

LUCIO ALGARRA, PLAINTIFF AND APPELLANT, VS. SIXTO SANDEJAS, DEFENDANT AND APPELLEE.*G.R. No. 8385. March 24, 1914*

Ponente: TRENT, J.

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This is a civil action for personal injuries received from a collision with the defendant's automobile due to the negligence of the defendant, who was driving the car. The negligence of the defendant is not questioned and this case involves only the amount of damages which should be allowed.

As a result of the injuries received, plaintiff was obliged to spend ten days in the hospital, during the first four or five of which he could not leave his bed. After being discharged from the hospital, he received medical attention from a private practitioner for several days. The latter testified that after the last treatment the plaintiff described himself as being well. On the trial the plaintiff testified that he had done no work since the accident, which occurred on July 9, 1912, and that he was not yet entirely recovered. Plaintiff testified that his earning capacity was P50 per month. It is not clear at what time plaintiff became entirely well again, but as the doctor to whom he described himself as being well stated that this was about the last of July, and the trial took place September 19, two months' pay would seem sufficient for the actual time lost from his work. Plaintiff further testified that he paid the doctor P8 and expended P2 for medicines. This expense, amounting in all to P110, should also be allowed.

Plaintiff sold the products of a distillery on a 10 per cent commission and made an average of P50 per month. He had about twenty regular customers who, it seems, purchased in small quantities, necessitating regular and frequent deliveries. Since the accident his wife had done something in a small way to keep up this business but the total orders taken by her would not net them over P15. He lost all his regular customers but four, other agents filling their orders since his accident. It took him about four years to build up the business he had at the time of the accident, and he could not say how long it would take him to get back the business he had lost.

Under this state of facts, the lower court, while recognizing the justness of the claim, refused to allow him anything for injury to his business due to his enforced absence there from, on the ground that the doctrine of *Marcelo vs. Velasco* (11 Phil. Rep., 277) is opposed to such allowance. The trial court's opinion appears to be based upon the following quotation from *Viada* (vol. 1, p. 539), quoted in that decision: "* * * with regard to the offense of lesiones, for example, the civil liability is almost always limited to indemnity for damage to the party aggrieved for the time during which he was incapacitated for work; * * *"

This statement, however, derives its force, not from any provision of the law applicable to lesiones, but is a mere deduction from the operation of the law upon the cases arising under it. That the interpretation placed upon this statement of *Viada* by the lower court is either not correct, or that it does not apply to actions for personal injuries under article 1902 of the Civil Code, is apparent from the decisions of the supreme court of Spain of January 8, 1906, January 15, 1902, and October 19, 1909, to which a more extended reference will be made further on in this

opinion. There is nothing said in the decision in question prohibiting the allowance of compensatory damages, nor does there seem to be anything contained therein opposed to the allowance of such damages occurring subsequent to the institution of the action. In fact, it appears from the following quotation that the court would have been disposed to consider favorably the plaintiff's claim for injury to her business had the evidence presented it.

"No evidence was then offered by the plaintiff to show that this slight lameness in any way interfered with the conduct of her business or that she could make any less amount therein than she could make if she did not suffer from this defect. The court, therefore, did not err in allowing her no further damages on this account, because there was no evidence that she had suffered any."

The alleged damages which the court refused to entertain in that case and under the discussion of which appears the above quotation from Viada, were for pain and suffering the plaintiff may have experienced. The court said: "For the profits which the plaintiff failed to obtain, spoken of in the latter part of this article, the plaintiff was allowed to recover, and the question is, whether the value of the loss which she suffered can be extended to pain which she experienced by reason of the accident."

Actions for damages such as the case at bar are based upon article 1902 of the Civil Code, which reads as follows:

"A person who, by act or omission, causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

Of this article, the supreme court of Spain, in its decision of February 7, 1900, in considering the indemnity imposed by it, said: "It is undisputed that said reparation, to be efficacious and substantial, must rationally include the generic idea of complete indemnity, such as is defined and explained in article 1106 of the said (Civil) Code."

Articles 1106 and 1107 of the Civil Code read as follows:

"1106. Indemnity for losses and damages includes not only the amount of the loss which may have been suffered, but also that of the profit which the creditor may have failed to realize, reserving the provisions contained in the following articles.

"1107. The losses and damages for which a debtor in good faith is liable, are those foreseen or which may have been foreseen, at the time of constituting the obligation, and which may be a necessary consequence of its nonfulfillment.

"In case of fraud, the debtor shall be liable for all those which clearly may originate from the nonfulfillment of the obligation."

Fraud is not an element of the present case, and we are not therefore concerned with it. The liability of the present defendant includes only those damages which were "fore-seen or may have been foreseen" at the time of the accident, and which are the necessary and immediate consequences of his fault. In discussing the question of damages under the civil law, Gutierrez (vol. 4, pp. 64, 65) says:

"In the impossibility of laying down a surer rule, the Code understands known damages to be those which in the prudent discernment of the judge merit such a qualification, although their consequences may not be direct, immediate, inevitable.

