action upon a check is ordinarily governed by the statutory period applicable to instruments in writing.[40]

Our laws on the matter provide that the action upon a written contract must be brought within ten year from the time the right of action accrues.[41] hence, the reckoning time for the prescriptive period begins when the instrument was issued and the corresponding check was returned by the bank to its depositor (normally a month thereafter). Applying the same rule, the cause of action for the recovery of the proceeds of Citibank Check No. SN 04867 would normally be a month after December 19, 1977, when Citibank paid the face value of the check in the amount of P4,746,114.41. Since the original complaint for the cause of action was filed on January 20, 1984, barely six years had lapsed. Thus, we conclude that Ford's cause of action to recover the amount of Citibank Check No. SN 04867 was seasonably filed within the period provided by law.

Finally, we also find thet Ford is not completely blameless in its failure to detect the fraud. Failure on the part of the depositor to examine its passbook, statements of account, and cancelled checks and to give notice within a reasonable time (or as required by statute) of any discrepancy which it may in the exercise of due care and diligence find therein, serves to mitigate the banks' liability by reducing the award of interest from twelve percent (12%) to six percent (6%) per annum. As provided in Article 1172 of the Civil Code of the Philippines, respondibility arising from negligence in the performance of every kind of obligation is also demandable, but such liability may be regulated by the courts, according to the circumstances. In quasi-delicts, the contributory negligence of the plaintiff shall reduce the damages that he may recover.[42]

WHEREFORE, the assailed Decision and Resolution of the Court of Appeals in CA-G.R. CV No. 25017 are**AFFIRMED.** PCIBank, know formerly as Insular Bank of Asia and America, id declared solely responsible for the loss of the proceeds of Citibank Check No SN 04867 in the amount P4,746,114.41, which shall be paid together with six percent (6%) interest thereon to Ford Philippines Inc. from the date when the original complaint was filed until said amount is fully paid.

However, the Decision and Resolution of the Court of Appeals in CA-G.R. No. 28430 are **MODIFIED** as follows: PCIBank and Citibank are adjudged liable for and must share the loss, (concerning the proceeds of Citibank Check Numbers SN 10597 and 16508 totalling P12,163,298.10) on a fifty-fifty ratio, and each bank is **ORDERED**to pay Ford Philippines Inc. P6,081,649.05, with six percent (6%) interest thereon, from the date the complaint was filed until full payment of said amount.*1âwphi1.nêt*

Costs against Philippine Commercial International Bank and Citibank N.A.

SO ORDERED.

G.R. No. 137873 April 20, 2001

D. M. CONSUNJI, INC., petitioner,
vs.
COURT OF APPEALS and MARIA J. JUEGO, respondents.

KAPUNAN, *J.*:

At around 1:30 p.m., November 2, 1990, Jose Juego, a construction worker of D. M. Consunji, Inc., fell 14 floors from the Renaissance Tower, Pasig City to his death.

PO3 Rogelio Villanueva of the Eastern Police District investigated the tragedy and filed a report dated November 25, 1990, stating that:

> x x x. [The] [v]ictim was rushed to [the] Rizal Medical Center in Pasig, Metro Manila where he was pronounced dead on arrival (DOA) by the attending physician, Dr. Errol de Yzo[,] at around 2:15 p.m. of the same date.
>
> Investigation disclosed that at the given time, date and place, while victim Jose A. Juego together with Jessie Jaluag and Delso Destajo [were] performing their work as carpenter[s] at the elevator core of the 14th floor of the Tower D, Renaissance Tower Building on board a [p]latform made of channel beam (steel) measuring 4.8 meters by 2 meters wide with pinulid plywood flooring and cable wires attached to its four corners and hooked at the 5 ton chain block, when suddenly, the bolt or pin which was merely inserted to connect the chain block with the [p]latform, got loose xxx causing the whole [p]latform assembly and the victim to fall down to the basement of the elevator core, Tower D of the

> building under construction thereby crushing the victim of death, save his two (2) companions who luckily jumped out for safety.
>
> It is thus manifest that Jose A. Juego was crushed to death when the [p]latform he was then on board and performing work, fell. And the falling of the [p]latform was due to the removal or getting loose of the pin which was merely inserted to the connecting points of the chain block and [p]latform but without a safety lock.[1]

On May 9, 1991, Jose Juego's widow, Maria, filed in the Regional Trial Court (RTC) of Pasig a complaint for damages against the deceased's employer, D.M. Consunji, Inc. The employer raised, among other defenses, the widow's prior availment of the benefits from the State Insurance Fund.

After trial, the RTC rendered a decision in favor of the widow Maria Juego. The dispositive portion of the RTC decision reads:

> WHEREFORE, judgment is hereby rendered ordering defendant to pay plaintiff, as follows:
>
> 1. P50,000.00 for the death of Jose A. Juego.
>
> 2. P10,000.00 as actual and compensatory damages.
>
> 3. P464,000.00 for the loss of Jose A. Juego's earning capacity.
>
> 4. P100,000.00 as moral damages.
>
> 5. P20,000.00 as attorney's fees, plus the costs of suit.
>
> SO ORDERED.[2]

On appeal by D. M. Consunji, the Court of Appeals (CA) affirmed the decision of the RTC *in toto*.

D. M. Consunji now seeks the reversal of the CA decision on the following grounds:

- THE APPELLATE COURT ERRED IN HOLDING THAT THE POLICE REPORT WAS ADMISSIBLE EVIDENCE OF THE ALLEGED NEGLIGENCE OF PETITIONER.
- THE APPELLATE COURT ERRED IN HOLDING THAT THE DOCTRINE OF *RES IPSA LOQUITOR* [sic] IS APPLICABLE TO PROVE NEGLIGENCE ON THE PART OF PETITIONER.
- THE APPELLATE COURT ERRED IN HOLDING THAT PETITIONER IS PRESUMED NEGLIGENT UNDER ARTICLE 2180 OF THE CIVIL CODE, AND
- THE APPELLATE COURT ERRED IN HOLDING THAT RESPONDENT IS NOT PRECLUDED FROM RECOVERING DAMAGES UNDER THE CIVIL CODE.[3]

Petitioner maintains that the police report reproduced above is hearsay and, therefore, inadmissible. The CA ruled otherwise. It held that said report, being an entry in official records, is an exception to the hearsay rule.

The Rules of Court provide that a witness can testify only to those facts which he knows of his personal knowledge, that is, which are derived from his perception.[4] A witness, therefore, may not testify as what he merely learned from others either because he was told or read or heard the same. Such testimony is considered hearsay and may not be received as proof of the truth of what he has learned.[5] This is known as the hearsay rule.

Hearsay is not limited to oral testimony or statements; the general rule that excludes hearsay as evidence applies to written, as well as oral statements.[6]

The theory of the hearsay rule is that the many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross-examiantion.[7] The hearsay rule, therefore, excludes evidence that cannot be tested by cross-examination.[8]

The Rules of Court allow several exceptions to the rule,[9] among which are entries in official records. Section 44, Rule 130 provides:

> Entries in official records made in the performance of his duty made in the performance of his duty by a public officer of the Philippines, or by a person in the performance of a duty specially enjoined by law are*prima facie* evidence of the facts therein stated.

In *Africa, et al. vs. Caltex (Phil.), Inc., et al.*,[10] this Court, citing the work of Chief Justice Moran, enumerated the requisites for admissibility under the above rule:

> (a) that the entry was made by a public officer or by another person specially enjoined by law to do so;
>
> (b) that it was made by the public officer in the performance of his duties, or by such other person in the performance of a duty specially enjoined by law; and
>
> (c) that the public officer or other person had sufficient knowledge of the facts by him stated, which must have been acquired by him personally or through official information.

The CA held that the police report meets all these requisites. Petitioner contends that the last requisite is not present.

The Court notes that PO3 Villanueva, who signed the report in question, also testified before the trial court. In*Rodriguez vs. Court of Appeals*,[11] which involved a Fire Investigation Report, the officer who signed the fire report also testified before the trial court. This Court held that the report was inadmissible for the purpose of proving the truth of the statements contained in the report but admissible insofar as it constitutes part of the testimony of the officer who executed the report.

> x x x. Since Major Enriquez himself took the witness stand and was available for cross-examination, the portions of the report which were of his personal knowledge or which consisted of his perceptions and conclusions were not hearsay. The rest of the report, such as the summary of the statements of the parties based on their sworn statements (which were annexed to the Report) as well as the latter, having been included in the first purpose of the offer [as part of the testimony of Major Enriquez], may then be considered as *independently relevant statements* which were gathered in the course of the investigation and may thus be admitted as such, but not necessarily to prove the truth thereof. It has been said that:

> "Where regardless of the truth or falsity of a statement, the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown. Evidence as to the making of such statement is not secondary but primary, for the statement itself may constitute a fact in issue, or be circumstantially relevant as to the existence of such a fact."

When Major Enriquez took the witness stand, testified for petitioners on his Report and made himself available for cross-examination by the adverse party, the Report, insofar as it proved that certain utterances were made (but not their truth), was effectively removed from the ambit of the aforementioned Section 44 of Rule 130. Properly understood, this section does away with the testimony in open court of the officer who made the official record, considers the matter as an exception to the hearsay rule and makes the entries in said official record admissible in evidence as *prima facie* evidence of the facts therein stated. The underlying reasons for this exceptionary rule are necessity and trustworthiness, as explained in *Antillon v. Barcelon*.

> The litigation is unlimited in which testimony by officials is daily needed; the occasions in which the officials would be summoned from his ordinary duties to declare as a witness are numberless. The public officers are few in whose daily work something is not done in which testimony is not needed from official sources. Were there no exception for official statements, hosts of officials would be found devoting the greater part of their time to attending as witnesses in court or delivering deposition before an officer. The work of administration of government and the interest of the public having business with officials would alike suffer in consequence. For these reasons, and for many others, a certain verity is accorded such documents, which is not extended to private documents. (3 Wigmore on Evidence, Sec. 1631).
>
> The law reposes a particular confidence in public officers that it presumes they will discharge their several trusts with accuracy and fidelity; and, therefore, whatever acts they do in discharge of their duty may be given in evidence and shall be taken to be true under such a degree of caution as to the nature and circumstances of each case may appear to require.

