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**Master-Servant--Right of Action by Employer Against Tort-feaser of Employee**

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defense that his order to report for induction was invalid because of a procedural error committed by the administrative agency in the classification process.\textsuperscript{21}

The \textit{Warner} case illustrates that it is most difficult indeed to establish that a selective service board exceeded its jurisdiction in deciding a particular case. This is because the local board can guard its province by showing that certain facts existed to substantiate its conclusion. As a result, the efficacy of contesting the board's decision on the grounds that it exceeded its jurisdiction may be seriously questioned. Rather, constitutional arguments, such as those set forth in \textit{Wolff}, \textit{Gabriel}, and \textit{Petersen} could in the future be a more successful way to assure judicial review of one's selective service classification.

\textit{Gary Gordon Markham}

\textbf{Master-Servant—Right of Action by Employer Against Tort-feaser of Employee}

West, allegedly negligent in driving his car, was involved in a collision. The driver of the other vehicle, an employee of Snow, was killed and six passengers, also employed by Snow, were injured. Snow brought an action against West to recover the profits lost from his business due to the loss of services of these employees. The trial court entered judgment for West, and Snow appealed. \textit{Held}, judgment affirmed. This is a problem of interference with a contractual relation, that of employer-employee. To be actionable, the interference must be intentional and not an inadvertent or incidental invasion of the employer's contractual interest. An employer will not be permitted to recover for the loss of services of an employee negligently injured. \textit{Snow v. West}, 440 P.2d 864 (Ore. 1968).

The action permitting the master to recover for the loss of services of an employee who has been injured by a third party is an ancient one. It can be traced to early Roman law where the head of the household could bring an action for violence committed upon his wife, his children, his slaves, or other members of his establishment, on the premise that they were identifiable with him, so that

the wrong was one to himself. Under early English common law, the wrong giving rise to the action consisted of actual damage to the master by reason of loss of service. The rationale was that the master had a property in the service rather than an interest in the servant's person. The action was not for the direct injury, on which only the injured servant could recover, but for the resulting damage to the master. Since it was not actionable per se, it was necessary to allege a per quod, i.e. per quod servitium amisit.

The response to the common law action in this country can hardly be characterized as favorable. Although a number of states have recognized its existence, they have done so chiefly through dicta; however, the right of action has been recognized by statute in California and Oklahoma. Apparently the earliest appellate decision concerning the action in the United States was rendered in 1805; but it was not until the latter half of the century that usage of the action became noticeable. In the twentieth century there has been considerable opposition to it, and courts are presently re-examining the

1 W. Prosser, Torts § 123 at 952 (3rd ed. 1964); see Wampler v. Palmerton, 439 P.2d 601, 605 (Ore. 1968).
2 In Robert Mary's Case, 77 Eng. Rep. 895, 898-899 (K. B. 1612), the leading English case, Lord Coke said:
   [I]f my servant is beat, the master shall not have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of his servant, but by reason of a per quod, viz. per quod servitium, etc., amisit; so that the original act is not the cause of his action, but the consequent upon it, viz. the loss of his service is the cause of his action; for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action.
3 Id.; see 2 Melbourne U.L. Rev. 413 (1960), relating the recent conflict in English courts concerning whether the relationship of the servant to his master was one of property or of contract.
7 Voss v. Howard, 1 D.C. (1 Cranch) 251 (1805) (master has no right of action for assault and battery unless some loss of service results).
action to determine the need for it in the light of present-day circumstances.⁹

One of the basic problems confronting the action is the determination of limits for its coverage. The action originated in a state of society where service was not a matter of contract, but of status.¹⁰ However, the relationship of the master and his servant has changed considerably during the past several centuries. As a result, several courts have restricted recovery for loss of service to the masters of menial or domestic servants in an attempt to conform to the original basis for the action,¹¹ while other courts have expanded the original concept to permit a variety of employers to recover.¹² Moreover, the existence of an actual binding contract for the services between the master and the servant has never been deemed necessary.¹³

Another fundamental problem with the common law action is the determination of when it is to be applied and what rationale will support its application. The loss of service due to intentional injury was being compensated at a time when the concept of negligence was merely an embryo. As the latter concept burgeoned, negligent injuries to the servant presented difficulties for the courts until it was eventually determined that there was no distinction between willful and negligent injuries in this action.¹⁴ However, when the relationship of master and servant became more clearly one of contract, courts labored to determine an analytical approach on which to base recovery. With negligence being couched in concepts of "duty" and "foreseeability," many courts were hesitant to include the loss of services within these concepts and thus concluded that no duty was owed to the employer¹⁵ or that such consequences were

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⁹ United States v. Standard Oil Co., 153 F.2d 958, 960 (9th Cir. 1946), affd 332 U.S. 301 (1947), where the action is referred to as "an anomaly in the law."
too remote to permit recovery. Moreover, several courts, after examining intentional injuries to the servant, concluded that if there were no intent to harm the master through injuring his servant or no malice was directed towards the master, then he should not be compensated.