"If it is a question of losses occasioned through other causes, except fraud, and the contracting parties have not covenanted any indemnity for the case of nonfulfillment, then the reparation of the losses or damages shall only comprise those that are the necessary and immediate consequence of that fault. This rule may not be very clear, but is the only one possible in a matter more of the domain of prudence than of law."

In its decision of April 18, 1901, the supreme court of Spain said: "Neither were the errors incurred that are

mentioned in the third assignment, since the indemnity for damages is understood to apply to those caused the complainant directly, and not to those which, indirectly and through more or less logical deductions, may affect the interests of the Ayuntamiento de Viana, as occurs in the present case where the increase of wealth concerns not only the Ayuntamiento but also the province and the state, yet, not on this account does any action lie in their behalf as derived from the contracts with Urioste."

This doctrine is also affirmed in the more recent decision of March 18, 1909, in the following words: "For the calculation of the damages claimed, it is necessary, pursuant to the provisions of article 924 of the Law of Civil Procedure, to give due regard to the nature of the obligation that was unfulfilled and to the reasonable consequences of its non-fulfillment, because the conviction sought can be imposed only when there exists a natural and true relation between such nonfulfillment and the damages, whatever reason there may be to demand them on another account."

In the case of Garcia Gamo vs. Compania Madrilena de Alumbrado, etc. (101 Jurisp., 662), it appeared that an employee of the defendant company whose duty it was to clean and light the street lamps left a stepladder leaning against a tree which stood in a public promenade. The seven-year old son of the plaintiff climbed the tree by means of the ladder, and while endeavoring to cut some branches fell to the ground, sustaining severe injuries which eventually caused his death. The plaintiff lost in the lower courts and on appeal to the supreme court the decision of those lower courts was affirmed with the following statement:

"That in this sense—aside from the fitness of the judgment appealed from, inasmuch as the acquittal of the defendant party resolves all the issues argued at the trial, if no counterclaim was made—the assignments of error in the appeal cannot be sustained, because, while the act of placing the stepladder against the tree in the manner and for the purposes aforesaid, was not permissible it was regularly allowed by the local authorities, and that fact did not precisely determine the injury, which was due first to the abandonment of the child by his parents and secondly to his own imprudence, according to the findings of the trial court, not legally objected to in the appeal; so it is beyond peradventure that the circumstances necessary for imposing the obligations arising from guilt or negligence do not concur in the present case."

The court here simply held that the injury to the child could not be considered as the probable consequence of an injury which could have been foreseen from the act of the company's employee in leaving the ladder leaning against the tree.

In De Alba vs. Sociedad Anonima de Tranvias (102 Jurisp., 928), a passenger was standing on the platform of a street car while it was in motion when, on rounding a curve, the plaintiff fell off and under the car, thereby sustaining severe injuries which took several months to heal. He was not allowed to recover in the lower courts and on appeal the supreme court sustained the inferior tribunals saying:

"Whereas, considering the circumstances of the accident that happened to D. Antonio Morales de Alba, such as they were held by the trial court to have been proved, the evidence does not disclose that any liability whatever in the said accident, for acts or omissions, may be charged against the employees of the street car, as being guilty through fault or negligence, since it was shown that the car was not traveling at any unusual speed nor was this increased on rounding the curve, but that the accident was solely due to the fact that the car in turning made a movement which caused the plaintiff to lose his balance; and whereas no act whatever has been proved of any violation of the regulations, nor can it be required of street-car employees, who have to attend to their respective duties, that they should foresee and be on the alert to notify the possibility of danger when not greater than that which is more or less inherent to this mode of travel; therefore the appeal can not be upheld, and with all the more reason since the passenger who takes the risk of travelling on the platform, especially when there is an unoccupied seat in the car, should be on his guard against a contingency so natural as that of losing his balance to a greater or less extent when the car rounds a curve."

In *Crespo vs. Garcia* {112 Jurisp., 796), the plaintiff, a servant woman, 72 years old, was injured in the performance of her duties by the sudden and unexpected failure of the upper floor of a house in which she was working. The owner and the architect of the building were made defendants and after due trial it was held that no responsibility attached to them for the failure of the floor, consequently the plaintiff was not allowed to recover. On her appeal to the supreme court that tribunal said:

"Whereas the trial court held, in view of all the evidence adduced, including the expert and other testimony, that the act which occasioned the injury suffered by Dona Maria Alonso Crespo, was accidental, without fault of anybody, and consequently fortuitous, and that, in so considering it to absolve the defendants, he did not incur the second error assigned on the appeal, because, without overlooking the import and legal value of the affidavit adduced at the trial, he held that the defendants in their conduct were not liable for any omission that might constitute such fault or negligence as would oblige them to indemnify the plaintiff; and to support the error assigned no legal provision whatever was cited such as would require a different finding, nor was any other authentic document produced than the aforesaid affidavit which contained an account of the ocular inspection and the expert's report, which, as well as the testimony of the witnesses, the trial court was able to pass upon in accordance with its exclusive power—all points of proof which do not reveal any mistake on the part of the judge, whose opinion the appellant would substitute with his own by a different interpretation."