It would have been an entirely different matter if Major Enriquez was not presented to testify on his report. In that case the applicability of Section 44 of Rule 143 would have been ripe for determination, and this Court would have agreed with the Court of Appeals that said report was inadmissible since the aforementioned third requisite was not satisfied. The statements given by the sources of information of Major Enriquez failed to qualify as "official information," there being no showing that, at the very least, they were under a duty to give the statements for record.

Similarly, the police report in this case is inadmissible for the purpose of proving the truth of the statements contained therein but is admissible insofar as it constitutes part of the testimony of PO3 Villanueva.

In any case, the Court holds that portions of PO3 Villanueva's testimony which were of his personal knowledge suffice to prove that Jose Juego indeed died as a result of the elevator crash. PO3 Villanueva had seen Juego's remains at the morgue,[12] making the latter's death beyond dispute. PO3 Villanueva also conducted an ocular inspection of the premises of the building the day after the incident[13] and saw the platform for himself.[14] He observed that the platform was crushed[15] and that it was totally damaged.[16] PO3 Villanueva also required Garcia and Fabro to bring the chain block to the police headquarters. Upon inspection, he noticed that the chain was detached from the lifting machine, without any pin or bolt.[17]

What petitioner takes particular exception to is PO3 Villanueva's testimony that the cause of the fall of the platform was the loosening of the bolt from the chain block. It is claimed that such portion of the testimony is mere opinion. Subject to certain exceptions,[18] the opinion of a witness is generally not admissible.[19]

Petitioner's contention, however, loses relevance in the face of the application of *res ipsa loquitur* by the CA. The effect of the doctrine is to warrant a presumption or inference that the mere fall of the elevator was a result of the person having charge of the instrumentality was negligent. As a rule of evidence, the doctrine of *res ipsa loquitur*is peculiar to the law of negligence which recognizes that *prima facie* negligence may be established without direct proof and furnishes a substitute for specific proof of negligence.[20]

The concept of *res ipsa loquitur* has been explained in this wise:

> While negligence is not ordinarily inferred or presumed, and while the mere happening of an accident or injury will not generally give rise to an inference or presumption that it was due to negligence on defendant's part, under the doctrine of res ipsa loquitur, which means, literally, the thing or transaction speaks for itself, or in one jurisdiction, that the thing or instrumentality speaks for itself, the facts or circumstances accompanying an injury may be such as to raise a presumption, or at least permit an inference of negligence on the part of the defendant, or some other person who is charged with negligence.
>
> x x x where it is shown that the thing or instrumentality which caused the injury complained of was under the control or management of the defendant, and that the occurrence resulting in the injury was such as in the ordinary course of things would not happen if those who had its control or management used proper care, there is sufficient evidence, or, as sometimes stated, reasonable evidence, in the absence of explanation by the defendant, that the injury arose from or was caused by the defendant's want of care.[21]

One of the theoretical based for the doctrine is its necessity, i.e., that necessary evidence is absent or not available.[22]

> The res ipsa loquitur doctrine is based in part upon the theory that the defendant in charge of the instrumentality which causes the injury either knows the cause of the accident or has the best opportunity of ascertaining it and that the plaintiff has no such knowledge, and therefore is compelled to allege negligence in general terms and to rely upon the proof of the happening of the accident in order to establish negligence. The inference which the doctrine permits is grounded upon the fact that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to the defendant but inaccessible to the injured person.
>
> It has been said that the doctrine of res ipsa loquitur furnishes a bridge by which a plaintiff, without knowledge of the cause, reaches over to defendant who knows or should know the cause, for any explanation of care exercised by the defendant in respect of the matter of which the plaintiff complains. The res ipsa loquitur doctrine, another court has said, is a rule of necessity, in that it proceeds on the theory that under the peculiar circumstances in which the doctrine is applicable, it is within the power of the defendant to show that there was no negligence on his part, and direct proof of defendant's negligence is beyond plaintiff's power. Accordingly, some court add to the three prerequisites for the application of the res ipsa loquitur doctrine the further requirement that for the res ipsa loquitur doctrine to apply, it must appear that the injured party had no knowledge or means of knowledge as to the cause of the accident, or that the party to be charged with negligence has superior knowledge or opportunity for explanation of the accident.[23]

The CA held that all the requisites of *res ipsa loquitur* are present in the case at bar:

> There is no dispute that appellee's husband fell down from the 14th floor of a building to the basement while he was working with appellant's construction project, resulting to his death. The construction site is within the exclusive control and management of appellant. It has a safety engineer, a project superintendent, a carpenter leadman and others who are in complete control of the situation therein. The circumstances of any accident that would occur therein are peculiarly within the knowledge of the appellant or its employees. On the other hand, the appellee is not in a position to know what caused the accident. *Res ipsa loquitur* is a rule of necessity and it applies where evidence is absent or not readily available, provided the following requisites are present: (1) the accident was of a kind which does not ordinarily occur unless someone is negligent; (2) the instrumentality or agency which caused the injury was under the exclusive control of the person charged with negligence; and (3) the injury suffered must not have been due to any voluntary action or contribution on the part of the person injured. x x x.
>
> No worker is going to fall from the 14th floor of a building to the basement while performing work in a construction site unless someone is negligent[;] thus, the first requisite for the application of the rule of *res ipsa loquitur* is present. As explained earlier, the construction site with all its paraphernalia and human resources that likely caused the injury is under the exclusive control and management of appellant[;] thus[,] the second requisite is also present. No contributory negligence was attributed to the appellee's deceased husband[;] thus[,] the last requisite is also present. All the requisites for the application of the rule of *res ipsa loquitur* are present, thus a reasonable presumption or inference of appellant's negligence arises. x x x.[24]

Petitioner does not dispute the existence of the requisites for the application of *res ipsa loquitur*, but argues that the presumption or inference that it was negligent did not arise since it "proved that it exercised due care to avoid the accident which befell respondent's husband."

Petitioner apparently misapprehends the procedural effect of the doctrine. As stated earlier, the defendant's negligence is presumed or inferred[25] when the plaintiff establishes the requisites for the application of *res ipsa loquitur.* Once the plaintiff makes out a prima facie case of all the elements, the burden then shifts to defendant to explain.[26] The presumption or inference may be rebutted or overcome by other evidence and, under appropriate circumstances disputable presumption, such as that of due care or innocence, may outweigh the inference.[27] It is not for the defendant to explain or prove its defense to prevent the presumption or inference from arising. Evidence by the defendant of say, due care, comes into play only after the circumstances for the application of the doctrine has been established.

In any case, petitioner cites the sworn statement of its leadman Ferdinand Fabro executed before the police investigator as evidence of its due care. According to Fabro's sworn statement, the company enacted rules and regulations for the safety and security of its workers. Moreover, the leadman and the *bodegero* inspect the chain block before allowing its use.

It is ironic that petitioner relies on Fabro's sworn statement as proof of its due care but, in arguing that private respondent failed to prove negligence on the part of petitioner's employees, also assails the same statement for being hearsay.

Petitioner is correct. Fabro's sworn statement is hearsay and inadmissible. Affidavits are inadmissible as evidence under the hearsay rule, unless the affiant is placed on the witness stand to testify thereon.[28] The inadmissibility of this sort of evidence is based not only on the lack of opportunity on the part of the adverse

party to cross-examine the affiant, but also on the commonly known fact that, generally, an affidavit is not prepared by the affiant himself but by another who uses his own language in writing the affiant's statements which may either be omitted or misunderstood by the one writing them.[29] Petitioner, therefore, cannot use said statement as proof of its due care any more than private respondent can use it to prove the cause of her husband's death. Regrettably, petitioner does not cite any other evidence to rebut the inference or presumption of negligence arising from the application of *res ipsa loquitur*, or to establish any defense relating to the incident.

Next, petitioner argues that private respondent had previously availed of the death benefits provided under the Labor Code and is, therefore, precluded from claiming from the deceased's employer damages under the Civil Code.

Article 173 of the Labor Code states:

> Article 173. Extent of liability. – Unless otherwise provided, the liability of the State Insurance Fund under this Title shall be exclusive and in place of all other liabilities of the employer to the employee, his dependents or anyone otherwise entitled to receive damages on behalf of the employee or his dependents. The payment of compensation under this Title shall not bar the recovery of benefits as provided for in Section 699 of the Revised Administrative Code, Republic Act Numbered Eleven hundred sixty-one, as amended, Republic Act Numbered Six hundred ten, as amended, Republic Act Numbered Forty-eight hundred sixty-four as amended, and other laws whose benefits are administered by the System or by other agencies of the government.

The precursor of Article 173 of the Labor Code, Section 5 of the Workmen's Compensation Act, provided that:

> Section 5. *Exclusive right to compensation*. – The rights and remedies granted by this Act to an employee by reason of a personal injury entitling him to compensation shall exclude all other rights and remedies accruing to the employee, his personal representatives, dependents or nearest of kin against the employer under the Civil Code and other laws because of said injury x x x.

Whether Section 5 of the Workmen's Compensation Act allowed recovery under said Act as well as under the Civil Code used to be the subject of conflicting decisions. The Court finally settled the matter in *Floresca vs.Philex Mining Corporation*,[30] which involved a cave-in resulting in the death of the employees of the Philex Mining Corporation. Alleging that the mining corporation, in violation of government rules and regulations, failed to take the required precautions for the protection of the employees, the heirs of the deceased employees filed a complaint against Philex Mining in the Court of First Instance (CFI). Upon motion of Philex Mining, the CFI dismissed the complaint for lack of jurisdiction. The heirs sought relief from this Court.

Addressing the issue of whether the heirs had a choice of remedies, majority of the Court *En Banc*,[31] following the rule in *Pacaña vs. Cebu Autobus Company*, held in the affirmative.

> WE now come to the query as to whether or not the injured employee or his heirs in case of death have a right of selection or choice of action between availing themselves of the worker's right under the Workmen's Compensation Act and suing in the regular courts under the Civil Code for higher damages (actual, moral and exemplary) from the employers by virtue of the negligence or fault of the employers or whether they may avail themselves cumulatively of both actions, i.e., collect the limited compensation under the Workmen's Compensation Act and sue in addition for damages in the regular courts.

