7 Phil. 359

[G.R. No. 1719. January 23, 1907]

M. H. RAKES, PLAINTIFF AND APPELLEE, VS. THE ATLANTIC, GULF AND PACIFIC COMPANY, DEFENDANT AND APPELLANT.

D E C I S I O N

TRACEY, J.:

This is an action for damages. The plaintiff, one of a gang of eight negro laborers in the employment of the defendant, was at work transporting iron rails from a barge in the harbor to the company's yard near the Malecon in Manila. Plaintiff claims that but one hand car was used in this work. The defendant has proved that there were two immediately following one another, upon which were piled lengthwise seven rails, each weighing 560 pounds, so that the ends of the rails projected beyond the cars both in front and behind. The rails lay upon two crosspieces or sills secured to the cars, but without side pieces or guards to prevent them from slipping off. According to the testimony of the plaintiff, the men were either in the rear of the car or at its sides. According to that of the defendant, some of them were also in front, hauling by a rope. At a certain spot at or near the water's edge the track sagged, the tie broke, the car either canted or upset, the rails slid off and caught the plaintiff, breaking his leg, which was afterwards amputated at about the knee.

The first point for the plaintiff to establish was that the accident happened through the negligence of the defendant. The detailed description by the defendant's witnesses of the construction and quality of the track proves that it was up to the general standard of tramways of that character, the foundation consisting on land of blocks or crosspieces of wood, 6 by 8 inches thick and from 8 to 10 feet long, laid on the surface of the ground, upon which at a right angle rested stringers of the same thickness, but from 24 to 30 feet in length. On and across the stringers and parallel with the blocks were the ties to which the tracks were fastened. After the road reached the water's edge, the blocks or crosspieces were replaced with piling, capped by timbers extending from one side to the other. The tracks were each about 2 feet wide and the two inside rails of the parallel tracks about 18

inches apart. It was admitted that there were no side pieces or guards on the car; that where the ends of the rails of the track met each other and also where the stringers joined, there were no fish plates. The defendant has not effectually overcome the plaintiff's proof that the joints between the rails were immediately above the joints between the underlying stringers.

The cause of the sagging of the track and the breaking of the tie, which was the immediate occasion of the accident, is not clear in the evidence, but is found by the trial court and is admitted in the briefs and in the argument to have been the dislodging of the crosspiece or piling under the stringer by the water of the bay raised by a recent typhoon. The superintendent of the company attributed it to the giving way of the block laid in the sand. No effort was made to repair the injury at the time of the occurrence. According to plaintiff's witnesses, a depression of the track, varying from one-half inch to one inch and a half, was thereafter apparent to the eye, and a fellow-workman of the plaintiff swears that the day before the accident he called the attention of McKenna, the foreman, to it and asked him to have it repaired. After the accident it was mended by simply straightening out the crosspiece, resetting the block under the stringer and renewing the tie, but otherwise leaving the very same timbers as before. It has not been proved that the company inspected the track after the typhoon or had any proper system of inspection.

In order to charge the defendant with negligence, it was necessary to show a breach of duty on its part in failing either to properly secure the load of iron to the vehicles transporting it, or to skillfully build the tramway or to maintain it in proper condition, or to vigilantly inspect and repair the roadway as soon as the depression in it became visible. It is upon the failure of the defendant to repair the weakened track, after notice of its condition, that the judge below based his judgment.

This case presents many important matters for our decision, and first among them is the standard of duty which we shall establish in our jurisprudence on the part of employers toward employees.

The lack or the harshness of legal rules on this subject has led many countries to enact laws designed to put these relations on a fair basis in the form of compensation or liability laws or the institution of industrial insurance. In the absence of special legislation we find no difficulty in so applying the general principles of our law as to work out a just result.

Article 1092 of the Civil Code provides:

> "Civil obligations, arising from crimes or misdemeanors, shall be governed by the provisions of the Penal Code."

And article 568 of the latter code provides:

> "He who shall execute through reckless negligence an act that if done with malice would constitute a grave crime, shall be punished."

And article 590 provides that the following shall be punished:

> "4. Those who by simple imprudence or negligence, without committing any infraction of regulations, shall cause an injury which, had malice intervened, would have constituted a crime or misdemeanor."

And finally by articles 19 and 20, the liability of owners and employers for the faults of their servants and representatives is declared to be civil and subsidiary in its character.