These authorities are sufficient to show that liability for acts *ex delicto* under the Civil Code is precisely that embraced within the "proximate cause" of the Anglo-Saxon law of torts.

"The general rule, as frequently stated, is that in order that an act or omission may be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission and such as might have been foreseen by an ordinarily responsible and prudent man, in the light of the attendant circumstances, as likely to result therefrom * * *

"According to the later authorities foreseeableness, as an element of proximate cause, does not depend upon whether an ordinarily reasonable and prudent man would or ought in advance to have anticipated the result which happened, but whether, if such result and the chain of events connecting it with the act complained of had occurred to his mind, the same would have seemed natural and probable and according to the ordinary course of nature. Thus, as said in one case, 'A person guilty of negligence, or an unlawful act, should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, would at the time of the negligent or unlawful act have thought reasonable to follow, if they had occurred to his mind.' (*Wabash R. etc. Co. vs. Coker*, 81 Ill. App. 660, 664; *Cooley on Torts*, sec. 15.)"

"The view which I shall endeavor to justify is that, for the purpose of civil liability, those consequences, and those only, are deemed 'immediate,' 'proximate,' or, to anticipate a little, 'natural and probable,' which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forth coming, whether the consequence was 'immediate' or not does not matter. That which a man actually foresees is to him, at all events, natural and probable." (*Webb's Pollock on Torts*, p. 32.)

There is another line Of definitions which have for their basis "the natural and probable consequences" or "the direct and immediate consequences" of the defendant's act. (*Joyce on Damages*, sec. 82.)

It will be observed that the supreme court of Spain, in the above decisions, has rather inclined to this line of definitions of what results a defendant is liable for as a consequence of his wrongful acts, while the Civil Code uses the phraseology, "those foreseen or which may have been foreseen." From either viewpoint the method of arriving at the liability of the wrongdoer under the Civil Code and under the Anglo Saxon law is the same. Such

was the holding of this court in *Taylor vs. M. E. R. & L. Co.* (16 Phil. Rep., 8, 15):

"We agree with counsel for appellant that under the Civil Code, as under the generally accepted doctrine in the United States, the plaintiff in an action such as that under consideration, in order to establish his right to a recovery, must establish by competent evidence:

"(1) Damages to the plaintiff.

"(2) Negligence by act or omission of which defendant personally, or some person for whose acts it must respond, was guilty.

" (3) The connection of cause and effect between the negligence and the damages.

"These propositions are, of course, elementary, and do not admit of discussion, the real difficulty arising in the application of these principles to the particular facts developed in the case under consideration."

Parenthetically it may be said that we are not now dealing with the doctrine of comparative (contributory) negligence which was established by *Rakes vs. A. G. & P. Co.* (7 Phil. Rep., 359), and *Eades vs. A. G. & P. Co.* (19 Phil. Rep., 561.)

The rules for the measure of damages, once that liability is determined, are, however, somewhat different. The Civil Code requires that the defendant repair the damage caused by his fault or negligence. No distinction is made therein between damage caused maliciously and intentionally and damages caused through mere negligence in so far as the civil liability of the wrongdoer is concerned. Nor is the defendant required to do more than repair the damage done, or, in other words, to put the plaintiff in the same position, so far as pecuniary compensation can do so, that he would have been in had the damage not been inflicted. In this respect there is a notable difference between the two systems.

Under the Anglo-Saxon law, when malicious or willful intention to cause the damage is an element of the defendant's act, it is quite generally regarded as an aggravating circumstance for which the plaintiff is entitled to more than mere compensation for the injury inflicted. These are called exemplary or punitive damages, and no provision is made for them in article 1902 of the Civil Code.

Again, it is quite common under the English system to award what is called nominal damages where there is only a technical violation of the plaintiff's rights resulting in no substantial injury to him. This branch of damages is also unknown under the Civil Code. If no damages have actually occurred there can be none to repair and the doctrine of nominal damages is not applicable. Thus it has been often held by the supreme court of Spain that a mere noncompliance with the obligations of a contract is not sufficient to sustain a judgment for damages. It must be shown that damages actually existed. (Decision of February 10, 1904.)

Again, in its decision of January 9, 1897, that high tribunal said that as a logical consequence of the requirements of articles 1101, 1718, and 1902 that he who causes damages must repair them, their existence must be proved.

In at least one case decided by this court we held in effect that nominal-damages could not be allowed. (*Mercado vs. Abangan*, 10 Phil. Rep., 676.)