> In disposing of a similar issue, this Court in Pacaña vs. Cebu Autobus Company, 32 SCRA 442, ruled thatan injured worker has a choice of either to recover from the employer the fixed amounts set by the Workmen's Compensation Act or to prosecute an ordinary civil action against the tortfeasor for higher damages but he cannot pursue both courses of action simultaneously. [Underscoring supplied.]

Nevertheless, the Court allowed some of the petitioners in said case to proceed with their suit under the Civil Code despite having availed of the benefits provided under the Workmen's Compensation Act. The Court reasoned:

> With regard to the other petitioners, it was alleged by Philex in its motion to dismiss dated May 14, 1968 before the court *a quo*, that the heirs of the deceased employees, namely Emerito Obra, Larry Villar, Jr., Aurelio Lanuza, Lorenzo Isla and Saturnino submitted notices and claims for compensation to the Regional Office No. 1 of the then Department of Labor and all of them have been paid in full as of August 25, 1967, except Saturnino Martinez whose heirs decided that they be paid in installments x x x. Such allegation was admitted by herein petitioners in their opposition to the motion to dismiss dated may 27, 1968 x x x in the lower court, but they set up the defense that the claims were filed under the Workmen's Compensation Act before they learned of the official report of the committee created to investigate the accident which established the criminal negligence and violation of law by Philex, and which report was forwarded by the Director of Mines to then Executive Secretary Rafael Salas in a letter dated October 19, 1967 only x x x.
>
> WE hold that although the other petitioners had received the benefits under the Workmen's Compensation Act, such my not preclude them from bringing an action before the regular court because they became cognizant of the fact that Philex has been remiss in its contractual obligations with the deceased miners only after receiving compensation under the Act. Had petitioners been aware of said violation of government rules and regulations by Philex, and of its negligence, they would not have sought redress under the Workmen's Compensation Commission which awarded a lesser amount for compensation. The choice of the first remedy was based on ignorance or a mistake of fact, which nullifies the choice as it was not an intelligent choice. The case should therefore be remanded to the lower court for further proceedings. However, should the petitioners be successful in their bid before the lower court, the payments made under the Workmen's Compensation Act should be deducted from the damages that may be decreed in their favor. [Underscoring supplied.]

The ruling in *Floresca* providing the claimant a choice of remedies was reiterated in *Ysmael Maritime Corporation vs. Avelino*,[32] *Vda. De Severo vs. Feliciano-Go*,[33] and *Marcopper Mining Corp. vs. Abeleda*.[34] In the last case, the Court again recognized that a claimant who had been paid under the Act could still sue under the Civil Code. The Court said:

> In the Robles case, it was held that claims for damages sustained by workers in the course of their employment could be filed only under the Workmen's Compensation Law, to the exclusion of all further claims under other laws. In Floresca, this doctrine was abrogated in favor of the new rule that the claimants may invoke either the Workmen's Compensation Act or the provisions of the Civil Code, subject to the consequence that the choice of one remedy will exclude the other and that the acceptance of compensation under the remedy chosen will preclude a claim for additional benefits under the other remedy. The exception is where a claimant who has already been paid under the Workmen's Compensation Act may still sue for damages under the Civil Code on the basis of supervening facts or developments occurring after he opted for the first remedy. (Underscoring supplied.)

Here, the CA held that private respondent's case came under the exception because private respondent was unaware of petitioner's negligence when she filed her claim for death benefits from the State Insurance Fund. Private respondent filed the civil complaint for damages after she received a copy of the police investigation report and the Prosecutor's Memorandum dismissing the criminal complaint against petitioner's personnel. While stating that there was no negligence attributable to the respondents in the complaint, the prosecutor nevertheless noted in the Memorandum that, "if at all," the "case is civil in nature." The CA thus applied the exception in *Floresca*:

> x x x We do not agree that appellee has knowledge of the alleged negligence of appellant as early as November 25, 1990, the date of the police investigator's report. The appellee merely executed her sworn statement before the police investigator concerning her personal circumstances, her relation to the victim, and her knowledge of the accident. She did not file the complaint for "Simple Negligence Resulting to Homicide" against appellant's employees. It was the investigator who recommended the filing of said case and his supervisor referred the same to the prosecutor's office. This is a standard operating procedure for police investigators which appellee may not have even known. This may explain why no complainant is mentioned in the preliminary statement of the public prosecutor in her memorandum dated February 6, 1991, to wit: "Respondent Ferdinand Fabro x x x are being charged by complainant of "Simple Negligence Resulting to Homicide." It is also possible that the appellee did not have a chance to appear before the public prosecutor as can be inferred from the following statement in said memorandum: "Respondents who were notified pursuant to Law waived their rights to present controverting evidence," thus there was no reason for the public prosecutor to summon the appellee. Hence, notice of appellant's negligence cannot be imputed on appellee before she applied for death benefits under ECC or before she received the first payment therefrom. Her using the police investigation report to support her complaint filed on May 9, 1991 may just be an afterthought after receiving a copy of the February 6, 1991 Memorandum of the Prosecutor's Office dismissing the criminal complaint for insufficiency of evidence, stating therein that: "The death of the victim is not attributable to any negligence on the part of the respondents. If at all and as shown by the records this case is civil in nature." (Underscoring supplied.) Considering the foregoing, We are more inclined to believe appellee's allegation that she learned about appellant's negligence only after she applied for and received the benefits under ECC. This is a mistake of fact that will make this case fall under the exception held in the Floresca ruling.[35]

The CA further held that not only was private respondent ignorant of the facts, but of her rights as well:

> x x x. Appellee [Maria Juego] testified that she has reached only elementary school for her educational attainment; that she did not know what damages could be recovered from the death of her husband; and that she did not know that she may also recover more from the Civil Code than from the ECC. x x x.[36]

Petitioner impugns the foregoing rulings. It contends that private respondent "failed to allege in her complaint that her application and receipt of benefits from the ECC were attended by ignorance or mistake of fact. Not being an issue submitted during the trial, the trial court had no authority to hear or adjudicate that issue."

Petitioner also claims that private respondent could not have been ignorant of the facts because as early as November 28, 1990, private respondent was the complainant in a criminal complaint for "Simple Negligence Resulting to Homicide" against petitioner's employees. On February 6, 1991, two months before the filing of the action in the lower court, Prosecutor Lorna Lee issued a resolution finding that, although there was insufficient evidence against petitioner's employees, the case was "civil in nature." These purportedly show that prior to her receipt of death benefits from the ECC on January 2, 1991 and every month thereafter,

private respondent also knew of the two choices of remedies available to her and yet she chose to claim and receive the benefits from the ECC.

When a party having knowledge of the facts makes an election between inconsistent remedies, the election is final and bars any action, suit, or proceeding inconsistent with the elected remedy, in the absence of fraud by the other party. The first act of election acts as a bar.[37] Equitable in nature, the doctrine of election of remedies is designed to mitigate possible unfairness to both parties. It rests on the moral premise that it is fair to hold people responsible for their choices. The purpose of the doctrine is not to prevent any recourse to any remedy, but to prevent a double redress for a single wrong.[38]

The choice of a party between inconsistent remedies results in a **waiver** by election. Hence, the rule in *Floresca*that a claimant cannot simultaneously pursue recovery under the Labor Code and prosecute an ordinary course of action under the Civil Code. The claimant, by his choice of one remedy, is deemed to have waived the other.

Waiver is the intentional relinquishment of a *known* right.[39]

> [It] is an act of understanding that presupposes that a party has knowledge of its rights, but chooses not to assert them. It must be generally shown by the party claiming a waiver that the person against whom the waiver is asserted had at the time knowledge, actual or constructive, of the existence of the party's rights or of all material facts upon which they depended. Where one lacks knowledge of a right, there is no basis upon which waiver of it can rest. Ignorance of a material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact.
>
> A person makes a knowing and intelligent waiver when that person knows that a right exists and has adequate knowledge upon which to make an intelligent decision.
>
> Waiver requires a knowledge of the facts basic to the exercise of the right waived, with an awareness of its consequences. That a waiver is made knowingly and intelligently must be illustrated on the record or by the evidence.[40]

That lack of knowledge of a fact that nullifies the election of a remedy is the basis for the exception in *Floresca*.

It is in light of the foregoing principles that we address petitioner's contentions.

Waiver is a defense, and it was not incumbent upon private respondent, as plaintiff, to allege in her complaint that she had availed of benefits from the ECC. It is, thus, erroneous for petitioner to burden private respondent with raising waiver as an issue. On the contrary, it is the defendant who ought to plead waiver, as petitioner did in pages 2-3 of its Answer;[41] otherwise, the defense is waived. It is, therefore, perplexing for petitioner to now contend that the trial court had no jurisdiction over the issue when petitioner itself pleaded waiver in the proceedings before the trial court.

Does the evidence show that private respondent knew of the facts that led to her husband's death and the rights pertaining to a choice of remedies?

It bears stressing that what negates waiver is lack of knowledge or a mistake of *fact*. In this case, the "fact" that served as a basis for nullifying the waiver is the *negligence* of petitioner's employees, of which private respondent purportedly learned only after the prosecutor issued a resolution stating that there may be civil

liability. In*Floresca*, it was the *negligence* of the mining corporation and its *violation of government rules and regulations*. Negligence, or violation of government rules and regulations, for that matter, however, is not a fact, but a*conclusion of law*, over which only the courts have the final say. Such a conclusion binds no one until the courts have decreed so. It appears, therefore, that the principle that ignorance or mistake of fact nullifies a waiver has been misapplied in *Floresca* and in the case at bar.

In any event, there is no proof that private respondent knew that her husband died in the elevator crash when on November 15, 1990 she accomplished her application for benefits from the ECC. The police investigation report is dated November 25, 1990, 10 days after the accomplishment of the form. Petitioner filed the application in her behalf on November 27, 1990.

There is also no showing that private respondent knew of the remedies available to her when the claim before the ECC was filed. On the contrary, private respondent testified that she was not aware of her rights.

Petitioner, though, argues that under Article 3 of the Civil Code, ignorance of the law excuses no one from compliance therewith. As judicial decisions applying or interpreting the laws or the Constitution form part of the Philippine legal system (Article 8, Civil Code), private respondent cannot claim ignorance of this Court's ruling in*Floresca* allowing a choice of remedies.