It is contended by the defendant, as its first defense to the action, that the necessary conclusion from these collated laws is that the remedy for injuries through negligence lies only in a criminal action in which the official criminally responsible must be made primarily liable and his employer held only subsidiarily to him. According to this theory the plaintiff should have procured the arrest of the representative of the company accountable for not repairing the track, and on his prosecution a suitable fine should have been imposed, payable primarily by him and secondarily by his employer.

This reasoning misconceived the plan of the Spanish codes upon this subject. Article 1093 of the Civil Code makes obligations arising from faults or negligence *not punished by the law,* subject to the provisions of Chapter II of Title XVI. Section 1902 of that chapter reads:

> "A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.
>
> "SEC. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom

> they should be responsible.
>
> "The father, and on his death or incapacity, the mother, is liable for the damages caused by the minors who live with them.
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> * * * * *
>
> "Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or in the performance of their duties.
>
> * * * * *
>
> "The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage."

As an answer to the argument urged in this particular action it may be sufficient to point out that nowhere in our general statutes is the employer penalized for failure to provide or maintain safe appliances for his workmen. His obligation therefore is one "not punished by the law" and falls under civil rather than criminal jurisprudence. But the answer may be a broader one. We should be reluctant, under any conditions, to adopt a forced construction of these scientific codes, such as is proposed by the defendant, that would rob some of these articles of effect, would shut out litigants against their will from the civil courts, would make the assertion of their rights dependent upon the selection for prosecution of the proper criminal offender, and render recovery doubtful by reason of the strict rules of proof prevailing in criminal actions. Even if these articles had always stood alone, such a construction would be unnecessary, but clear light is thrown upon their meaning by the provisions of the Law of Criminal Procedure of Spain *(Ley de Enjuiciamiento Criminal)*, which, though never in actual force in these Islands, was formerly given a suppletory or explanatory effect. Under article 111 of this law, both classes of action, civil and criminal, might be prosecuted jointly or separately, but while the penal action was pending the civil was suspended. According to article 112, the penal action once started, the civil remedy should be sought therewith, unless it had been waived by the party injured or been expressly reserved by him for civil proceedings for the future. If the civil action alone was prosecuted, arising out of a crime that could be enforced only on private complaint, the penal action thereunder should be extinguished. These provisions are in harmony with those

of articles 23 and 133 of our Penal Code on the same subject.

An examination of this topic might be carried much further, but the citation of these articles suffices to show that the civil liability was not intended to be merged in the criminal nor even to be suspended thereby, except as expressly provided in the law. Where an individual is civilly liable for a negligent act or omission, it is not required that the injured party should seek out a third person criminally liable whose prosecution must be a condition precedent to the enforcement of the civil right.

Under article 20 of the Penal Code the responsibility of an employer may be regarded as subsidiary in respect of criminal actions against his employees only while they are in process of prosecution, or in so far as they determine the existence of the criminal act from which liability arises, and his obligation under the civil law and its enforcement in the civil courts is not barred thereby unless by the election of the injured person. Inasmuch as no criminal proceeding had been instituted, growing out of the accident in question, the provisions of the Penal Code can not affect this action. This construction renders it unnecessary to finally determine here whether this subsidiary civil liability in penal actions has survived the laws that fully regulated it or has been abrogated by the American civil and criminal procedure now in force in the Philippines.

The difficulty in construing the articles of the code above cited in this case appears from the briefs before us to have arisen from the interpretation of the words of article 1093, “fault or negligence not punished by law,” as applied to the comprehensive definition of offenses in articles 568 and 590 of the Penal Code. It has been shown that the liability of an employer arising out of his relation to his employee who is the offender is not to be regarded as derived from negligence punished by the law, within the meaning of articles 1092 and 1093. More than this, however, it can not be said to fall within the class of acts unpunished by the law, the consequences of which are regulated by articles 1902 and 1903 of the Civil Code. The acts to which these articles are applicable are understood to be those not growing out of preexisting duties of the parties to one another. But where relations already formed give rise to duties, whether springing from contract or quasi contract, then breaches of those duties are subject to articles 1101, 1103, and 1104 of the same code. A typical application of this distinction may be found in the consequences of a railway accident due to defective machinery supplied by the employer. His liability to his employee would arise out of the contract of employment, that to the passengers out of the contract for passage, while that to the injured bystander would originate in the negligent act itself. This distinction is thus clearly set forth by Manresa in his commentary on article 1093:

> "We see with reference to such obligations, that *culpa*, or negligence, may be understood in two different senses; either as *culpa, substantive* and *independent*, which on account of its origin arises in an obligation between two persons not formerly bound by any other obligation; or as an *incident* in the performance of an obligation which already existed, which can not be presumed to exist without the other, and which increases the liability arising from the already existing obligation.
>
> "Of these two species of *culpa* the first one mentioned, existing by itself, may be also considered as a real source of an independent obligation, and, as chapter 2, title 16 of this book of the code is devoted to it, it is logical to presume that the reference contained in article 1093 is limited thereto and that it does not extend to those provisions relating to the other species of *culpa* (negligence), the nature of which we will discuss later." (Vol. 8, p. 29.)

And in his commentary on articles 1102 and 1104 he says that these two species of negligence may be somewhat inexactly described as contractual and extra-contractual, the latter being the *culpa aquiliana* of the Roman law and not entailing so strict an obligation as the former. This terminology is unreservedly accepted by Sanchez-Roman (Derecho Civil, fourth section, Chapter XI, Article II, No. 12), and the principle stated is supported by decisions of the supreme court of Spain, among them those of November 20, 1896 (80 Jurisprudencia Civil, No. 151), and June 27, 1894 (75 Jurisprudencia Civil, No. 182). The contract is one for hire and not one of mandate. (March 10, 1897, 81 Jurisprudencia Civil, No. 107.)

Spanish jurisprudence, prior to the adoption of the Working Men's Accident Law of January 30, 1900, throws uncertain light on the relation between master and workman. Moved by the quick industrial development of their people, the courts of France early applied to the subject the principles common to the law of both countries, which are lucidly discussed by the leading French commentators.

The original French theory, resting the responsibility of owners of industrial enterprises upon articles 1382, 1383, and 1384 of the Code Napoleon, corresponding in scope to articles 1902 and 1903 of the Spanish Code, soon yielded to the principle that the true basis is the contractual obligation of the employer and employee. (See 18 Dalloz, 1896, Title *Travail*, 331.)

Later the hardships resulting from special exemptions inserted in contracts for employment led to the discovery of a third basis for liability in an article of the French Code making the possessor of any object answerable for damage done by it while in his charge. Our law having no counterpart of this article, applicable to every kind of object, we need consider neither the theory growing out of it nor that of "professional risk" more recently imposed by express legislation, but rather adopting the interpretation of our Civil Code above given, find a rule for this case in the contractual obligation. This contractual obligation, implied from the relation and perhaps so inherent in its nature to be invariable by the parties, binds the employer to provide safe appliances for the use of the employee, thus closely corresponding to English and American law. On these principles it was the duty of the defendant to build and to maintain its track in reasonably sound condition, so as to protect its workingmen from unnecessary danger. It is plain that in one respect or the other it failed in its duty, otherwise the accident could not have occurred; consequently the negligence of the defendant is established.

Another contention of the defense is that the injury resulted to the plaintiff as a risk incident to his employment and, as such, one assumed by him. It is evident that this can not be the case if the occurrence was due to the failure to repair the track or to duly inspect it, for the employee is not presumed to have stipulated that the employer might neglect his legal duty. Nor may it be excused upon the ground that the negligence leading to the accident was that of a fellow-servant of the injured man. It is not apparent to us that the intervention of a third person can relieve the defendant from the performance of its duty nor impose upon the plaintiff the consequences of an act or omission not his own. *Sua cuique culpa nocet*. This doctrine, known as "the fellow-servant rule," we are not disposed to introduce into our jurisprudence. Adopted in England by Lord Abinger in the case of Prescott *vs*. Fowler (3 Meeson & Welsby, 1) in 1837, it has since been effectually abrogated by "the Employers' Liability Acts" and the "Compensation Law." The American States which applied it appear to be gradually getting rid of it; for instance, the New York State legislature of 1906 did away with it in respect to railroad companies, and had in hand a scheme for its total abolition. It has never found place in the civil law of continental Europe. (Dalloz, vol. 39, 1858, Title Responsibilite, 630, and vol. 15, 1895, same title, 804. Also more recent instances in Fuzier-Herman, Title Responsibilite Civile, 710.)

The French *Cour de Cassation* clearly laid down the contrary principle in its judgment of June 28, 1841, in the case of Reygasse, and has since adhered to it.