West Virginia has had two cases in which a master has sought recovery based on an injury to his servant. In one instance, a corporation sought recovery for the loss of services of an employee due to an assault and battery committed upon him. The court held that an employer could recover from one who intentionally harms his servant where such injury results in a loss of services to the employer. In the other case, however, the defendant's conduct was not intentional. More particularly, the employee in this case was killed by the defendant's negligent operation of a train. In discussing the plaintiff's contention that the defendant's negligence was the proximate cause in a chain of causation resulting in damage to the plaintiff, the court reasoned that such damages were too remote and indirect to support a recovery. The court further ruled that no "legal duty is owed by the tortfeasor to the employer. It is only where an injury is intentionally calculated to harm the employer in his contractual relations that recovery may be had." This view seemingly coincides with that

16 Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277, 282 (4th Cir. 1940), cert. denied, 312 U.S. 702 (1941).
18 Coal Land Development Co. v. Chidester, 86 W. Va. 561, 103 S.E. 923 (1920).
19 Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277, 282 (4th Cir. 1940), cert. denied, 312 U.S. 702 (1941). The employer sought recovery for expenses paid and increased payments made to the Workmen's Compensation Fund due to the death of the employee, but the court held that the employer had no right to indemnity or subrogation in lieu of an express statutory grant.
20 At common law recovery was denied for loss of services where the death of the servant occurred. See Higgins v. Butcher, 80 Eng. Rep. 61 (K. B. 1872).
of the Oregon court in its decision that an employer cannot recover for the loss of services of an employee who is negligently injured by a third party.

In addition to this decision, there is other authority for the proposition that recovery for loss of service can be maintained by a master or employer only where a wrongful intent or malice was directed at the employer, or where the tortfeasor was aware of the master-servant relationship. The substitution of this rule in place of the common law rule obviates the difficulties previously encountered. Thus, where the employee's injury is negligently caused, it eliminates the problem of the faint foreseeability that such an injury would harm the employer and the problem of a vague duty owed to the employer. Where the employee's injury is intentionally caused and no harmful intent or malice is directed to the employer, but such harm is merely felt vicariously, recovery would be denied. Also, the question of limiting or expanding the common law concept of "master" vanishes since an injury to the employee, committed with the intention of harming the employer's business, would permit a recovery by all types of employers.

Limiting the employer's right of recovery to situations where his employee was intentionally injured as a means to harm the employer's business interests may not eliminate all problems. For instance, it may seem rather anomalous if an employer made liable under the doctrine of respondeat superior could not bring an action per quod servitium amisit in appropriate circumstances. Nevertheless, the need for vindicating the master's proprietary interest in

the tortfeasor is held responsible because he is expected to recognize the natural and probable consequences of his wrong. (Citations omitted). However, no such special treatment is given by our law to the relationship of employer and employee. And, until the legislature deems it wise to create a specific social employer-employee status, with additional obligations and immunities thereunto appertaining, the ordinary rules of tort law will here apply. (Emphasis added).


22 Cowen, The Consequences of the Commonwealth v. Quince, 19 Austl. L.J. 2, 9 (1945). The doctrine of respondeat superior is the converse of the doctrine per quod servitium amisit as far as the employer is concerned. Imposing liability on the employer in the former situation and denying recovery to him in the latter is justifiable. Due to the employer's control over his servant, courts readily find that the employer could foresee the
the service of a dependent servant, based on a pseudo-family relationship, no longer exists. The necessary shift in the function of the action is to the protection of the employer's business interests, and the cases indicate that the law has moved in that direction.

John Campbell Palmer IV

Pleading—Amendment of Pleadings by Leave of Court

The prior practice of "gamesmanship" in pleading has been replaced by a judicious emphasis on substance rather than on form under the West Virginia Rules of Civil Procedure. The Rules focus on the orderly presentation of all the relevant issues. Under the Rules, substantive law need no longer seem to be "secreted in the interstices of procedure." Unfortunately, lawyers, and even judges are often too busy with the business of the day to lay aside the habits of decades. Perhaps, more for this reason than any other, the West Virginia Supreme Court of Appeals gave a restrictive treatment to Rule 15(a) of the West Virginia Rules of Civil Procedure in deciding the case of Perdue v. S. J. Groves and Sons Co. The pertinent facts of that case are as follows:

Plaintiffs, who were landowners in Huntington, West Virginia, alleged their home was damaged as the proximate result of de-

possibility of his servant injuring a third party. Conversely, when the servant is injured by a third party, it is difficult to find that the tortfeasor should foresee an injury to a person with whom the servant has merely a contractual relation. This is subject to the criticism that a tortfeasor should be held to foresee such an injury since most people are employed; however, courts usually hold that this is too remote. Another rationale commonly employed is that the employer usually is the one who is best equipped to bear the loss, whether his servant injures a third person or a third person injures his servant. Thus while the two doctrines may be symmetrical factually, the rules of the courts result in the balance being weighted unequally.


1 The Rules contemplate that a decision will be made on the merits of the controversy. Moreover, Rule 1 provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of any action." W. VA. R. CIV. P. 1.

2 "So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." SIR HENRY MAINE, EARLY LAW AND CUSTOM 389 (1907).

3 161 S.E.2d 250 (W. Va. 1968).