The argument has no merit. The application of Article 3 is limited to mandatory and prohibitory laws.[42] This may be deduced from the language of the provision, which, notwithstanding a person's ignorance, does not excuse his or her *compliance* with the laws. The rule in *Floresca* allowing private respondent a choice of remedies is neither mandatory nor prohibitory. Accordingly, her ignorance thereof cannot be held against her.

Finally, the Court modifies the affirmance of the award of damages. The records do not indicate the total amount private respondent ought to receive from the ECC, although it appears from Exhibit "K"[43] that she received P3,581.85 as initial payment representing the accrued pension from November 1990 to March 1991. Her initial monthly pension, according to the same Exhibit "K," was P596.97 and present total monthly pension was P716.40. Whether the total amount she will eventually receive from the ECC is less than the sum of P644,000.00 in total damages awarded by the trial court is subject to speculation, and the case is remanded to the trial court for such determination. Should the trial court find that its award is greater than that of the ECC, payments already received by private respondent under the Labor Code shall be deducted from the trial court'' award of damages. Consistent with our ruling in *Floresca*, this adjudication aims to prevent double compensation.

WHEREFORE, the case is ***REMANDED*** to the Regional Trial Court of Pasig City to determine whether the award decreed in its decision is more than that of the ECC. Should the award decreed by the trial court be greater than that awarded by the ECC, payments already made to private respondent pursuant to the Labor Code shall be deducted therefrom. In all other respects, the Decision of the Court of Appeals is ***AFFIRMED.***

SO ORDERED.

G.R. No. 127473 December 8, 2003

PHILIPPINE AIRLINES, INC., petitioner,
vs.
COURT OF APPEALS, JUDY AMOR, JANE GAMIL, minors GIAN CARLO AMOR represented by ATTY. OWEN AMOR, and CARLO BENITEZ represented by JOSEPHINE BENITEZ, respondents.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.:*

Before us is a petition for review on certiorari under Rule 45 of the Rules of Court seeking the reversal of the decision[1] dated August 12, 1996, in CA-G.R. CV No. 38327[2] and the Resolution dated November 15, 1996 denying the motion for reconsideration of Philippine Airlines, Inc. (petitioner for brevity).

Private respondents Judy Amor, Jane Gamil, minor Gian Carlo Amor, represented by his father, Atty. Owen Amor, and, minor Carlo Benitez, represented by his mother, Josephine Benitez, filed with the Regional Trial Court (Branch 53), Sorsogon, Sorsogon, a complaint[3] for damages against petitioner due to the latter's failure to honor their confirmed tickets.

In support of their claim, private respondents presented evidence establishing the following facts:

Private respondent Judy Amor purchased three confirmed plane tickets for her and her infant son, Gian Carlo Amor as well as her sister Jane Gamil for the May 8, 1988, 7:10 a.m. flight, PR 178, bound for Manila from defendant's branch office in Legaspi City. Judy Amor, a dentist and a member of the Board of Directors of the Sorsogon Dental Association, was scheduled to attend the National Convention of the Philippine Dental Association from May 8 to 14, 1988 at the Philippine International Convention Center. [4]

On May 8, 1988, Judy with Gian, Jane and minor Carlo Benitez, nephew of Judy and Jane, arrived at the Legaspi Airport at 6:20 a.m. for PR 178. Carlo Benitez was supposed to use the confirmed ticket of a certain Dra. Emily Chua.[5] They were accompanied by Atty. Owen Amor and the latter's cousin, Salvador Gonzales who fell in line at the check-in counter with four persons ahead of him and three persons behind him[6] while plaintiff Judy went to the office of the station manager to request that minor plaintiff Carlo Benitez be allowed to use the ticket of Dra. Chua.[7] While waiting for his turn, Gonzales was asked by Lloyd Fojas, the check-in clerk on duty, to approach the counter. Fojas wrote something on the tickets which Gonzales later read as "late check-in 7:05". When Gonzales' turn came, Fojas gave him the tickets of private respondents Judy, Jane and Gian and told him to proceed to the cashier to make arrangements.[8]

Salvador then went to Atty. Amor and told him about the situation. Atty. Amor pleaded with Fojas, pointing out that it is only 6:45 a.m., but the latter did not even look at him or utter any word. Atty. Amor then tried to plead with Delfin Canonizado and George Carranza, employees of petitioner, but still to no avail. Private respondents were not able to board said flight. The plane left at 7:30 a.m., twenty minutes behind the original schedule.[9]

Private respondents went to the bus terminals hoping to catch a ride for Manila. Finding none, they went back to the airport and tried to catch an afternoon flight.[10] Unfortunately, the 2:30 p.m. flight, PR 278, was cancelled due to "aircraft situation".[11] Private respondents were told to wait for the 5:30 p.m. flight, PR 180. They checked-in their bags and were told to hand in their tickets. Later, a PAL employee at the check-in counter called out the name of private respondent minor Carlo Benitez. Plaintiff Judy approached the counter

and was told by the PAL personnel that they cannot be accommodated. Fojas who was also at the counter then removed the boarding passes inserted in private respondents' tickets as well as the tags from their luggages.[12]

Manuel Baltazar, a former Acting Manager of petitioner in Legaspi City in May 1988, testified that based on his investigation, the private respondents, although confirmed passengers, were not able to board PR 178 in the morning of May 8, 1988 because there were "go-show" or "waitlisted" and non-revenue passengers who were accommodated in said flight. He also noted that there was overbooking for PR 178.[13]

On the other hand, petitioner contends that private respondents are not entitled to their claim for damages because they were late in checking-in for PR 178; and that they were only chance or waitlisted passengers for PR 180 and were not accommodated because all confirmed passengers of the flight had checked-in. In support thereof, petitioner presented Lloyd Fojas, who testified, as follows:

In the morning of May 8, 1988, he was on duty at the check-in counter of the Legaspi Airport. He was the one who attended to the tickets of private respondents which were tendered by Salvador Gonzales at 7:05 a.m. when the counter was already closed. The clock at the check-in counter showed that it was already 7:05 and so he told Gonzales that they are already late and wrote "late check-in, 7:05" on private respondents' tickets. The flight was scheduled to leave at 7:10 a.m. and checking-in is allowed only until 30 minutes before departure time. At the time private respondents went to the check-in counter, passengers were already leaving the pre-departure area and going towards the plane and there were no more passengers in the check-in area, not even waitlisted passengers. The baggages of the passengers have been loaded in the aircraft. Gonzales left and later came back with Atty. Amor who pleaded that plaintiffs be accommodated in the flight. He told Atty. Amor to go to his supervisor to re-book the tickets because there were no more boarding passes and it was already time for boarding the plane. Atty. Amor then left the counter. [14]

On cross-examination, Fojas testified that he did not know how many waitlisted or non-revenue passengers were accommodated or issued boarding passes in the 7:00 a. m. and in the afternoon flight of May 8, 1988.[15]

After trial, the RTC rendered judgment upholding the evidence presented by private respondents, the dispositive portion of which reads:

WHEREFORE, judgment is hereby rendered:

> (a) ordering the defendant to reimburse the plaintiffs the amount of ₱1,171.60 representing the purchase price of the four (4) plane tickets;
>
> (b) condemning the defendant to pay plaintiffs Judy Amor and Jane Gamil the amount of ₱250,000.00 each as moral damages, ₱200,000.00 as exemplary damages, plus ₱100,000.00 as actual damages;
>
> (c) for the defendant to pay plaintiffs the amount of ₱30,000.00 as attorney's fees, plus ₱500.00 for every appearance, or a total of ₱10,500.00 for 21 actual appearance (sic) in court, ₱2,000.00 as incidental litigation expenses, and to pay the cost of the suit.

SO ORDERED.[16]

Aggrieved, petitioner appealed to the Court of Appeals (CA for brevity) which affirmed the judgment of the trial court in toto and denied petitioner's motion for reconsideration.

Hence, the present petition of PAL, raising the following issues:

I

WHETHER PRIVATE RESPONDENTS WERE LATE CHECKED-IN PASSENGERS AND WHETHER THE FAILURE OF AN AIRLINE TO ACCOMMODATE A PASSENGER WHO CHECKED IN LATE IS ACTIONABLE SO AS TO ENTITLE THEM TO DAMAGES.

II

ASSUMING ARGUENDO THAT PETITIONER IS LIABLE, WHETHER THE AMOUNT OF DAMAGES AWARDED TO PRIVATE RESPONDENTS IS EXCESSIVE, UNCONSCIONABLE AND UNREASONABLE.[17]

In support of the first issue, petitioner argues:

(1) While ordinarily, the findings of the CA are accepted as conclusive by this Court, there are instances when the Court may make its own findings such as when the appellate court based its findings on speculation, surmises or conjectures. The appellate court erroneously gave too much reliance on the testimony of Baltazar who is a disgruntled former employee and relative of private respondent Amor. He was not present at the time of the incident. Baltazar merely interpreted the flight manifest and made a lot of speculations which is undeserving of attention and merit.

(2) Its employees are adequately trained and service oriented that they would not dare violate company rules and regulations. They are aware of the drastic consequences that may befall them as what happened to Baltazar.

(3) As to PR 180, private respondents were merely waitlisted in said flight hence it was known to them that their accommodation in said flight was dependent upon the failure of any confirmed passenger to check-in within the regulation check-in time. Unfortunately for them, all the confirmed passengers on PR 180 checked-in on time.

In support of the second issue, petitioner contends:

(1) The award of actual, moral and exemplary damages to private respondents have no factual nor legal basis at all. Its failure to accommodate private respondents on Flights PR 178, 278 and 180 was not motivated by bad faith or malice but due to a situation which private respondents brought upon themselves. It had exerted utmost and sincere effort to lessen the "agony and predicament" of private respondents. They immediately made protective bookings for private respondents on the 2:30 p.m. flight, PR 278, which unfortunately was cancelled due to "aircraft situation". Upon cancellation of PR 278, they made special arrangements to enable private respondents to have first priority in PR 180 in case of a "no show" confirmed passenger.

(2) To award damages to a passenger who checked-in late would place a premium or reward for breach of contract that would encourage passengers to intentionally check-in late with the expectation of an award of damages.

(3) Moral and exemplary damages as well as attorney’s fees are not recoverable in damage suits predicated on breach of contract of carriage unless there is evidence of fraud, malice or bad faith on the part of the carrier. Even assuming arguendo that petitioner is liable for damages, the amounts

awarded in favor of private respondents are excessive, unreasonable and unconscionable. The primary object of an award of damages in a civil action is compensation or indemnity or to repair the wrong that has been done. Damages awarded should be equal to, and commensurate with, the injury sustained.