"The purpose of the law in awarding actual damages is to repair the wrong that has been done, to compensate for the injury inflicted, and not to impose a penalty. Actual damages are not dependent on nor graded by the intent with which the wrongful act is done." (*Field vs. Munster*, 11 Tex. Civ. Appl., 341, 32 S. W., 417.) "The words 'actual damages' shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession, or occupation, and no other damages whatever." (*Gen. Stat. Minn.*, 1894, sec. 5418.) "Actual damages are compensatory only." (*Lord, Owen & Co. vs. Wood*, 120 Iowa, 303, 94 N. W., 842.) " 'Compensatory damages' as indicated by the word employed to characterize them,

simply make good or replace the loss caused by the wrong. They proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another." (Reid vs. Ter williger, 116 N. Y., 530; 22 N. E., 1091.) " 'Compensatory damages' are such as are awarded to compensate the injured party for injury caused by the wrong, and must be only such as make just and fair compensation, and are due when the wrong is established, whether it was committed maliciously—that is, with evil intention—or not." (Wimer vs. Allbaugh, 78 Iowa, 79; 42 N. W., 587; 16 Am. St. Rep., 422.)

Finally, this court has itself held that actual damages are the extent of the recovery allowed to the plaintiff. In Marker vs. Garcia (5 Phil. Rep., 557), which was an action for damages for breach of contract, this court said: "Except in those cases where the law authorizes the imposition of punitive or exemplary damages, the party claiming damages must establish by competent evidence the amount of such damages, and courts can not give judgment for a greater amount than those actually proven."

We are of the opinion that the requirements of article 1902, that the defendant repair the damage done can only mean what is set forth in the above definitions. Anything short of that would not repair the damages and anything beyond that would be excessive. Actual compensatory damages are those allowed for tortious wrongs under the Civil Code; nothing more, nothing less.

According to the text of article 1106 of the Civil Code, which, according to the decision of February 7, 1900 (referred to above), is the generic conception of what article 1902 embraces, actual damages include not only loss already suffered, but loss of profits which may not have been realized. The allowance of loss of prospective profits could hardly be more explicitly provided for. But it may may not be amiss to refer to the decisions of the supreme court of Spain for its interpretation of this article. The decisions are numerous upon this point. The decision of February 12, 1896, as epitomized by Sanchez Roman (vol. 1, p. 281), interprets article 1106 as follows:

"Pursuant to articles 1106 and 1107 of the same Code, which govern in general the matter of indemnity due for the nonfulfillment of obligations, the indemnity comprises, not only the value of the loss suffered, but also that of the prospective profit that was not realized, and the obligation of the debtor in good faith is limited to such losses and damages as were foreseen or might have been foreseen at the time the obligation was incurred and which are a necessary consequence of his failure of fulfillment. Losses and damages under such limitations and frustrated profits must, therefore, be proved directly by means of the evidence the law authorizes."

The decision of January 8, 1906 (published in 14 Jurisp. del C6digo Civil, 516) had to do with the following case: The plaintiff, a painter by occupation; was engaged to paint the poles from which were suspended the trolley wires of a traction company. While at work on February 8, 1901, the electric current was negligently turned on by the company, whereby plaintiff received a severe shock, causing him to fall to the ground. Plaintiff sustained severe injuries which took several months to heal and his right arm was permanently disabled by the accident. The age of the plaintiff is not stated. His daily wage was four pesetas. He was awarded 25,000 pesetas by the trial court and this judgment was affirmed on appeal to the supreme court. This was equivalent to approximately twenty years' salary. In its decision of January 15, 1902 (published in 10 Jurisp. del Codigo Civil, 260), the supreme court had the following case under consideration: Plaintiff's son was a travelling salesman 48 years of age, who received an annual salary of 2,500 pesetas and expenses. While travelling on defendant's train an accident occurred which caused his death. The accident was held to be due to the failure of the defendant company to keep its track and roadbed in good repair. Plaintiff was allowed 35,000 pesetas for the death of her son. This would be equivalent to about fourteen years' salary.

In the case dated October 19, 1909 (published in 116 Jurisp. del Codigo Civil, 120), plaintiff was suing for the death of his son caused from injuries inflicted by the defendant's bull while plaintiff and his son were travelling

along a public road. The age of the son is not given. Plaintiff was awarded 3,000 pesetas damages.

In each of the above-mentioned cases the supreme court refused to pass on the amount of damages which had been awarded. It appears to be the unvarying rule of the supreme court of Spain to accept the amount of damages awarded by trial courts, its only inquiry being as to whether damages have actually occurred as the result of the defendant's fault or negligence. (Decision of July 5, 1909.) The reason why the supreme court of Spain refuses to consider the amount of damages awarded is to be found in the great importance attached by it to the provisions of the Ley de Enjuiciamiento Civil, articles 659 and 1692, No. 7. In its auto of March. 16, 1900 (published in 8 Jurisp. delCodigo Civil, 503), the following comment is made on these articles:

"As this supreme court has repeatedly held, the weight given by the trial judge to the testimony, with good discernment or otherwise, can not be a matter for reversal, not even with the support of No. 7 of article 1692 of the Ley de Enjuiciamiento Civil, as it is exclusively submitted to him, pursuant to the provisions of article 659 of the said law and article 1248 of the Code."