The most controverted question in the case is that of the negligence of the plaintiff,

contributing to the accident, to what extent it existed in fact and what legal effect is to be given it. In two particulars is he charged with carelessness:

First. That having noticed the depression in the track he continued his work; and

Second. That he walked on the ends of the ties at the side of the car instead of along the boards, either before or behind it.

As to the first point, the depression in the track might indicate either a serious or a trivial difficulty. There is nothing in the evidence to show that the plaintiff did or could see the displaced timber underneath the sleeper. The claim that he must have done so is a conclusion drawn from what is assumed to have been a probable condition of things not before us, rather than a fair inference from the testimony. While the method of construction may have been known to the men who had helped build the road, it was otherwise with the plaintiff who had worked at this job less than two days. A man may easily walk along a railway without perceiving a displacement of the underlying timbers. The foreman testified that he knew the state of the track on the day of the accident and that it was then in good condition, and one Danridge, a witness for the defendant, working on the same job, swore that he never noticed the depression in the track and never saw any bad place in it. The sagging of the track this plaintiff did perceive, but that was reported in his hearing to the foreman who neither promised nor refused to repair it. His lack of caution in continuing at his work after noticing the slight depression of the rail was not of so gross a nature as to constitute negligence, barring his recovery under the severe American rule. On this point we accept the conclusion of the trial judge who found as facts that “the plaintiff did not know the cause of the one rail being lower than the other” and “it does not appear in this case that the plaintiff knew before the accident occurred that the stringers and rails joined in the same place.”

Were we not disposed to agree with these findings they would, nevertheless, be binding upon us, because not “plainly and manifestly against the weight of evidence,” as those words of section 497, paragraph 3 of the Code of Civil Procedure were interpreted by the Supreme Court of the United States in the De la Rama case (201 U. S., 303).

In respect of the second charge of negligence against the plaintiff, the judgment below is not so specific. While the judge remarks that the evidence does not justify the finding that the car was pulled by means of a rope attached to the front end or to the rails upon it, and further that the circumstances in evidence make it clear that the persons necessary to

operate the car could not walk upon the plank between the rails and that, therefore, it was necessary for the employees moving it to get hold upon it as best they could, there is no specific finding upon the instruction given by the defendant to its employees to walk only upon the planks, nor upon the necessity of the plaintiff putting himself upon the ties at the side in order to get hold upon the car. Therefore the findings of the judge below leave the conduct of the plaintiff in walking along the side of the loaded car, upon the open ties, over the depressed track, free to our inquiry.

While the plaintiff and his witnesses swear that not only were they not forbidden to proceed in this way, but were expressly directed by the foreman to do so, both the officers of the company and three of the workmen testify that there was a general prohibition frequently made known to all the gang against walking by the side of the car, and the foreman swears that he repeated the prohibition before the starting of this particular load. On this contradiction of proof we think that the preponderance is in favor of the defendant's contention to the extent of the general order being made known to the workmen. If so, the disobedience of the plaintiff in placing himself in danger contributed in some degree to the injury as a proximate, although not as its primary cause. This conclusion presents sharply the question, What effect is to be given such an act of contributory negligence? Does it defeat a recovery, according to the American rule, or is it to be taken only in reduction of damages?

While a few of the American States have adopted to a greater or less extent the doctrine of comparative negligence, allowing a recovery by a plaintiff whose own act contributed to his injury, provided his negligence was slight as compared with that of the defendant, and some others have accepted the theory of proportional damages, reducing the award to a plaintiff in proportion to his responsibility for the accident, yet the overwhelming weight of adjudication establishes the principle in American jurisprudence that any negligence, however slight, on the part of the person injured which is one of the causes proximately contributing to his injury, bars his recovery. (English and American Encyclopedia of law, Titles "Comparative Negligence" and "Contributory Negligence.")

In Grand Trunk Railway Company *vs*. Ives (144 U. S., 408, at page 429) the Supreme Court of the United States thus authoritatively states the present rule of law:

> "Although the defendant's' negligence may have been the primary cause of the injury complained of, yet an action for such injury can not be maintained if the

> proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured; subject to this qualification, which has grown up in recent years (having been first enunciated in Davies *vs*. Mann, 10 M. & W., 546) that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

There are many cases in the supreme court of Spain in which the defendant was exonerated, but when analyzed they prove to have been decided either upon the point that he was not negligent or that the negligence of the plaintiff was the immediate cause of the casualty or that the accident was due to *casus fortuitus*. Of the first class is the decision of January 26, 1887 (38 *Jurisprudencia Criminal,* No. 70), in which a railway employee, standing on a car, was thrown therefrom and killed by the shock following the backing up of the engine. It was held that the management of the train and engine being in conformity with proper rules of the company, showed no fault on its part.