(4) It was erroneous to award damages in favor of Jane Gamil when she never appeared before the trial court to prove her claim for damages.

In their Comment, private respondents stress that the fact they were not late in checking-in for PR 178 has been substantially established in the hearing before the trial court and affirmed by the CA. They maintain that, contrary to the assertion of petitioner, they have established their case not only by a preponderance of evidence but by proof that is more than what is required by law justifying the factual findings of the trial court and the CA.

Private respondents point out that since the issues raised by this petition are factual and do not fall under exceptional circumstances, there is nothing left to be reviewed or examined by the Supreme Court.

As to the damages awarded, private respondents contend that the amounts awarded are not excessive, unconscionable or unreasonable because of the high-handed, malicious, dictatorial and savage act of petitioner's employee which caused them untold mental anguish, excruciating pain, public contempt and ridicule, sleepless nights and other forms of moral suffering.

In its Reply, petitioner reiterates its earlier points and questions once more the credibility of private respondents' witnesses, particularly Atty. Owen Amor, Salvador Gonzales and Manuel Baltazar who are related to the respondents by blood or affinity.

In their Rejoinder, private respondents aver that the findings of facts of the courts *a quo* were based not only on the testimonies of their witnesses but also on petitioner's own employee, Lloyd Fojas, who testified that there were non-revenue, go-show and waitlisted passengers who were accommodated in PR 178. They reiterate their position that where there is a question regarding the credibility of witnesses, the findings of trial courts are generally not disturbed by appellate courts. Finally, as to the damages awarded, private respondents claim that there was substantial basis in awarding such amounts.

Evidently, in resolving the two issues raised in the present petition, it is inevitable and most crucial that we first determine the question whether or not the CA erred in upholding the RTC ruling that private respondents were late in checking-in. Both issues call for a review of the factual findings of the lower courts.

In petitions for review on certiorari under Rule 45 of the Rules of Court, the general rule is that only questions of law may be raised by the parties and passed upon by this Court.[18] Factual findings of the appellate court are generally binding on us especially when in complete accord with the findings of the trial court.[19] This is because it is not our function to analyze or weigh the evidence all over again.[20] However, this general rule admits of exceptions, to wit:

(a) where there is grave abuse of discretion; (b) when the finding is grounded entirely on speculations, surmises or conjectures; (c) when the inference made is manifestly mistaken, absurd or impossible; (d) when the judgment of the Court of Appeals was based on a misapprehension of facts; (e) when the factual findings are conflicting; (f) when the Court of Appeals, in making its findings, went beyond the issues of the case and the same are contrary to the admissions of both appellant and appellee; (g) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties and which, if properly considered,

would justify a different conclusion; and, (h) where the findings of fact of the Court of Appeals are contrary to those of the trial court, or are mere conclusions without citation of specific evidence, or where the facts set forth by the petitioner are not disputed by the respondent, or where the findings of fact of the Court of Appeals are premised on the absence of evidence and are contradicted by the evidence on record.[21]

Petitioner invokes exception (b).

As to the first issue: Whether or not private respondents checked-in on time for PR 178. The determination of this issue is necessary because it is expressly stipulated in the airline tickets issued to private respondents that PAL will consider the reserved seat cancelled if the passenger fails to check-in at least thirty minutes before the published departure time.[22]

After a careful review of the records, we find no reason to disturb the affirmance by the CA of the findings of the trial court that the private respondents have checked-in on time; that they reached the airport at 6:20 a.m., based on the testimonies of private respondent Judy Amor, and witnesses Salvador Gonzales and Atty. Owen Amor who were consistent in their declarations on the witness stand and corroborated one another's statements; and that the testimony of petitioner's lone witness, Lloyd Fojas is not sufficient to overcome private respondents' evidence.

We have repeatedly held that the truth is established not by the number of witnesses but by the quality of their testimonies.[23] In the present case, it cannot be said that the quality of the testimony of petitioner's lone witness is greater than those of the private respondents. Fojas testified that when respondents went to the check-in counter, there were no more persons in that area since all the passengers already boarded the plane.[24] However, the testimonies of Manuel Baltazar and Judy Amor together with the manifest, Exhibits "E", "E-1" and "E-2", point to the fact that many passengers were not able to board said flight, including confirmed passengers, because of overbooking.[25]

It is a well-entrenched principle that absent any showing of grave abuse of discretion or any palpable error in its findings, this Court will not question the probative weight accorded by the lower courts to the various evidence presented by the parties. As we explained in *Superlines Transportation Co. Inc., vs. ICC Leasing & Financing Corporation*:[26]

The Court is not tasked to calibrate and assess the probative weight of evidence adduced by the parties during trial all over again…*So long as the findings of facts of the Court of Appeals are consistent with or are not palpably contrary to the evidence on record, this Court shall decline to embark on a review on the probative weight of the evidence of the parties.*[27] (Emphasis supplied)

It is also well established that findings of trial courts on the credibility of witnesses is entitled to great respect and will not be disturbed on appeal except on very strong and cogent grounds.[28] Petitioner failed to demonstrate that the trial court committed any error in upholding the testimonies of private respondents' witnesses. We find that the CA committed no reversible error in sustaining the findings of facts of the trial court.

Private respondents who had confirmed tickets for PR 178 were bumped-off in favor of non-revenue passengers. Witness Manuel Baltazar, a former Acting Manager of petitioner, evaluated the manifest for PR 178 and found that there were non-revenue passengers allowed to go on board. He specifically identified the family of Labanda, a certain Mr. Luz, petitioner's former branch manager, and, a certain Mr. Moyo. [29] Although petitioner had every opportunity to refute such testimony, it failed to present any countervailing evidence. Instead, petitioner merely focused on assailing the credibility of Baltazar on the ground that he was a

disgruntled employee and a relative of private respondents. Apart from the bare allegations in petitioner's pleadings, no evidence was ever presented in court to substantiate its claim that Baltazar was a disgruntled employee that impelled him to testify against petitioner.

As to his relationship with private respondents, this Court has repeatedly held that a witness' relationship to the victim does not automatically affect the veracity of his or her testimony.[30] While this principle is often applied in criminal cases, we deem that the same principle may apply in this case, albeit civil in nature. If a witness' relationship with a party does not ipso facto render him a biased witness in criminal cases where the quantum of evidence required is proof beyond reasonable doubt, there is no reason why the same principle should not apply in civil cases where the quantum of evidence is only preponderance of evidence.

As aptly observed by the CA which we hereby adopt:

Ironically for the defendant, aside from appellant's assumption that Baltazar could be a disgruntled former employee of their company and could be biased (which same reason could be attributed to Lloyd Fojas) due to a distant relationship with the plaintiff, it offered no proof or evidence to rebut, demean and contradict the substance of the testimony of Baltazar on the crucial point that plaintiffs-appellees were bumped off to accommodate non-revenue, waitlisted or go-show passengers. On this fact alone, defendant's position weakens while credibly establishing that indeed plaintiffs arrived at the airport on time to check-in for Flight PR 178. Further emphasis must be made that Lloyd Fojas even affirmed in court that he can not recall how many PR 178 boarding passes he had at the check-in counter because management has authority to accommodate in any flight and correspondingly issue boarding passes to non-revenue passengers (pages 15-16, TSN, January 24, 1990).[31]

Indeed, petitioner, through its lone witness Fojas, could only answer during his examination on the witness stand that he is unable to recall the circumstances recommending the issuances of boarding passes to waitlisted and that it is the management which has the authority to issue boarding passes to non-revenue passengers.[32] Even in the afternoon flight, PR 180, Fojas could not squarely deny that confirmed paying passengers were bumped-off in favor of non-revenue ones.[33]

The CA likewise correctly concluded that there was overbooking in the morning flight on the basis of the testimony of private respondents' witness Manuel Baltazar, to wit:

ATTY. CALICA:

Q- There was a memorandum order of the PAL prohibiting overbooking. Are you aware of CAB Regulation No. 7 on boarding passengers?

WITNESS:

A- Yes.

ATTY. CALICA:

Q- You will agree with me that this regulation allows only overbooking by 10%?

WITNESS:

A- Yes, that is a government regulation and the company regulation is different.

COURT:

Q- But in the morning flight of May 8, 1988, granting that the government regulation allows only 10% overbooking, can you tell the Court from the manifest itself whether it exceeded the 10% overbooking allowed by the regulation reckoning from the 109 passenger seater?

WITNESS:

A- With the capacity of 109, 10% of it will be 10 or 11, so if we add this it will not exceed 120 passengers.

COURT:

Q- In that flight how many were confirmed?

WITNESS:

Q- In that flight those passengers that were confirmed have a total of 126.

COURT:

Q- Even if when allowed the government regulation of overbooking, you will still exceed the allowable overbooking number?

WITNESS:

A- *Yes*.[34] (Emphasis supplied)

This fact of overbooking, again, was not adequately refuted by petitioner's evidence.

The appellate court aptly sustained the trial court in giving probative weight to the testimony of private respondent Judy Amor that there were other passengers who were not accommodated in flight PR 178, to wit:

Q: And how about you, what did you do when you arrived at the Legaspi Airport at 6:20 while Salvador Gonzales was at the check-in counter to pay the tickets?

A: I went to the Office of the OIC Manager at the right side of the Legaspi Terminal.

…

Q: Who was that Manager?

A: I was able to know his name as Delfin Canonizado.

Q: *There were also people there near the table of Mr. Canonizado, do you know what were they doing?*

A: *They were making complaints also because they were also scheduled for flight on that day. They were not accommodated.*[35] (Emphasis supplied)

We have noted an inconsistency in the testimony of private respondents' witness, Salvador Gonzales in the direct and cross-examinations. In his direct testimony, Gonzales stated that while he was waiting in line at the

check-in counter, with four persons still ahead of him, Lloyd Fojas asked him to approach the counter, took private respondents' tickets and wrote something on them. It was only later on when his turn came, that he found out that what Fojas wrote on the tickets was "late check-n 7:05". On cross-examination, Gonzales testified that it was only after the four persons ahead of him were accommodated that Fojas wrote on the tickets "late check-in 7:05". However, upon clarificatory questions propounded by the trial court, Gonzales was able to clarify that Fojas had written the time on the ticket before the four persons ahead of him were entertained at the counter.[36]Understandably, the lower courts found no cogent reason to discredit the testimony of witness Gonzales.