The practice of this court, under our Code of Civil Procedure, does not permit of our going to such lengths in sustaining the findings of fact in trial courts. We have repeatedly held that due weight will be given in this court to the findings of fact by trial courts by reason of their opportunities to see and hear the witnesses testify, note their demeanor and bearing upon the stand, etc., but when the decision of the trial court, after permitting due allowance for its superior advantages in weighing the evidence of the case, appears to us to be against the fair preponderance of that evidence, it is our duty to reverse or set aside the findings of fact made by the trial court and render such judgment as the facts of the same seem to us to warrant. (Code Civ. Proc, sec. 496.) We need go to no other branch of law than that of damages to support this statement. In the following cases the damages awarded by the lower court were reduced after a consideration of the evidence: Sparrevohn vs. Fisher (2 Phil. Rep., 676); Campbell & Go-Tauco vs. Behn, Meyer & Co. (3 Phil. Rep., 590); Causin vs. Jakosalem (5. Phil. Rep., 155) ; Marker vs. Garcia (5 Phil. Rep., 557); Uy Piapco vs. Osmeña (9 Phil. Rep., 299); Macleod vs. Phil. Pub. Co. (12 Phil. Rep., 427); Orense vs. Jaucian (18 Phil. Rep., 553). In Rodriguez vs. Findlay & Co. (14 Phil. Rep., 294); and Cordoba y Conde vs. Castle Bros. (18 Phil. Rep., 317), the damages awarded by the lower court were increased on appeal after a consideration of the evidence. In Brodek vs. Larson (8 Phil. Rep., 425), it was held that the damages awarded by the lower court were based on too uncertain evidence, and the case was remanded for a new trial as to the amount of damages sustained. Also in Saldivar vs. Municipality of Talisay (18 Phil. Rep., 362), where the lower court exonerated the defendant from liability, this court, after a consideration of the evidence, held that the defendant was liable and remanded the case for the purpose of a new trial in order to ascertain the amount of damages sustained.

In this respect the law of damages under article 1902, as laid down by the decisions of the supreme court of Spain, has been indirectly modified by the present Code of Civil Procedure so that the finding of the lower court as to the amount of damages is not conclusive on appeal.

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

This court has already gone some distance in incorporating into our jurisprudence those principles of the American law of actual damages which are of a general and abstract nature. In Baer Senior & Co.'s Successors vs. Compania Maritima (6 Phil. Rep., 215), the American principle of admiralty law that the liability of the ship for a tow is not so great as that for her cargo was applied in determining the responsibility of a ship, under the Code of

Commerce, for her tow. In *Rodriguez vs. Findlay & Co.* (14 Phil. Rep., 294), which was an action for breach of contract of warranty* the following principle, supported entirely by American authority. Was used in computing the amount of damages due the plaintiff:

"The damages recoverable of a manufacturer or dealer for the breach of warranty of machinery; which he contracts to furnish, or place in operation for a known purpose are not confined to the difference in value of the machinery as warranted and as it proves to be, but includes such consequential damages as are the direct, immediate, and probable result of the breach."

In *Aldaz vs. Gay* (7 Phil. Rep., 268), it was held that the earnings or possible earnings of a workman wrongfully discharged should be considered in mitigation of his damages for the breach of contract by his employer, with the remark that nothing had been brought to our attention to the contrary under Spanish jurisprudence.

In *Fernandez vs. M. E. R. & L. Co.* (14 Phil. Rep., 274), a release or compromise for personal injury sustained by negligence attributed to the defendant company was held a bar to an action for the recovery of further damages, on the strength of American precedents.

In *Taylor vs. M. E. R. & L. Co.*, supra, in the course of an extended reference to American case law, the doctrine of the so-called "Turntable" and "Torpedo" cases was adopted by this court as a factor in determining the question of liability for damages in such cases as the one the court then had under consideration.

In *Martinez vs. Van Buskirk* (18 Phil. Rep., 79), this court, after remarking that the rules under the Spanish law by which the fact of negligence is determined are, generally speaking, the same as they are in Anglo-Saxon countries, approved the following well-known rule of the Anglo Saxon law of negligence, relying exclusively upon American authorities: "* * * acts, the performance of which has not proven destructive or injurious and which have been generally acquiesced in by society for so long a time as to have ripened into a custom, cannot be held to be unreasonable or imprudent and that, under the circumstances, the driver was not guilty of negligence in so leaving his team while assisting in unloading his wagon."

This court does not, as a rule, content itself in the determination of cases brought before it, with a mere reference to or quotation of the articles of the codes or laws applicable to the questions involved, for the reason that it is committed to the practice of citing precedents for its rulings wherever practicable. (See *Ocampo vs. Cabangis*, 15 Phil. Rep., 626.) No better example of the necessity of amplifying this treatment of a subject given in the code is afforded than article 1902 of the Civil Code, That article requires that the defendant repair the damage done. There is, however, a world of difficulty in carrying out the legislative will in this particular. The measure of damages is an ultimate fact, to be determined from the evidence submitted to the court. The question is sometimes a nice one to determine, whether the offered evidence is such as ought to be considered by the «court in fixing the quantum of damages; and while the complexity of human affairs is such that two cases are seldom exactly alike, a thorough discussion of each case may permit of their more or less definite classification, and develop leading principles which will be of great assistance to a court in determining the question, not only of damages, but of the prior one of negligence. We are of the opinion that as the Code is so indefinite (even though from necessity) on the subject of damages arising from fault or negligence, the bench and bar should have access to and avail themselves of those great, underlying principles which have been gradually and conservatively developed and thoroughly tested in Anglo-Saxon courts. A careful and intelligent application of these principles should have a tendency to prevent mistakes in the rulings of the court on the evidence offered, and should assist in determining damages, generally, with some degree of uniformity.