Of the second class are the decisions of the 15th of January, the 19th of February, and the 7th of March, 1902, stated in Alcubilla's Index of that year; and of the third class the decision of the 4th of June, 1888 (64 *Jurisprudencia Civil,* No. 1), in which the breaking down of plaintiff's dam by the logs of the defendant impelled against it by the Tajo River, was held due to a freshet as a fortuitous cause.

The decision of the 7th of March, 1902, on which stress has been laid, rested on two bases, one, that the defendant was not negligent, because expressly relieved by royal order from the common obligation imposed by the police law of maintaining a guard at the road crossing; the other, because the act of the deceased in driving over level ground with unobstructed view in front of a train running at speed, with the engine whistle blowing was the determining cause of the accident. It is plain that the train was doing nothing but what it had a right to do and that the only fault lay with the injured man. His negligence was not contributory, it was sole, and was of such an efficient nature that without it no catastrophe could have happened.

On the other hand, there are many cases reported in which it seems plain that the plaintiff sustaining damages was not free from contributory negligence; for instance, the decision of the 14th of December, 1894 (76 *Jurisprudencia Civil,* No. 134), in which the owner of a

building was held liable for not furnishing protection to workmen engaged in hanging out flags, when the latter must have perceived beforehand the danger attending the work.

None of those cases define the effect to be given the negligence of a plaintiff which contributed to his injury as one of its causes, though not the principal one, and we are left to seek the theory of the civil law in the practice of other countries.

In France in the case of Marquant, August 20, 1879, the *cour de cassation* held that the carelessness of the victim did not civilly relieve the person without whose fault the accident could not have happened, but that the contributory negligence of the injured man had the effect only of reducing the damages. The same principle was applied in the case of Recullet, November 10, 1888, and that of Laugier of the 11th of November, 1896. (Fuzier-Herman, Title *Responsibilite Civile,* 411, 412.) Of like tenor are citations in Dalloz (vol. 18, 1896, Title *Travail,* 363, 364, and vol. 15, 1895, Title *Responsibilite,* 193, 198).

In the Canadian Province of Quebec, which has retained for the most part the French Civil Law, now embodied in a code following the Code Napoleon, a practice in accord with that of France is laid down in many cases collected in the annotations to article 1053 of the code edited by Beauchamps, 1904. One of these is Luttrell *vs*. Trottier, reported in *La Revue de Jurisprudence,* volume 6, page 90, in which the court of King's bench, otherwise known as the court of appeals, the highest authority in the Dominion of Canada on points of French law, held that contributory negligence did not exonerate the defendants whose fault had been the immediate cause of the accident, but entitled him to a reduction of damages. Other similar cases in the provincial courts have been overruled by appellate tribunals made up of common law judges drawn from other provinces, who have preferred to impose uniformly throughout the Dominion the English theory of contributory negligence. Such decisions throw no light upon the doctrines of the civil law. Elsewhere we find this practice embodied in legislation; for instance, section 2 of article 2398 of the Code of Portugal reads as follows:

> "If in the case of damage there was fault or negligence on the part of the person injured or on the part of some one else, the indemnification shall be reduced in the first case, and in the second case it shall be apportioned in proportion to such fault or negligence as provided in paragraphs 1 and 2 of section 2372."

And article 1304 of the Austrian Code provides that the victim who is partly chargeable with the accident shall stand his damages in proportion to his fault, but when that proportion is

incapable of ascertainment, he shall share the liability equally with the person principally responsible. The principle of proportional damages appears to be also adopted in article 51 of the Swiss Code. Even in the United States in admiralty jurisdictions, whose principles are derived from the civil law, common fault in cases of collision have been disposed of not on the ground of contributory negligence, but on that of equal loss, the fault of the one party being offset against that of the other. (Ralli *vs*. Troop, 157 U. S., 386, p. 406.)

The damage of both being added together and the sum equally divided, a decree is entered in favor of the vessel sustaining the greater loss against the other for the excess of her damages over one-half of the aggregate sum. (The Manitoba, 122 U. S., 97.)