We have held in an earlier case that a witness may contradict himself on the circumstances of an act or different acts due to a long series of questions on cross-examination during which the mind becomes tired to such a degree that the witness does not understand what he is testifying about, especially if the questions, in their majority are leading and tend to make him ratify a former contrary declaration.[37]

In fine, the findings of fact of the trial court, as sustained by the CA, have to be respected. As we have consistently held, trial courts enjoy the unique advantage of observing at close range the demeanor, deportment and conduct of witnesses as they give their testimonies. Thus, assignment to declarations on the witness stand is best done by them who, unlike appellate magistrates, can weigh firsthand the testimony of a witness.[38]

Anent the second issue as to whether or not the damages awarded are excessive, we rule in the affirmative. The Court of Appeals committed an error in sustaining the ruling of the trial court requiring petitioner to reimburse private respondents the amount of four plane tickets, including the ticket for private respondent minor Carlo Benitez.

As admitted by private respondent Judy in her testimony, the only confirmed tickets for the morning flight (PR 178) are the tickets for herself, her infant son, Gian Carlo and her sister Jane Gamil. They had another ticket which Judy bought for a certain Dra. Emily Chua who backed out and whose ticket they had intended to be transferred to Carlo Benitez.[39] Although it is clearly stated in the ticket that the same is non-transferrable,[40] Judy testified that a PAL employee issued another ticket in the name of Carlo Benitez in lieu of the ticket issued for Dra. Chua. However, an examination of the ticket issued, Exhibit "C", discloses that it does not state therein the flight number or time of departure. Consequently, in the absence of competent evidence, private respondent Carlo Benitez' complaint should be dismissed.

We find no justifiable reason that warrants the award of ₱100,000.00 as actual damages in favor of all private respondents. Article 2199 of the Civil Code, provides that actual or compensatory damages may only be given for such pecuniary loss suffered by him as he has duly proved. We explained in *Chan vs. Maceda*[41] that:

…A court cannot rely on speculations, conjectures or guesswork as to the fact and amount of damages, but must depend upon competent proof that they have been suffered by the injured party and on the best obtainable evidence of the actual amount thereof. It must point out specific facts which could afford a basis for measuring whatever compensatory or actual damages are borne.[42]

All that was proved by herein private respondents was the amount of the purchase price of the plane tickets of private respondents Judy, Jane and Gian Carlo. Only said amounts should therefore be considered in awarding actual damages. As borne by the records, private respondent Judy Amor paid ₱466.00 each for her ticket and that of Jane; while she paid ₱46.60 for her infant Gian Carlo.[43] The amount of actual damages should therefore be reduced to ₱978.60, payable to private respondent Judy Amor.

As to moral damages.

It should be stressed that moral damages are not intended to enrich a plaintiff at he expense of the defendant but are awarded only to allow the former to obtain means, diversion or amusements that will serve to alleviate the moral suffering he has undergone due to the defendant's culpable action.[44] We emphasized in *Philippine National Bank vs. Court of Appeals* that moral damages are not punitive in nature but are designed to somehow alleviate the physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation and similar injury unjustly caused to a person. We have held that even though moral damages are incapable of pecuniary computation, it should nevertheless be proportional to and in approximation of the suffering inflicted. And, to be recoverable, such damage must be the proximate result of a wrongful act or omission the factual basis for which is satisfactorily established by the aggrieved party. [45]

In the case at bar, private respondent Judy Amor testified that she felt "ashamed" when the plane took off and they were left at the airport since there were many people there who saw them including dentists like her. She also related that she missed the Philippine Dental Convention scheduled on the 8th of May, 1988 where she was supposed to attend as a dentist and officer of the Sorsogon Dental Association. They tried to look for buses bound for Manila but missed those scheduled in the morning. They went back to the airport but still failed to take an afternoon flight. Hence, she was forced to take a bus that evening for Manila which did not allow her to sleep that night.[46] Private respondent Judy however did not miss the whole convention as she was able to leave on the night of the first day of the week-long convention.

While there is no hard and fast rule for determining what would be a fair amount of moral damages, generally, the amount awarded should be commensurate with the actual loss or injury suffered.[47]

The CA erred in upholding the trial court's award of moral damages based on Judy Amor's claim that there was a denigration of her social and financial standing. Private respondent Judy failed to show that she was treated rudely or disrespectfully by petitioner's employees despite her stature as a dentist. As we held in *Kierulf vs. Court of Appeals*[48]

The social and financial standing of Lucila cannot be considered in awarding moral damages. The factual circumstances prior to the accident show that no "rude and rough" reception, no "menacing attitude," no "supercilious manner," no "abusive language and highly scornful reference" was given her. The social and financial standing of a claimant of moral damages may be considered in awarding moral damages only if he or she was subjected to contemptuous conduct despite the offender's knowledge of his or her social and financial standing.[49] (Emphasis supplied)

Nevertheless, we hold that private respondent Judy Amor is entitled to moral damages. In a number of cases, we have pronounced that air carriage is a business possessed with special qualities. In *Singson vs. Court of Appeals*,[50] we explained that:

A contract of air carriage is a peculiar one. Imbued with public interest, common carriers are required by law to carry passengers safely as far as human care and foresight can provide, using the utmost diligence of a very cautious person, with due regard for all the circumstances.*1âwphi1* A contract to transport passengers is quite different in kind and degree from any other contractual relation. And this because its business is mainly with the traveling public. It invites people to avail of the comforts and advantages it offers. The contract of carriage, therefore, generates a relation attended with a public duty. Failure of the carrier to observe this high degree of care and extraordinary diligence renders it liable for any damage that may be sustained by its passengers.[51]

As the lower courts have found, evidence positively show that petitioner has accommodated waitlisted and non-revenue passengers and had overbooked more than what is allowed by law, to the prejudice of private respondents who had confirmed tickets. Overbooking amounts to bad faith[52] and therefore petitioner is liable to pay moral damages to respondent Judy Amor.

Considering all the foregoing, we deem that the award of ₱250,000.00 as moral damages in favor of private respondent Judy Amor is exorbitant. Where the damages awarded are far too excessive compared to the actual losses sustained by the aggrieved party, the same should be reduced to a more reasonable amount.[53] We find the amount of ₱100,000.00 to be sufficient, just and reasonable.

We consider the award of actual damages in favor of private respondent Jane Gamil to be inappropriate considering the testimony of Judy Amor that she was the one who paid for the tickets.[54] Likewise, the appellate court erred in sustaining the award of moral damages in favor of Jane Gamil as she never testified in court. It has been held that where the plaintiff fails to take the witness stand and testify as to his social humiliation, wounded feelings and anxiety, moral damages cannot be recovered".[55]

As to the award of exemplary damages, Article 2234 of the Civil Code provides that the claimant must show that he would be entitled to moral, temperate or compensatory damages before the court may consider the question whether or not exemplary damages should be awarded.

Consequently, private respondent Jane Gamil, not being entitled to actual and moral damages, is not entitled to exemplary damages.

The award of exemplary damages in favor of private respondent Judy Amor is warranted in this case.[56] Waitlisted and non-revenue passengers were accommodated while private respondent Judy Amor who had fully paid her fare and was a confirmed passenger was unduly deprived of enplaning. Petitioner was guilty of overbooking its flight to the prejudice of its confirmed passengers. This practice cannot be countenanced especially considering that the business of air carriage is imbued with public character. We have ruled that where in breaching the contract of carriage, the airline is shown to have acted in bad faith, as in this case,[57] the award of exemplary damages in addition to moral and actual damages is proper.[58] However, as in the matter of the moral damages awarded by the trial court, we consider the amount of ₱200,000.00 as exemplary damages to be far too excessive. The amount of ₱25,000.00 is just and proper.

We find the award of attorney's fees in this case to be in order since it is well settled that the same may be awarded when the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest.[59]

WHEREFORE, we affirm the decision of the Court of Appeals with the following MODIFICATIONS:

1. Petitioner is ordered to pay private respondent Judy Amor the amount of ₱978.60 as and for actual damages; ₱100,000.00 as moral damages; ₱25,000.00 as exemplary damages; and attorney's fees in the amount of ₱30,000.00 plus ₱500.00 for every appearance of private respondent's lawyer, or a total of₱10,500.00 for 21 actual appearances in court; ₱2,000.00 as incidental litigation expenses; and costs of suit.

2. The claim for damages of private respondent Jane Gamil is DENIED for lack of evidence.

3. The complaint of private respondent Carlo Benitez is DISMISSED for lack of cause of action.

No pronouncement as to costs.

SO ORDERED

G.R. No. 145804 February 6, 2003

LIGHT RAIL TRANSIT AUTHORITY & RODOLFO ROMAN, petitioners,
vs.
MARJORIE NAVIDAD, Heirs of the Late NICANOR NAVIDAD & PRUDENT SECURITY AGENCY, respondents.

D E C I S I O N

VITUG, *J.:*

The case before the Court is an appeal from the decision and resolution of the Court of Appeals, promulgated on 27 April 2000 and 10 October 2000, respectively, in CA-G.R. CV No. 60720, entitled "Marjorie Navidad and Heirs of the Late Nicanor Navidad vs. Rodolfo Roman, et. al.," which has modified the decision of 11 August 1998 of the Regional Trial Court, Branch 266, Pasig City, exonerating Prudent Security Agency (Prudent) from liability and finding Light Rail Transit Authority (LRTA) and Rodolfo Roman liable for damages on account of the death of Nicanor Navidad.

On 14 October 1993, about half an hour past seven o'clock in the evening, Nicanor Navidad, then drunk, entered the EDSA LRT station after purchasing a "token" (representing payment of the fare). While Navidad was standing on the platform near the LRT tracks, Junelito Escartin, the security guard assigned to the area approached Navidad. A misunderstanding or an altercation between the two apparently ensued that led to a fist fight. No evidence, however, was adduced to indicate how the fight started or who, between the two, delivered the first blow or how Navidad later fell on the LRT tracks. At the exact moment that Navidad fell, an LRT train, operated by petitioner Rodolfo Roman, was coming in. Navidad was struck by the moving train, and he was killed instantaneously.