The law of damages has not, for some reason, proved as favorite a theme with the civil-law writers as with those of the common-law school. The decisions of the supreme court of Spain, though numerous on damages arising

from contractual obligations, are exceedingly few upon damages for personal injuries arising ex delicto. The reasons for this are not important to the present discussion. It is sufficient to say that the Law of damages has not received the elaborate treatment that it has at the hands of the Anglo Saxon jurists. If we in this jurisdiction desire to base our conclusions in damage cases upon controlling principles, we may develop those principles and incorporate them into our jurisprudence by that difficult and tedious process which constitutes the centuries-old history of Anglo-Saxon jurisprudence; or we may avail ourselves of these principles in their present state of development without further effort than it costs to refer to the works and writings of many eminent text-writers and jurists. We shall not attempt to say that all these principles will be applicable in this jurisdiction. It must be constantly borne in mind that the law of damages in this jurisdiction was conceived in the womb of the civil law and under an entirely different form of government. These influences have had their effect upon the customs and institutions of the country. Nor are the industrial and social conditions the same. An act which might constitute negligence or damage there might not constitute negligence or damage here, and vice versa. As stated in Story on Bailments, section 12, "It will thence follow that, in different times and in different countries, the standard (of diligence) is necessary variable with respect to the facts, although it may be uniform with respect to the principle. So that it may happen that the same acts which in one country or in one age may be deemed negligent acts, may at another time or in another country be justly deemed an exercise of ordinary diligence."

The abstract rules for determining negligence and the measure of damages are, however, rules of natural justice rather than man-made law, and are applicable under any enlightened system of jurisprudence. There is all the more reason for our adopting the abstract principles of the Anglo Saxon law of damages, when we consider that there are at least two important laws on our statute books of American origin, in the application of which we must necessarily be guided by American authorities: they are the Libel Law (which, by the way, allows damages for injured feelings and reputation, as well as punitive damages, in a proper case), and the Employers' Liability Act.

The case at bar involves actual incapacity of the plaintiff for two months, and loss of the greater portion of his business. As to the damages resulting from the actual incapacity of the plaintiff to attend to his business there is no question. They are, of course, to be allowed on the basis of his earning capacity, which in this case, is P50 per month. The difficult question in the present case is to determine the damage which has resulted to his business through his enforced absence. In *Sanz vs. Lavin Bros.* (6 Phil. Rep., 299), this court, citing numerous decisions of the supreme court of Spain, held that evidence of damages "must rest upon satisfactory proof of the existence in reality of the damages alleged to have been suffered." But, while certainty is an essential element of an award of damages, it need not be a mathematical certainty. That this is true is adduced not only from the personal injury cases from the supreme court of Spain which we have discussed above, but by many cases decided by this court, reference to which has already been made. As stated in *Joyce on Damages*, section 75, "But to deny the injured party the right to recover any actual damages in cases of torts because they are of such a nature as cannot be thus certainly measured, would be to enable parties to profit by and speculate upon their own wrongs; such is not the law."

As to the elements to be considered in estimating the damage done to plaintiff's business by reason of his accident, this same author, citing numerous authorities, has the following to say: "It is proper to consider the business the plaintiff is engaged in, the nature and extent of such business, the importance of his personal oversight and superintendence in conducting it, and the consequent loss arising from his inability to prosecute it."

The business of the present plaintiff required his immediate supervision. All the profits derived therefrom were wholly due to his own exertions. Nor are his damages confined to the actual time during which he was physically incapacitated for work, as is the case of a person working for a stipulated daily or monthly or yearly salary. As to persons whose labor is thus compensated and who completely recover from their injuries, the rule may be said to

be that their damages are confined to the duration of their enforced absence from their occupation. But the present plaintiff could not resume his work at the same profit he was making when the accident occurred. He had built up an established business which included some twenty regular customers. These customers represented to him a regular income. In addition to this he made sales to other people who were not so regular in their purchases. But he could figure on making at least some sales each month to others besides his regular customers. Taken as a whole his average monthly income from his business was about P50. As a result of the accident, he lost all but four of his regular customers and his receipts dwindled down to practically nothing. Other agents had invaded his territory, and upon becoming physically able to attend to his business, he found that it would be necessary to start with practically no regular trade, and either win back his old customers from his competitors or else secure others. During this process of reestablishing his patronage his income would necessarily be less than he was making at the time of the accident and would continue to be so for some time. Of course, if it could be mathematically determined how much less he will earn during this rebuilding process than he would have earned if the accident had not occurred, that would be the amount he would be entitled to in this action. But manifestly this ideal compensation cannot be ascertained. The question therefore resolves itself into whether this damage to his business can be so nearly ascertained as to justify a court in awarding any amount whatever.