Exceptional practice appears to prevail in maritime law in other jurisdictions. The Spanish Code of Commerce, article 827, makes each vessel liable for its own damage when both are at fault; this provision restricted to a single class of maritime accidents, falls far short of a recognition of the principle of contributory negligence as understood in American law, with which, indeed, it has little in common. This is plain from other articles of the same code; for instance, article 829, referring to articles 826, 827, and 828, which provides: “In the cases above mentioned the civil action of the owner against the person liable for the damage is reserved, as well as the criminal liability which may appear.”

The rule of the common law, a hard and fast one, not adjustable with respect of the faults of the parties, appears to have grown out of the original method of trial by jury, which rendered difficult a nice balancing of responsibilities and which demanded an inflexible standard as a safeguard against too ready sympathy for the injured. It was assumed that an exact measure of several concurring faults was unattainable.

> “The reason why, in cases of mutual concurring negligence, neither party can maintain an action against the other, is, not that the wrong of the one is set off against the wrong of the other; it is that the law can not measure how much of the damage suffered is attributable to the plaintiff’s own fault. If he were allowed to recover, it might be that he would obtain from the other party compensation for his own misconduct.” (Heil *vs*. Glanding, 42 Penn. St. Rep., 493, 499.)
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> “The parties being mutually in fault, there can be no apportionment of damages. The law has no scales to determine in such cases whose wrongdoing weighed most in the compound that occasioned the mischief.” Railroad *vs*. Norton, 24 Penn. St. Rep., 465, 469.)

Experience with jury trials in negligence cases has brought American courts of review to relax the vigor of the rule by freely exercising the power of setting aside verdicts deemed excessive, through the device of granting new trials, unless reduced damages are stipulated for, amounting to a partial revision of damages by the courts. It appears to us that the control by the court of the subject-matter may be secured on a more logical basis and its judgment adjusted with greater nicety to the merits of the litigants through the practice of offsetting their respective responsibilities. In the civil-law system this desirable end is not deemed beyond the capacity of its tribunals.

Whatever may prove to be the doctrine finally adopted in Spain or in other countries under the stress and counter stress of novel schemes of legislation, we find the theory of damages laid down in this judgment the most consistent with the history and the principles of our law in these Islands and with its logical development.

Difficulty seems to be apprehended in deciding which acts of the injured party shall be considered immediate causes of the accident. The test is simple. Distinction must be made between the accident and the injury, between the event itself, without which there could have been no accident, and those acts of the victim not entering into it, independent of it, but contributing to his own proper hurt. For instance, the cause of the accident under review was the displacement of the crosspiece or the failure to replace it. This produced the event giving occasion for damages—that is, the sinking of the track and the sliding of the iron rails. To this event, the act of the plaintiff in walking by the side of the car did not contribute, although it was an element of the damage which came to himself. Had the crosspiece been out of place wholly or partly through his act or omission of duty, that would have been one of the determining causes of the event or accident, for which he would have been responsible. Where he contributes to the principal occurrence, as one of its determining factors, he can not recover. Where, in conjunction with the occurrence, he contributes only to his own injury, he may recover the amount that the defendant responsible for the event should pay for such injury, less a sum deemed a suitable equivalent for his own imprudence.

Accepting, though with some hesitation, the judgment of the trial court, fixing the damage incurred by the plaintiff at 5,000 pesos, the equivalent of 2,500 dollars, United States money, we deduct therefrom 2,500 pesos, the amount fairly attributable to his negligence, and direct judgment to be entered in favor of the plaintiff for the resulting sum of 2,500 pesos, with costs of both instances, and ten days hereafter let the case be remanded to the court below for proper action. So ordered.

Arellano, C. J., Torres, and *Mapa, JJ.,* concur.

DISSENTING

WILLARD, J., with whom concurs **CARSON, J.:**

The knowledge which the plaintfff had in regard to the condition of the track is indicated by his own evidence. He testified, among other things, as follows:

> "Q. Now, describe the best you can the character of the track that ran from the place where you loaded the irons from the barge up to the point where you unloaded them on the ground.—A. Well, it was pretty bad character.
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> * * * * *
>
> "Q. And you were familiar with the track before that—its construction?—A. Familiar with what?
>
> "Q. Well, you have described it here to the court.—A. Oh, yes; I knew the condition of the track.
>
> "Q. You knew its condition as you have described it here at the time you were working around there?—A. Yes, sir.
>
> * * * * *
>
> "Q. And while operating it from the side it was necessary for you to step from board to board on the cross-ties which extended out over the stringers?—A. Yes, sir.
>
> "Q. And these were of very irregular shape, were they not?—A. They were in pretty bad condition.
>
> * * * * *
>
> "Q. And it was not safe to walk along on the outside of these crosspieces?—A. It was safe if the car stayed on the track. We didn't try to hold the load on. We tried

to hold the car back, keep it from going too fast, because we knew the track was in bad condition just here, and going down too fast we would be liable to run off most any time.