On 08 December 1994, the widow of Nicanor, herein respondent Marjorie Navidad, along with her children, filed a complaint for damages against Junelito Escartin, Rodolfo Roman, the LRTA, the Metro Transit Organization, Inc. (Metro Transit), and Prudent for the death of her husband. LRTA and Roman filed a counterclaim against Navidad and a cross-claim against Escartin and Prudent. Prudent, in its answer, denied liability and averred that it had exercised due diligence in the selection and supervision of its security guards.

The LRTA and Roman presented their evidence while Prudent and Escartin, instead of presenting evidence, filed a demurrer contending that Navidad had failed to prove that Escartin was negligent in his assigned task. On 11 August 1998, the trial court rendered its decision; it adjudged:

"WHEREFORE, judgment is hereby rendered in favor of the plaintiffs and against the defendants Prudent Security and Junelito Escartin ordering the latter to pay jointly and severally the plaintiffs the following:

"a) 1) Actual damages of P44,830.00;

2) Compensatory damages of P443,520.00;

3) Indemnity for the death of Nicanor Navidad in the sum of P50,000.00;

"b) Moral damages of P50,000.00;

"c) Attorney's fees of P20,000;

"d) Costs of suit.

"The complaint against defendants LRTA and Rodolfo Roman are dismissed for lack of merit.

"The compulsory counterclaim of LRTA and Roman are likewise dismissed."[1]

Prudent appealed to the Court of Appeals. On 27 August 2000, the appellate court promulgated its now assailed decision exonerating Prudent from any liability for the death of Nicanor Navidad and, instead, holding the LRTA and Roman jointly and severally liable thusly:

"WHEREFORE, the assailed judgment is hereby MODIFIED, by exonerating the appellants from any liability for the death of Nicanor Navidad, Jr. Instead, appellees Rodolfo Roman and the Light Rail Transit Authority (LRTA) are held liable for his death and are hereby directed to pay jointly and severally to the plaintiffs-appellees, the following amounts:

a) P44,830.00 as actual damages;

b) P50,000.00 as nominal damages;

c) P50,000.00 as moral damages;

d) P50,000.00 as indemnity for the death of the deceased; and

e) P20,000.00 as and for attorney's fees."[2]

The appellate court ratiocinated that while the deceased might not have then as yet boarded the train, a contract of carriage theretofore had already existed when the victim entered the place where passengers were supposed to be after paying the fare and getting the corresponding token therefor. In exempting Prudent from liability, the court stressed that there was nothing to link the security agency to the death of Navidad. It said that Navidad failed to show that Escartin inflicted fist blows upon the victim and the evidence merely established the fact of death of Navidad by reason of his having been hit by the train owned and managed by the LRTA and operated at the time by Roman. The appellate court faulted petitioners for their failure to present expert evidence to establish the fact that the application of emergency brakes could not have stopped the train.

The appellate court denied petitioners' motion for reconsideration in its resolution of 10 October 2000.

In their present recourse, petitioners recite alleged errors on the part of the appellate court; viz:

"I.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED BY DISREGARDING THE FINDINGS OF FACTS BY THE TRIAL COURT

"II.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN FINDING THAT PETITIONERS ARE LIABLE FOR THE DEATH OF NICANOR NAVIDAD, JR.

"III.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN FINDING THAT RODOLFO ROMAN IS AN EMPLOYEE OF LRTA."[3]

Petitioners would contend that the appellate court ignored the evidence and the factual findings of the trial court by holding them liable on the basis of a sweeping conclusion that the presumption of negligence on the part of a common carrier was not overcome. Petitioners would insist that Escartin's assault upon Navidad, which caused the latter to fall on the tracks, was an act of a stranger that could not have been foreseen or prevented. The LRTA would add that the appellate court's conclusion on the existence of an employer-employee relationship between Roman and LRTA lacked basis because Roman himself had testified being an employee of Metro Transit and not of the LRTA.

Respondents, supporting the decision of the appellate court, contended that a contract of carriage was deemed created from the moment Navidad paid the fare at the LRT station and entered the premises of the latter, entitling Navidad to all the rights and protection under a contractual relation, and that the appellate court had correctly held LRTA and Roman liable for the death of Navidad in failing to exercise extraordinary diligence imposed upon a common carrier.

Law and jurisprudence dictate that a common carrier, both from the nature of its business and for reasons of public policy, is burdened with the duty of exercising utmost diligence in ensuring the safety of passengers.[4] The Civil Code, governing the liability of a common carrier for death of or injury to its passengers, provides:

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

"Article 1756. In case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as prescribed in articles 1733 and 1755."

"Article 1759. Common carriers are liable for the death of or injuries to passengers through the negligence or willful acts of the former's employees, although such employees may have acted beyond the scope of their authority or in violation of the orders of the common carriers.

"This liability of the common carriers does not cease upon proof that they exercised all the diligence of a good father of a family in the selection and supervision of their employees."

"Article 1763. A common carrier is responsible for injuries suffered by a passenger on account of the willful acts or negligence of other passengers or of strangers, if the common carrier's employees through the exercise of the diligence of a good father of a family could have prevented or stopped the act or omission."

The law requires common carriers to carry passengers safely using the utmost diligence of very cautious persons with due regard for all circumstances.[5] Such duty of a common carrier to provide safety to its passengers so obligates it not only during the course of the trip but for so long as the passengers are within its premises and where they ought to be in pursuance to the contract of carriage.[6] The statutory provisions render a common carrier liable for death of or injury to passengers (a) through the negligence or wilful acts of its employees or b) on account of wilful acts or negligence of other passengers or of strangers if the common carrier's employees through the exercise of due diligence could have prevented or stopped the act or omission.[7] In case of such death or injury, a carrier is presumed to have been at fault or been negligent, and[8] by simple proof of injury, the passenger is relieved of the duty to still establish the fault or negligence of the carrier or of its employees and the burden shifts upon the carrier to prove that the injury is due to an unforeseen event or to force majeure.[9] In the absence of satisfactory explanation by the carrier on how the accident occurred, which petitioners, according to the appellate court, have failed to show, the presumption would be that it has been at fault,[10] an exception from the general rule that negligence must be proved.[11]

The foundation of LRTA's liability is the contract of carriage and its obligation to indemnify the victim arises from the breach of that contract by reason of its failure to exercise the high diligence required of the common carrier. In the discharge of its commitment to ensure the safety of passengers, a carrier may choose to hire its own employees or avail itself of the services of an outsider or an independent firm to undertake the task. In either case, the common carrier is not relieved of its responsibilities under the contract of carriage.

Should Prudent be made likewise liable? If at all, that liability could only be for tort under the provisions of Article 2176[12] and related provisions, in conjunction with Article 2180,[13] of the Civil Code. The premise, however, for the employer's liability is negligence or fault on the part of the employee. Once such fault is established, the employer can then be made liable on the basis of the presumption juris tantum that the employer failed to exercise diligentissimi patris families in the selection and supervision of its employees. The liability is primary and can only be negated by showing due diligence in the selection and supervision of the employee, a factual matter that has not been shown. Absent such a showing, one might ask further, how then must the liability of the common carrier, on the one hand, and an independent contractor, on the other hand, be described? It would be solidary. A contractual obligation can be breached by tort and when the same act or omission causes the injury, one resulting in culpa contractual and the other in culpa aquiliana, Article 2194[14] of the Civil Code can well apply.[15] In fine, a liability for tort may arise even under a contract, where tort is that which breaches the contract.[16] Stated differently, when an act which constitutes a breach of contract would have itself constituted the source of a quasi-delictual liability had no contract existed between the parties, the contract can be said to have been breached by tort, thereby allowing the rules on tort to apply.[17]

Regrettably for LRT, as well as perhaps the surviving spouse and heirs of the late Nicanor Navidad, this Court is concluded by the factual finding of the Court of Appeals that "there is nothing to link (Prudent) to the death of Nicanor (Navidad), for the reason that the negligence of its employee, Escartin, has not been duly proven x x x." This finding of the appellate court is not without substantial justification in our own review of the records of the case.

There being, similarly, no showing that petitioner Rodolfo Roman himself is guilty of any culpable act or omission, he must also be absolved from liability. Needless to say, the contractual tie between the LRT and Navidad is not itself a juridical relation between the latter and Roman; thus, Roman can be made liable only for his own fault or negligence.

The award of nominal damages in addition to actual damages is untenable. Nominal damages are adjudicated in order that a right of the plaintiff, which has been violated or invaded by the defendant, may be vindicated or recognized, and not for the purpose of indemnifying the plaintiff for any loss suffered by him.[18] It is an established rule that nominal damages cannot co-exist with compensatory damages.[19]

WHEREFORE, the assailed decision of the appellate court is AFFIRMED with MODIFICATION but only in that (a) the award of nominal damages is DELETED and (b) petitioner Rodolfo Roman is absolved from liability. No costs.

SO ORDERED.

G.R. No. 125678 March 18, 2002

PHILAMCARE HEALTH SYSTEMS, INC., petitioner,
vs.
COURT OF APPEALS and JULITA TRINOS, respondents.

YNARES-SANTIAGO, *J.:*

Ernani Trinos, deceased husband of respondent Julita Trinos, applied for a health care coverage with petitioner Philamcare Health Systems, Inc. In the standard application form, he answered no to the following question:

> Have you or any of your family members ever consulted or been treated for high blood pressure, heart trouble, diabetes, cancer, liver disease, asthma or peptic ulcer? (If Yes, give details).[1]

The application was approved for a period of one year from March 1, 1988 to March 1, 1989. Accordingly, he was issued Health Care Agreement No. P010194. Under the agreement, respondent's husband was entitled to avail of hospitalization benefits, whether ordinary or emergency, listed therein. He was also entitled to avail of "out-patient benefits" such as annual physical examinations, preventive health care and other out-patient services.

Upon the termination of the agreement, the same was extended for another year from March 1, 1989 to March 1, 1990, then from March 1, 1990 to June 1, 1990. The amount of coverage was increased to a maximum sum of P75,000.00 per disability.[2]

During the period of his coverage, Ernani suffered a heart attack and was confined at the Manila Medical Center (MMC) for one month beginning March 9, 1990. While her husband was in the hospital, respondent tried to claim the benefits under the health care agreement. However, petitioner denied her claim saying that the Health Care Agreement was void. According to petitioner, there was a concealment regarding Ernani's medical history. Doctors at the MMC allegedly discovered at the time of Ernani's confinement that he was hypertensive, diabetic and asthmatic, contrary to his answer in the application form. Thus, respondent paid the hospitalization expenses herself, amounting to about P76,000.00.