When it is shown that a plaintiff's business is a going concern with a fairly steady average profit on the investment, it may be assumed that had the interruption to the business through defendant's wrongful act not occurred, it would have continued producing this average income "so long as is usual with things of that nature." When in addition to the previous average income of the business it is further shown what the reduced receipts of the business; are immediately after the cause of the interruption has been removed, there can be no manner of doubt that a loss of profits has resulted from the wrongful act of the defendant. In the present case, we not only have the value of plaintiff's business to him just prior to the accident, but we also have its value to him after the accident. At the trial, he testified that his wife had earned about fifteen pesos during the two months that he was disabled. That this almost total destruction of his business was directly chargeable to defendant's wrongful act, there can be no manner of doubt; and the mere fact that the loss can not be ascertained with absolute accuracy, is no reason for denying plaintiff's claim altogether. As stated in one case, it would be a reproach to the law if he could not recover damages at all. (*Baldwin vs. Marqueze*, 91 Ga., 404.)

"Profits are not excluded from recovery because they are profits; but when excluded, it is on the ground that there are no criteria by which to estimate the amount with the certainty on which the adjudications of courts, and the findings of juries should be based." (*Brigham vs. Carlisle* (Ala.), 56 Am. Rep., 28, as quoted in *Wilson vs. Wernwag*, 217 Pa., 82.)

The leading English case on the subject is *Phillips vs. London & Southwestern Ry. Co.* (5 Q. B. D., 78; 41 L. T., 121; 8 Eng. Rul. Cases, 447). The plaintiff was a physician with a very lucrative practice. In one case he had received a fee of 5,000 guineas; but it appeared that his average income was between 6,000 and 7,000 pounds sterling per year. The report does not state definitely how serious plaintiff's injuries were, but apparently he was permanently disabled. The following instruction to the jury was approved, and we think should be set out in this opinion as applicable to the present case:

"You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants; and you must take care, to give him full, fair compensation for that which he has suffered."

The jury's award was seven thousand pounds. Upon a new trial, on the ground of the insufficiency of the damages awarded, plaintiff received 16,000 pounds. On the second appeal, *Bramwell, L. J.*, put the case of a laborer

earning 25 shillings a week, who, on account of injury, was totally incapacitated for work for twenty-six weeks, and then for ten weeks could not earn more than ten shillings a week, and was not likely to get into full work for another twenty weeks. The proper measure of damages would be in that case 25 shillings a week for twenty-six, weeks, plus 15 shillings a week for the ten: and twenty weeks, and damages for bodily suffering and medical expenses. Damages for bodily suffering, of course, are not, for reasons stated above, applicable to this jurisdiction; otherwise, we believe this example to be the ideal compensation for loss of profits which courts should strive to reach, in cases like the present.

In *Joslin vs. Grand Rapids Ice & Coal Co.* (53 Mich., 322), the court said: "The plaintiff, in making proof of his damages, offered testimony to the effect that he was an attorney at law of ability and in good standing, and the extent and value of his practice, and that, in substance; the injury had rendered him incapable of pursuing his profession. This was objected to as irrelevant, immaterial and incompetent. We think this was competent. It was within the declaration that his standing in his profession was such as to command respect, and was proper to be shown, and his ability to earn, and the extent of his practice, were a portion of the loss he had sustained by the injury complained of. There was no error in permitting this proof, and we further think it was competent, upon the question of damages under the evidence in this case, for the plaintiff to show, by Judge Hoyt, as was done, that an interruption in his legal business and practice for eight months was a damage to him. It seems to have been a part of the legitimate consequences of the plaintiff's injury."

In *Luck vs. City of Ripon* (52 Wis., 196), plaintiff was allowed to prove that she was a midwife and show the extent of her earnings prior to the accident in order to establish the damage done to her business.

The pioneer case of *Goebel vs. Hough* (26 Minn., 292) contains perhaps one of the clearest statements of the rule and is generally considered as one of the leading cases on this subject. In that case the court said:

"When a regular and established business, the value of which may be ascertained, has been wrongfully interrupted, the true general rule for compensating the party injured is to ascertain how much less valuable the business was by reason of the interruption, and allow that as damages. This gives him only what the wrongful act deprived him of. The value of such a business depends mainly on the ordinary profits derived from it. Such value cannot be ascertained without showing what the usual profits are; nor are the ordinary profits incident to such a business contingent or speculative, in the sense that excludes profits from consideration as an element of damages. What they would have been, in the ordinary course of the business, for a period during which it was interrupted, may be shown with reasonable certainty. What effect extraordinary circumstances would have had upon the business might be contingent and conjectural, and any profits anticipated from such causes would be obnoxious to the objection that they are merely speculative; but a history of the business, for a reasonable time prior to a period of interruption, would be done under ordinary circumstances, and in the usual course, during the given period; and the usual rate of profit being shown, of course the aggregate becomes only a matter of calculation."

