

**SILVESTRA CUEVO, PETITIONER, VS. FAUSTO BARREDO,
RESPONDENT.***G.R. No. 45699. February 24, 1938*

Ponente: VILLA-REAL, J.

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This case is before this court by virtue of a petition for certiorari filed by the plaintiff Silvestra Cuevo for the reversal by this court of the judgment rendered by the second division of the Court of Appeals, whereby it affirmed that of the Court of First Instance of Manila absolving the defendant Fausto Barredo from the complaint filed by said plaintiff against him and dismissing said complaint, without special pronouncement as to costs.

The jurisdiction of this court in this case being merely to review the conclusions of law inferred by the Court of Appeals from those of fact established in its judgment in question, we can take into consideration only the following conclusions of fact which are briefly as follows:

On August 3, 1935, a strong wind was blowing in the City of Manila. A typhoon signal was raised. The current of the Pasig River was swift and strong. On that date Anastacio Lozano was working as carpenter for the defendant on the job of cementing and setting up a concrete pier in the middle of the Pasig River, adjoining the "Convalescencia Island", and two abutments on the banks, upon which a bridge annexed to the Ayala bridge was to be constructed. While Anastacio Lozano was thus working, a wavelet, produced by a launch that had just passed by, reached the heap of unfastened logs which were to be used as piles, causing one of said logs to be carried by the current Yoshio Tagashira, the foreman of the defendant, upon seeing that said log was being carried away by the current, cried out, saying that the log should be recovered otherwise they would have to pay for its value. Thereupon, Anastacio Lozano, who knew how to swim and could swim across the Pasig River, leaped into the water, swam and attempted to recover the log, but unfortunately was drowned.

Said second division of the Court of Appeals, in affirming the absolatory judgment of the Court of First Instance of Manila, held that the defendant, as contractor of the work, is not bound, under section 1, clause 1, of Act No. 1874, to pay indemnity for damages for the death of Anastacio Lozano, inasmuch as said death was accidental and was not due to a defect in the condition of the ways, works, or machinery connected with or used in the business of the defendant, which arose from, or had not been discovered or remedied in consequence of, the negligence of the defendant or of a person in his service who had been intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; nor under clause 2 of the same section of said Act, because said death was not due to the negligence of the defendant or of a person in his service who was intrusted with and was exercising superintendence, and if so, the deceased employee failed to exercise due care.

There is no doubt that under section 1, clause 1, of Act No. 1874, the defendant is under no obligation to pay indemnity for damages for the death of Anastacio Lozano on the ground that said log was not a way, work, or machinery used by the defendant in carrying out the construction of the bridge annex, but a mere material that was to be employed in said work, and it was not the one that directly or indirectly caused Lozano's death.

As to the question whether or not Anastacio Lozano's death took place as a consequence of the negligence of a person in the defendant's service, who was intrusted with and was exercising superintendence, Yoshio Tagashira was the defendant's foreman charged with the vigilance and care of the workmen and materials for the construction of the bridge annex. While he was thus performing his duties as such foreman or superintendent, he heard the shout of one of the laborers under him, who were heaping the logs to be used as piles, that an unfastened log was being carried away by the current. Naturally, when said foreman saw what he had just been informed of there flashed in his mind the thought of recovering the log in question in order not to incur responsibility, and he issued the aforesaid threatening order. Said order—which, coming from a superior and containing a threat, had the nature of a command—was obeyed by Anastacio Lozano who, at that time was engaged in piling up logs. When Anastacio Lozano leaped into the water at that pressing moment, he was undoubtedly prompted by his confidence in his ability as a swimmer, the fear of having to pay for the loss of the log if it was not recovered, that of disobeying a superior's order and the impending loss of said log.

Under the second clause of section 1 of Act No. 1874, the negligence of the employer or of his superintendent makes the former civilly liable for any personal injury caused to an employee, or for his death as a consequence thereof. In order to exempt himself from this responsibility, it was necessary for the employer or his superintendent to take care so that no employee of theirs might suffer personal injury or die as a result of their negligence. Therefore, the foreman was, on that occasion, faced with the alternative of having to avoid injury to the employee, who might obey his order, and of saving the log. He knew, or at least, he should know from ordinary experience, that anybody who leaped into the water under said circumstances would run the risk of drowning. He likewise knew that a man's life is worth very much more than a log. Notwithstanding these considerations, said foreman, without taking the necessary precautions tending to protect the life of his employee, who might obey his order, issued the threatening order which prompted Anastacio Lozano to leap into the water to recover the log then being carried away by the current, thereby acting with serious negligence. The effects of such negligence rebound to the defendant as employer, because the custody and conservation of the materials to be used in the work formed part of the general power of superintendence received by the superintendent as such from his employer (art. 1712, Civil Code). In ordering recovery of the log carried away by the current, the foreman acted within the scope of said power, and the defendant, as principal, is responsible for the acts of his agent (art. 1727, Civil Code).