After her husband was discharged from the MMC, he was attended by a physical therapist at home. Later, he was admitted at the Chinese General Hospital. Due to financial difficulties, however, respondent brought her husband home again. In the morning of April 13, 1990, Ernani had fever and was feeling very weak. Respondent was constrained to bring him back to the Chinese General Hospital where he died on the same day.

On July 24, 1990, respondent instituted with the Regional Trial Court of Manila, Branch 44, an action for damages against petitioner and its president, Dr. Benito Reverente, which was docketed as Civil Case No. 90-53795. She asked for reimbursement of her expenses plus moral damages and attorney's fees. After trial, the lower court ruled against petitioners, *viz:*

> WHEREFORE, in view of the forgoing, the Court renders judgment in favor of the plaintiff Julita Trinos, ordering:
>
> 1. Defendants to pay and reimburse the medical and hospital coverage of the late Ernani Trinos in the amount of P76,000.00 plus interest, until the amount is fully paid to plaintiff who paid the same;
>
> 2. Defendants to pay the reduced amount of moral damages of P10,000.00 to plaintiff;
>
> 3. Defendants to pay the reduced amount of P10,000.00 as exemplary damages to plaintiff;
>
> 4. Defendants to pay attorney's fees of P20,000.00, plus costs of suit.
>
> SO ORDERED.[3]

On appeal, the Court of Appeals affirmed the decision of the trial court but deleted all awards for damages and absolved petitioner Reverente.[4] Petitioner's motion for reconsideration was denied.[5] Hence, petitioner brought the instant petition for review, raising the primary argument that a health care agreement is not an insurance contract; hence the "incontestability clause" under the Insurance Code[6] does not apply.*1âwphi1.nêt*

Petitioner argues that the agreement grants "living benefits," such as medical check-ups and hospitalization which a member may immediately enjoy so long as he is alive upon effectivity of the agreement until its expiration one-year thereafter. Petitioner also points out that only medical and hospitalization benefits are given under the agreement without any indemnification, unlike in an insurance contract where the insured is indemnified for his loss. Moreover, since Health Care Agreements are only for a period of one year, as compared to insurance contracts which last longer,[7] petitioner argues that the incontestability clause does not apply, as the same requires an effectivity period of at least two years. Petitioner further argues that it is not an insurance company, which is governed by the Insurance Commission, but a Health Maintenance Organization under the authority of the Department of Health.

Section 2 (1) of the Insurance Code defines a contract of insurance as an agreement whereby one undertakes for a consideration to indemnify another against loss, damage or liability arising from an unknown or contingent event. An insurance contract exists where the following elements concur:

> 1. The insured has an insurable interest;
>
> 2. The insured is subject to a risk of loss by the happening of the designated peril;

3. The insurer assumes the risk;

4. Such assumption of risk is part of a general scheme to distribute actual losses among a large group of persons bearing a similar risk; and

5. In consideration of the insurer's promise, the insured pays a premium.[8]

Section 3 of the Insurance Code states that any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest against him, may be insured against. Every person has an insurable interest in the life and *health* of himself. Section 10 provides:

> Every person has an insurable interest in the life and health:
>
> (1) of himself, of his spouse and of his children;
>
> (2) of any person on whom he depends wholly or in part for education or support, or in whom he has a pecuniary interest;
>
> (3) of any person under a legal obligation to him for the payment of money, respecting property or service, of which death or illness might delay or prevent the performance; and
>
> (4) of any person upon whose life any estate or interest vested in him depends.

In the case at bar, the insurable interest of respondent's husband in obtaining the health care agreement was his own health. The health care agreement was in the nature of non-life insurance, which is primarily a contract of indemnity.[9] Once the member incurs hospital, medical or any other expense arising from sickness, injury or other stipulated contingent, the health care provider must pay for the same to the extent agreed upon under the contract.

Petitioner argues that respondent's husband concealed a material fact in his application. It appears that in the application for health coverage, petitioners required respondent's husband to sign an express authorization for any person, organization or entity that has any record or knowledge of his health to furnish any and all information relative to any hospitalization, consultation, treatment or any other medical advice or examination.[10] Specifically, the Health Care Agreement signed by respondent's husband states:

> We hereby declare and agree that all statement and answers contained herein and in any addendum annexed to this application are full, complete and true and bind all parties in interest under the Agreement herein applied for, that there shall be no contract of health care coverage unless and until an Agreement is issued on this application and the full Membership Fee according to the mode of payment applied for is actually paid during the lifetime and good health of proposed Members; that no information acquired by any Representative of PhilamCare shall be binding upon PhilamCare unless set out in writing in the application;<u>that any physician is, by these presents, expressly authorized to disclose or give testimony at anytime relative to any information acquired by him in his professional capacity upon any question affecting the eligibility for health care coverage of the Proposed Members</u> and that the acceptance of any Agreement issued on this application shall be a ratification of any correction in or addition to this application as stated in the space for Home Office Endorsement.[11] (Underscoring ours)

In addition to the above condition, petitioner additionally required the applicant for authorization to inquire about the applicant's medical history, thus:

> I hereby authorize any person, organization, or entity that has any record or knowledge of my health and/or that of _____ to give to the PhilamCare Health Systems, Inc. any and all information relative to any hospitalization, consultation, treatment or any other medical advice or examination. This authorization is in connection with the application for health care coverage only. A photographic copy of this authorization shall be as valid as the original.[12] (Underscoring ours)

Petitioner cannot rely on the stipulation regarding "Invalidation of agreement" which reads:

> Failure to disclose or misrepresentation of any material information by the member in the application or medical examination, whether intentional or unintentional, shall automatically invalidate the Agreement from the very beginning and liability of Philamcare shall be limited to return of all Membership Fees paid. An undisclosed or misrepresented information is deemed material if its revelation would have resulted in the declination of the applicant by Philamcare or the assessment of a higher Membership Fee for the benefit or benefits applied for.[13]

The answer assailed by petitioner was in response to the question relating to the medical history of the applicant. This largely depends on opinion rather than fact, especially coming from respondent's husband who was not a medical doctor. Where matters of opinion or judgment are called for, answers made in good faith and without intent to deceive will not avoid a policy even though they are untrue.[14] Thus,

> (A)lthough false, a representation of the expectation, intention, belief, opinion, or judgment of the insured will not avoid the policy if there is no actual fraud in inducing the acceptance of the risk, or its acceptance at a lower rate of premium, and this is likewise the rule although the statement is material to the risk, if the statement is obviously of the foregoing character, since in such case the insurer is not justified in relying upon such statement, but is obligated to make further inquiry. There is a clear distinction between such a case and one in which the insured is fraudulently and intentionally states to be true, as a matter of expectation or belief, that which he then knows, to be actually untrue, or the impossibility of which is shown by the facts within his knowledge, since in such case the intent to deceive the insurer is obvious and amounts to actual fraud.[15] (Underscoring ours)

The fraudulent intent on the part of the insured must be established to warrant rescission of the insurance contract.[16] Concealment as a defense for the health care provider or insurer to avoid liability is an affirmative defense and the duty to establish such defense by satisfactory and convincing evidence rests upon the provider or insurer. In any case, with or without the authority to investigate, petitioner is liable for claims made under the contract. Having assumed a responsibility under the agreement, petitioner is bound to answer the same to the extent agreed upon. In the end, the liability of the health care provider attaches once the member is hospitalized for the disease or injury covered by the agreement or whenever he avails of the covered benefits which he has prepaid.

Under Section 27 of the Insurance Code, "a concealment entitles the injured party to rescind a contract of insurance." The right to rescind should be exercised previous to the commencement of an action on the contract.[17] In this case, no rescission was made. Besides, the cancellation of health care agreements as in insurance policies require the concurrence of the following conditions:

1. Prior notice of cancellation to insured;

2. Notice must be based on the occurrence after effective date of the policy of one or more of the grounds mentioned;

3. Must be in writing, mailed or delivered to the insured at the address shown in the policy;

4. Must state the grounds relied upon provided in Section 64 of the Insurance Code and upon request of insured, to furnish facts on which cancellation is based.[18]

None of the above pre-conditions was fulfilled in this case. When the terms of insurance contract contain limitations on liability, courts should construe them in such a way as to preclude the insurer from non-compliance with his obligation.[19] Being a contract of adhesion, the terms of an insurance contract are to be construed strictly against the party which prepared the contract – the insurer.[20] By reason of the exclusive control of the insurance company over the terms and phraseology of the insurance contract, ambiguity must be strictly interpreted against the insurer and liberally in favor of the insured, especially to avoid forfeiture.[21] This is equally applicable to Health Care Agreements. The phraseology used in medical or hospital service contracts, such as the one at bar, must be liberally construed in favor of the subscriber, and if doubtful or reasonably susceptible of two interpretations the construction conferring coverage is to be adopted, and exclusionary clauses of doubtful import should be strictly construed against the provider.[22]

Anent the incontestability of the membership of respondent's husband, we quote with approval the following findings of the trial court:

> (U)nder the title Claim procedures of expenses, the defendant Philamcare Health Systems Inc. had twelve months from the date of issuance of the Agreement within which to contest the membership of the patient if he had previous ailment of asthma, and six months from the issuance of the agreement if the patient was sick of diabetes or hypertension. The periods having expired, the defense of concealment or misrepresentation no longer lie.[23]

Finally, petitioner alleges that respondent was not the legal wife of the deceased member considering that at the time of their marriage, the deceased was previously married to another woman who was still alive. The health care agreement is in the nature of a contract of indemnity. Hence, payment should be made to the party who incurred the expenses. It is not controverted that respondent paid all the hospital and medical expenses. She is therefore entitled to reimbursement. The records adequately prove the expenses incurred by respondent for the deceased's hospitalization, medication and the professional fees of the attending physicians.[24]

WHEREFORE, in view of the foregoing, the petition is **DENIED**. The assailed decision of the Court of Appeals dated December 14, 1995 is **AFFIRMED**.

SO ORDERED.