In the very recent case of *Wellington vs. Spencer* (Okla., 132 S. W., 675), plaintiff had rented a building from the defendant and used it as a hotel. Defendant sued out a wrongful writ of attachment upon the equipment of the plaintiff, which caused him to abandon his hotel business. After remarking that the earlier cases held that no recovery could be had for prospective profits, but that the later authorities have held that such damages may be allowed when the amount is capable of proof, the court had the following to say:

"Where the plaintiff has just made his arrangements to begin business, and he is prevented from beginning either by tort or a breach of contract, or where the injury is to a particular subject matter, profits of which are uncertain, evidence as to expected profits must be excluded from the jury because of the uncertainty. There is as much reason to believe that there will be no profits as to believe that there will be profits, but no such argument can be made against proving a usual profit of an established business. In this case the plaintiff,

according to his testimony, had an established business, and was earning a profit in the business, and had been doing that for a sufficient length of time that evidence as to prospective profits was not entirely speculative. Men who have been engaged in business calculate with a reasonable certainty the income from their business, make their plans to live accordingly, and the value of such business is not such a matter of speculation as to exclude evidence from the jury."

A good example of a business not established for which loss of profits will not be allowed may be found in *States vs. Durkin* (65 Kan., 101). Plaintiffs formed a partnership and entered the plumbing business in the city of Topeka in April. In July of the same year, they brought an action against a plumbers' association on the ground that the latter had formed an unlawful combination in restraint of trade and prevented them from securing supplies for their business within a reasonable time. The court said;

"In the present case the plaintiffs had only been in business a short time—not so long that it can be said that they had an established business. They had contracted three jobs of plumbing, had finished two, and lost money on both; not, however, because of any misconduct or wrongful acts on the part of the defendants or either of them. They carried no stock in trade, and their manner of doing business was to secure a contract and then purchase the material necessary for its completion. It is not shown that they had any means or capital invested in the business other than their tools. Neither of them had prior thereto managed or carried on a similar business. Nor was it shown that they were capable of so managing this business as to make it earn a profit. There was little of that class of business being done at that time, and little, if any, profit derived therefrom. The plaintiffs' business lacked duration, permanency, and recognition. It was an adventure, as distinguished from an established business. It was an adventure, as distinguished from an established business. Its profits were speculative and remote, existing only in anticipation. The law, with all its vigor and energy in its effort to right wrongs and award damages for injuries sustained, may not enter into the domain of speculation or conjecture. In view of the character and condition of the plaintiffs' business, the jury had not sufficient evidence from which to ascertain profits."

Other cases which hold that the profits of an established business may be considered in calculating the measure of damages for an interruption of it are: *Wilkinson vs. Dunbar* (149 N. C., 20); *Kinney vs. Crocker* (18 Wis., 80); *Sachra vs. Manilla* (120 Ia., 562); *Kramer vs. City of Los Angeles* (147 Cal., 668); *Mugge vs. Erkmann* (161 Ill. App., 180); *Fredonia Gas Co. vs. Bailey* (77 Kan., 296); *Morrow vs. Mo. Pac. R. Co.* (140 Mo. App., 200); *City of Indianapolis vs. Gaston* (58 Ind., 224); *National Fibre Board vs. Auburn Electric Light Co.* (95 Me., 318); *Sutherland on Damages*, sec. 70.

We have now outlined the principles which should govern the measure of damages in this case. We are of the opinion that the lower court had before it sufficient evidence of the damage to plaintiff's business in the way of prospective loss of profits to justify it in calculating his damages as to this item. That evidence has been properly elevated to this court for review. Under section 496 of the Code of Civil Procedure, we are authorized to enter final judgment or direct a new trial, as may best subserve the ends of justice. We are of the opinion that the evidence presented as to the damage done to plaintiff's business is credible and that it is sufficient and clear enough upon which to base a judgment for damages. Plaintiff having had four years' experience in selling goods on commission, it must be presumed that he will be able to rebuild his business to its former proportions; so that at some time in the future his commissions will equal those he was receiving when the accident occurred. Aided by his experience, he should be able to rebuild this business to its former proportions in much less time than it took to establish it as it stood just prior to the accident. One year should be sufficient time in which to do this. The profits which plaintiff will receive from the business in the course of its reconstruction will gradually increase. The injury to plaintiff's business begins where these profits leave off, and, as a corollary, there is where defendant's liability begins. Upon this basis, we fix the damages to plaintiff's business at P250.

The judgment of the lower court is set aside, and the plaintiff is awarded the following damages: ten pesos for medical expenses; one hundred pesos for the two months of his enforced absence from his business; and two hundred and fifty pesos for the damage done to his business in the way of loss of profits, or a total of three hundred and sixty pesos. No costs will be allowed in this instance.

Arellano, C. J., and Araullo, J., concur.

Carson, J., concurs in the result

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