"Q. You knew the track was in bad condition when you got hold?—A. Sure, it was in bad condition.

* * * * *

"Q. And the accident took place at the point where you believed it to be so dangerous?—A. Yes, sir.

"Q. But you knew it was dangerous?—A. Why certainly, anybody could see it; but a workingman had to work in those days or get arrested for a vag here in Manila."

The court below, while it found that the plaintiff knew in a general way of the bad condition of the track, found that he was not informed of the exact cause of the accident, namely, the washing away of the large crosspiece laid upon the ground or placed upon the posts as the foundation upon which the stringers rested. This finding of fact to my mind is plainly and manifestly against the weight of the evidence. Ellis, a witness for the plaintiff, testified that on the morning of the accident he called the attention of McKenna, the foreman, to the defective condition of the track at this precise point where the accident happened. His testimony in part is as follows:

"A. I called Mr. McKenna. I showed him the track and told him I didn't think it was safe working, and that if he didn't fix it he was liable to have an accident; I told him I thought if he put fish plates on it it would hold it. He said, you keep on fishing around here for fish plates and you will be fishing for another job the first thing you know.' He says, 'You see too much.'

* * * * *

"Q. Who else was present at the time you had this conversation with Mr. McKenna?—A. Well, at that conversation as far as I can remember, we were all walking down the track and I know that McCoy and Mr. Rakes was along at the time. I remember them two, but we were all walking down the track in a bunch,

but I disremember them.

* * * * *

"Q. Was that the exact language that you used, that you wanted some fish plates put on?—A. No, sir; I told him look at that track. I says get some fish plates. I says if there was any fish plates we would fix that.

"Q. What did the fish plates have to do with that?—A. It would have strengthened that joint.

"Q. Why didn't you put the 8 by 8 which was washed crossways in place?—A. That would have taken the raising of the track and digging out along this upright piece and then putting it up again."

The plaintiff himself testified that he was present with Ellis at the time this conversation was had with McKenna. It thus appears that on the morning in question the plaintiff and McKenna were standing directly over the place where the accident happened later in the day. The accident was caused, as the court below found, by the washing away or displacement of the large 8 by 8 piece of timber. This track was constructed as all other tracks are, all of it open work, with no floor over the ties, and of course anyone standing on the track at a particular place could see the ground and the entire construction of the road, including these large 8 by 8 pieces, the long stringers placed thereon, the ties placed on these stringers, and the rails placed on the ties. The plaintiff himself must have seen that this 8 by 8 piece of timber was out of place.

If the testimony of the plaintiff's witnesses is to be believed, the displacement was more markedly apparent even than it would appear from the testimony of the defendant's witnesses. According to the plaintiff's witnesses, the water at high tide reached the place in question and these 8 by 8 pieces were therefore not laid upon the ground but were placed upon posts driven into the ground, the height of the posts at this particular place being, according to the testimony of the plaintiff's witnesses, from a foot to two feet and a half. As has been said, Ellis testified that the reason why they did not put the 8 by 8 back in its place was because that would have required the raising up of the track and digging out along this upright piece and then putting it up again.

It conclusively appears from the evidence that the plaintiff, before the accident happened,

knew the exact condition of the track and was informed and knew of the defect which caused the accident. There was no promise on the part of McKenna to repair the track.

Under the circumstances the plaintiff was negligent in placing himself on the side of the car where he knew that he would be injured by the falling of the rails from the car when they reached this point in the track where the two stringers were left without any support at their ends. He either should have refused to work at all or he should have placed himself behind the car, on the other side of it, or in front of it, drawing it with a rope. He was guilty of contributory negligence and is not entitled to recover.

It is said, however, that contributory negligence on the part of the plaintiff in a case like this is no defense under the law in force in these Islands. To this proposition I can not agree. The liability of the defendant is based in the majority opinion upon articles 1101 and 1103 of the Civil Code.