However, in order to hold the employer responsible for the death of an employee, it is not sufficient that such death was due to the negligence of a superintendent of his but it is necessary that the deceased employee had on his part exercise due care in order to avoid the accident. As already stated, Anastacio Lozano was a good swimmer and could swim across the Pasig River. Upon hearing the threatening order of the foreman and seeing that the current was carrying the log away, he leaped into the water. Offhand, he undoubtedly thought that, notwithstanding the swiftness of the current of the river, he could recover the log in question, confident in his ability as a good swimmer and in that his foreman, a more experienced and intelligent man than he, would not give said order if he were not sure that compliance therewith did not involve any risk. Furthermore, the thought of losing the log, the threat of having to pay the value thereof and the fear of being dismissed if he did not obey the order must have greatly oppressed the mind of the unfortunate workman and impelled him to leap into the water, without giving him time to consider the situation and exercise his free will. If due care and prudence are the result of a calm reflection, having been placed by the foreman in such a situation that he had no time to make use of his reflective faculties, he can not be blamed for acting as he did, in obeying the threatening order under the psychological impulse of the moment. Inasmuch as it was the foreman who, by his negligence, caused Anastacio Lozano to act in said manner, the former can not allege in his defense that the latter failed to exercise due care. Neither can the employer invoke said defense because the effects of the negligence of his foreman, while acting

within the scope of his authority, extend to him.

Now arises the question of procedure whether or not the defendant may be held responsible under the second clause of section 1 of Act No. 1874, as amended by Act No. 2473, by virtue of the complaint filed by Silvestra Cuevo in the Court of First Instance of Manila.

In paragraph III of the complaint in question, it is alleged that on August 3, 1935, at about 8 a. m., and while Anastacio Lozano was performing with due care his usual work as carpenter in the defendant's construction work of the Ayala Bridge annex, a log of the defendant's property, located near said Anastacio Lozano, was carried away by the strong current and, trying to save it, he was, along with the log, carried by the current and was drowned. While it is true that an allegation to the effect that the death of said workman arose from the negligence of a foreman of the defendant, who¹ was intrusted with and was exercising superintendence of the workmen, is lacking, in order to, make the alleged facts sufficient to constitute a cause of action, in accordance with the above-stated section 1, clause 2, of Act No. 1874, section 1 of Act No. 2473, amending Act No. 1874, provides that "in all litigations instituted by a laborer or by his heirs and successors under the provisions of Act Numbered Eighteen hundred and seventy-four of the Philippine Legislature, entitled 'An Act to extend and regulate the responsibility of employers for personal injuries and deaths suffered by their employees while at work,' neglect on the part of the employer shall constitute a presumption of law." The negligence of the employer being presumed by law, it is unnecessary to allege such requisite in a complaint filed by a laborer or by his heirs and successors. Therefore, as the allegations of the complaint are sufficient to constitute a cause of action under said section 1, clause 2, of Act No. 1874, and as the existence of the alleged facts have been proven by a preponderance of evidence, it is unnecessary to order the amendment of the complaint in question in order to make such allegations agree with the facts found, there being no variance between them (sec. 109, Act No. 190). Although the theory maintained by the plaintiff in the Court of First Instance was different from that maintained by her in the Court of Appeals, inasmuch as evidence in support of both theories had been adduced in the court of origin, without any objection, and as the plaintiff had prayed in her complaint that she be granted such other remedy as the court may deem just and equitable under the premises, this court is authorized under the procedural law to decide the case in accordance with the allegations of the complaint constituting a cause of action and supported by the evidence.

Therefore, as the complaint contains allegations sufficient to constitute a cause of action under section 1, clause 2, of Act No. 1874, in connection with Act No. 2473, and such allegations having been proven, judgment should be rendered in accordance with such allegations and the evidence.

The only question now left for this court to consider is whether or not the herein plaintiff-appellant is entitled to the indemnity claimed by her. Section 2 of Act No. 1874 requires that at the time of the death of the employee, as the result of the negligence of a person for whose acts the employer is liable, the heir claimant was dependent upon the wages of the deceased employee for support.

In the appealed judgment of the Court of Appeals, no data is available on this point. However, it appears from that of the Court of First Instance, which was affirmed in toto by the Court of Appeals, that the plaintiff was married in second wedlock to one Tomas Diaz, who had no permanent employment and did not earn enough for her and her children's support, and that her deceased son used to give her all his earnings. The law does not require the legitimate heir of the employee, who died as a result of the negligence of a person for whose acts the employer is liable, to depend absolutely for his or his children's support upon the salary of the deceased, it being sufficient that they somehow and to a certain extent depend upon said salary for support.

In view of the foregoing considerations, this court is of the opinion and so holds: (1) That where it is alleged in a complaint, seeking indemnity for damages caused by the death of an employee as a consequence of the negligence

of a foreman, that the deceased employee in question acted with due care, failure to allege the negligence of said foreman is not a defect making the allegation insufficient to constitute a cause of action under section 1, clause 2, of Act No. 1874, inasmuch as Act No. 2473 establishes the legal presumption of the existence of neglect on the part of the employer; (2) that where a complaint is based upon two causes of action, for both of which evidence has been presented without objection, any of said causes of action may be maintained on appeal, and the theory is not altered thereby; (3) that a foreman, who, in the performance of his duties as such, sees a log belonging to his employer being carried by a strong current, and warns the laborers under his superintendence that said log must be recovered, otherwise they would be made to pay for the value thereof, which threatening order is obeyed by one of the laborers who, knowing how to swim, leaps into the water to recover said log and drowns, commits negligence for not having taken the necessary precautions to avoid the fatal result; (4) that an employee, who, being a good swimmer, sees that one of the logs he is piling up is being carried away by the strong current, hears the order of his foreman that said log must be recovered otherwise they would be made to pay for the value thereof, and leaps into the water for the purpose of recovering it, is not guilty of negligence on the ground that he had no time for reflection; (5) that the foreman, whose threatening order, issued within the scope of his authority under circumstances which give no time for reflection, is taken as a command and obeyed, causing the drowning of the person obeying it, cannot invoke in his defense the drowned employee's alleged failure to exercise due care; (6) that neither can the employer of said foreman invoke said defense inasmuch as the employer is liable for the foreman's acts committed within the scope of his authority; and (7) that section 2 of Act No. 1874 does not require that the legitimate heir's dependence upon the salary of the deceased employee be total, it being sufficient that such dependence be partial.

Wherefore, the appealed judgment is reversed, and the respondent is ordered to pay, as indemnity for damages, the sum of P1,000, with legal interest thereon from the date of the filing of the complaint, until fully paid, with costs to said respondent. So ordered.

Abad Santos, and Imperial, JJ., concur.

CONCURRING IN THE RESULT

LAUREL, J.:

I concur in the result, but I desire to guard myself against any general statement which may unnecessarily bind this court in the dealing with cases of this kind in the future. For instance, in imputing negligence to the superintendent it is observed that he knew or should have known "por experiencia ordinaria, que el que se lanzara al agua en aquellas circunstancias correria el peligro de ahogarse". If this is true, does the mere fact that Lozano is a good swimmer, relieve him from knowledge of the same danger? It is also stated that on the unfortunate occasion, "surgio conio era natural, rapida en la mente del referido capataz la idea de salvarlo (el trozo) para no incurrir en responsabilidad, e hizo la advertencia amenazadora de que ya se ha hecho mencion", and yet he is held guilty of negligence. Upon the other hand, it is with the same rapidity and with practically the same purpose in view that Lozano plunged himself into the river. If it was a natural, rapid reaction in the case of the capataz, it is not clear why it is negligence in his case and not negligence in the case of the laborer. This goes to show that the negligence of the capataz must be predicated on a broader principle. Also, the argument that the laborer had a right to rely that the capataz "no daria semejante mandato si no estuviera seguro de que su cumplimiento no ofrecia ningun peligro" establishes, in my opinion, a rationale too broad, albeit doubtful. These and other observations in the above opinion I am not prepared to accept readily.

I think it is meet to admit, in this case, that under Act No. 1874 which is the only law relied upon by the plaintiff below the case is not free from doubt, but that the plaintiff below and petitioner here should nevertheless have judgment for the reason now to be stated.