In order to impose such liability upon the defendant, it must appear that its negligence caused the accident. The reason why contributory negligence on the part of the plaintiff is a defense in this class of cases is that the negligence of the defendant did not alone cause the accident. If nothing but that negligence had existed, the accident would not have happened and, as I understand it, in every case in which contributory negligence is a defense it is made so because the negligence of the plaintiff is the cause of the accident, to this extent, that if the plaintiff had not been negligent the accident would not have happened, although the defendant was also negligent. In other words, the negligence of the defendant is not alone sufficient to cause the accident. It requires also the negligence of the plaintiff.

There is, so far as I know, nothing in the Civil Code relating to contributory negligence. The rule of the Roman law was: *"Quod quis ex culpa sua damnum sentit, non intelligitur damnum sentire."* (Digest, book 50, tit. 17, rule 203.)

The *Partidas* contain the following provisions:

> "The just thing is that a man should suffer the damage which comes to him through his own fault, and that he can not demand reparation therefor from another." (Law 25, tit. 5, *partida* 3.)
>
> "And they even said that when a man received an injury through his own negligence, he should blame himself for it." (Rule 22, tit. 34, *partida* 7.)

> "According to ancient sages, when a man received an injury through his own acts, the grievance should be against himself and not against another." (Law 2, tit. 7, *partida* 2.)

In several cases in the supreme court of Spain the fact has been mentioned that the plaintiff was himself guilty of negligence, as in the civil judgments of the 4th of June, 1888, and of the 20th of February, 1897, and in the criminal judgments of the 20th of February 1888, the 9th of March, 1876, and the 6th of October, 1882. These cases do not throw much light upon the subject. The judgment of the 7th of March, 1902 (93 *Jurisprudencia Civil,* 391), is, however, directly in point. In that case the supreme court of Spain said:

> "According to the doctrine expressed in article 1902 of the Civil Code, fault or negligence is a source of obligation when between such negligence and the injury thereby caused there exists the relation of cause and effect; but if the injury caused should not be the result of acts or omissions of a third party, the latter has no obligation to repair the same, even though such acts or omissions were imprudent or unlawful, and much less when it is shown that the immediate cause of the injury was the negligence of the injured party himself.
>
> "For the reasons above stated, and the court below having found that the death of the deceased was due to his own imprudence, and not therefore due to the absence of a guard at the grade crossing where the accident occurred, it seems clear that that court in acquitting the railroad company of the complaint filed by the widow did not violate the provisions of the aforesaid article of the Civil Code.
>
> "For the same reason, although the authority granted to the railroad company to open the grade crossing without a special guard was nullified by the subsequent promulgation of the railroad police law and the regulations for the execution of the same, the result would be identical, leaving one of the grounds upon which the judgment of acquittal is based, to wit, that the accident was caused by the imprudence of the injured party himself, unaffected."

It appears that the accident in this case took place at a grade crossing where, according to the claim of the plaintiff, it was the duty of the railroad company to maintain a guard. It did not do so, and the plaintiff's deceased husband was injured by a train at this crossing, his

negligence contributing to the injury according to the ruling of the court below. This judgment, then, amounts to a holding that contributory negligence is a defense according to the law of Spain. (See also judgment of the 21st of October, 1903, vol. 96, p. 400, *Jurisprudencia Civil*.)

Although in the Civil Code there is no express provision upon the subject, in the Code of Commerce there is found a distinct declaration upon it in reference to damages caused by collisions at sea. Article 827 of the Code of Commerce is as follows:

> "If both vessels may be blamed for the collision, each one shall be liable for his own damages, and both shall be jointly responsible for the loss and damage suffered by their cargoes."

That article is an express recognition of the fact that in collision cases contributory negligence is a defense.

I do not think that this court is justified in view of the Roman law, of the provisions of the *Partidas*, of the judgment of March 7, 1902, of article 827 of the Code of Commerce, and in the absence of any declaration upon the subject in the Civil Code, in saying that it was the intention of the legislature of Spain to adopt for the Civil Code the rule announced in the majority opinion, a rule diametrically opposed to that put in force by the Code of Commerce.

The chief, if not the only, reason stated in the opinion for adopting the rule that contributory negligence is not a defense seems to be that such is the holding of the later French decisions.

As to whether, if any liability existed in this case, it would be secondary in accordance with the provisions of the Penal Code, or primary, in accordance with the provisions of the Civil Code, I express no opinion.

The judgment should, I think, be reversed and the defendant acquitted of the complaint.

Date created: September 16, 2014