Act No. 1874 entitled "An Act to extend and regulate the responsibility of employers for personal injuries and deaths suffered by their employees while at work" was enacted by the Philippine Commission on June 19, 1908. It is said to be essentially a copy of the Massachusetts Employers' Liability Act (Rev. Laws, 1902, chap. 106, secs. 71-79) and was originally enacted in that State in 1887 (Stat. 1887, chap. 270). The Massachusetts statute was "copied verbatim with some variations in detail from the English statute (43 & 44 Viet., c. 42)." (*Cerezo vs. Atlantic, Gulf & Pacific Co.*, 33 Phil., 425, 428). We are therefore called upon to interpret a law enacted in the State of Massachusetts more than seventy years ago and in the Philippines more than a quarter of a century ago. The strict rule is that a servant, as much as the employer and anybody else, who sees or could have seen if he had looked around and has the faculties to understand the dangers to which he is exposed is necessarily chargeable with knowledge of them, and that his failure to act on this knowledge is in every case negligence which is a bar to recovery. The courts below appear to have adhered to this strict rule in reference to the requirement of "due care" from the servant. My opinion is that under Act No. 1874, it is yet possible to relax the rule in the sense that if the master is originally and primarily chargeable with negligence in his legal relations with his servant, failure of the latter to make an appraisal of the danger incident to the execution of an order of his master, and which danger may not be apparent to a man in his position and condition, is not necessarily failure to exercise due care such as to bar recovery for damages in case of personal injury or death. Relaxed in this manner, the rule is to free itself from unnecessary rigidity and inflexibility and adapt itself to changing legal environment at the behest of powerful moral considerations which should not be overlooked in the application of legal principles. For this reason—and no other—I accept the conclusion of liability of the respondent Fausto Barredo in this case.

Avanceña, C.J., and Diaz, J., We concur in the foregoing observations of Justice Laurel and with him in the result.

CONCURRING

CONCEPCION, J.:

I fully concur with the writer of the decision, except with respect to the manner in which he examines and appraises the negligence of the construction foreman and the due care with which laborer Lozano acted when, in obedience to an order of said foreman, he apparently died of drowning (pages 3-6 of the majority opinion). With respect to these points, my opinion is as follows:

The death of said laborer took place as a consequence of the negligence, or rather, of the imprudence of the construction foreman, Yoshio Tagashira, who was entrusted with the superintendence and was responsible for the care and vigilance of the laborers and materials. Said foreman, upon seeing that the current of the river, which was swollen, was carrying away a log which was to be used as pile, shouted an order to His men to recover it, threatening to make them pay for the value thereof if it should be lost. With such order and threat, said foreman committed the most serious negligence he could commit because, of course, he should have taken into consideration the circumstances and the danger which his order involved. Under ordinary circumstances, it would be perfectly justifiable to order his men to recover the log which was being carried away, but under the circumstances of that morning, with a bad weather, and the Pasig River very swollen and with a swift current, he, being responsible for the life and safety of his laborers, should have known it infinitely more preferable to lose the

log in question, to exposing any of his men to the risk of losing his life in recovering it.

The threatening order having been given, Anastacio Lozano forthwith obeyed it, leaped into the water, swam and pursued the log. Unfortunately, he perished in the attempt. Did he act without due care? I think not. What had Lozano to think of with the rapidity of lightning, before leaping into the river in pursuit of the log, so that he might act with due care? Did he know how to swim? Yes. Could he struggle in the midst of the current to attain his purpose? Yes, because he not only knew how to swim but was a good swimmer as well. Furthermore, he was not going to pursue the log by swimming against the current but in the direction thereof. Did he leap into the water in order to avoid having to pay for the value of the log? Of course not, because he could have easily known that nobody could make him responsible for the swelling of the Pasig River on that day, carrying the log away with it. Therefore, he leaped into the water, conscious that he was in a condition and strong enough to obey the order of his foreman, to do what was demanded of him, to protect not his interest but that of his employer. What might have been sheer foolishness to others, that of going in pursuit of the log under the circumstances, was the most natural thing in the world to Lozano, what with his ability as a good swimmer, with his confidence in himself and with his praiseworthy desire to serve the interest of his employer. But he died. In his circumstances, could he foresee that he would die and why? I do not think so, because had he been able to foresee the cause that made his death possible, he would not have undertaken said enterprise for in that case it was suicide to do so, and there is nothing in the conclusions of fact of the Court of Appeals permitting the assumption that Lozano intended to commit suicide that morning. Therefore, he died of an unforeseen and unknown cause. We know that he died apparently of drowning, but we do not know exactly why. Perhaps it was due to a cramp, or to any other accident. The truth is that he died a victim of his duty.

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