LIABILITY TO MASTER FOR NEGLIGENT HARM TO SERVANT

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In the beginning the rules of the subject now known as Torts dealt primarily with interference with possessions, ownership, and family relations. Liability for interference with merely pecuniary interests came much later. The modern action for deceit began only in 1789,[1] the first recovery for interference with business in 1793,[2] while the first action for enticing away a contracting party did not come until 1853.[3] Perhaps because they came late these actions have been dealt with as something apart from other tort actions. Thus, while there is strict liability for all interference with possession,[4] reputation,[5] and family relation,[6] actions for causing harm to pecuniary interests alone must normally be based not merely upon negligent conduct, but upon conduct which is intentionally wrongful. In fact, in most jurisdictions there is no tort liability for negligent misrepresentation[7] nor for the negligent interference with contractual or other profitable relations. One who buys goods from a person when he should know that his purchase would cause a breach of contract by the seller is not liable to the other contracting party.[8] One who negligently burns a building is not liable to the workmen thrown out of employment.[9] One who commits even an intended wrong to one person, such as a battery, is not liable to others who are caused pecuniary loss by his conduct except where he acts for the purpose of causing such loss to the others. Thus, one who killed another was held not liable to the insurance company which was required to pay for the death.[10] In general, therefore, it may be said that while economic loss is an element of damages in all cases where independently of it a cause of action accrues, economic loss without interference with the person or tangible things is not the basis

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1. Pasley v. Freeman, 3 T.R. 51, 100 Eng. Rep. 450 (K.B. 1789).
2. Tarleton v. M'Cawley, Peake 270, 170 Eng. Rep. 153 (N.P. 1793).
3. Lumley v. Gye, 2 Ell. & Bl. 216, 118 Eng. Rep. 749 (Q.B. 1853).
4. Galvin v. Bacon, 11 Me. 28 (1833) (purchase from a bailee without power to give title).
5. Cassidy v. Daily Mirror Newspapers, Ltd., [1929] 2 K.B. 331 (C.A.) (defendant had no reason to know the statement was defamatory or that the plaintiff existed).
6. RESTATEMENT, TORTS § 685 (1938) (intercourse with a married woman believed to be single, creates right of action in husband).
7. The rule of Derry v. Peek, 14 App. Cas. 337 (H.L. 1889), the leading English case, is still the law in most American jurisdictions.
8. RESTATEMENT, TORTS § 766, comment *i* (1939).
9. Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio Ct. App. 1946).
10. Connecticut Mut. Life Ins. Co. v. New York & N.H.R.R., 25 Conn. 265 (1856).

of a cause of action except where the defendant acted for the purpose of causing the loss, or, in other cases, believed that it would result, or, in actions of deceit, intended to mislead the other parties. It is with this background that we should consider the liability of a person to a master for negligent harm to the servant.

Master and servant is one of the oldest of personal relations and, as in the case of family relations, one who interfered with it intentionally or negligently without excuse, became subject to liability, in many cases, even without knowledge of the existence of a relation. Thus, one who employed a minor child or apprentice was liable to the master or parent for the value of the services.[11] One who seduced a wife or daughter was liable to the husband or parent irrespective of his knowledge of the relation.[12] In the cases recovery was, in an action of trespass, based on the theory that the husband or father was in possession of the spouse or daughter.[13] It is also clear that in the latter case, at least, the action for the seduction of a daughter was based upon the theory that the daughter was the servant and further that the interference with the services of a servant either by seduction or by physical harm was the basis of an action.[14] In the days of the cottage industry when there were many servants in the home, the bonds between master and servant were strong and it was proper to regard the interests of the master and parent as property interests for which the action of trespass was proper.

It is quite clear today that the relation of master and servant no longer represents the close bond which it once did. It is equally clear that a servant no longer regards himself as his master's man, but as an independent person who can bargain effectually. There is no longer anything which even remotely resembles what was formerly thought of as the status of a servant. Although there is still a fiduciary relation, the bond is primarily contractual with rights and duties in many cases spelled out in great detail. Bearing in mind, therefore, the great difference between the modern industrial servant and the servant in the early centuries of the English common law, the question arises whether the liability placed upon a person who negligently harms a servant should continue in view of the change in the relation.

It is seldom that an interest which has been protected by the law loses its protection. But if the interests of the master in the services of the servant are different in kind from what they were centuries ago,

11. White v. Henry, 24 Me. 531 (1845).
12. RESTATEMENT, TORTS §§ 683, 701 (1938).
13. Tullidge v. Wade, 3 Wils. 18, 95 Eng. Rep. 909 (K.B. 1769).
14. POLLOCK, TORTS 235 (13th ed. 1929) says:
[T]he action for enticing away a servant . . . was turned to the purpose for which alone it may now be said to survive, that of punishing seducers; for the latitude allowed in estimating damages makes the proceedings in substance almost a penal one.

it is not improper to withdraw the protection which was once afforded. It is quite clear that regarding the master's interest as only an interest in economic advantage, the cases which impose liability upon a negligent third person for harm to the servant are out of step with the modern cases which do not allow recovery for negligent harm to purely economic interests even where there is knowledge that harm to the others will result from the defendant's act. Today, since one who employs a servant without inquiry as to his existing employment is not liable to the master,[15] though the servant committed a breach of contract in leaving his employment, it would follow that one who negligently harms a servant should not be responsible to the master. Indeed, if the courts act consistently with the rules applicable to harm to purely economic interests, one should not be liable to the master for intentionally harming a known servant.

However, the statement continues to be made in various treatises that a master has a cause of action for negligent harm to his servant.[16] These statements are in large measure based upon the admitted earlier rules. The modern authority, however, is so slight as to be almost non-existent. It is not unlikely that I have missed a case or two, but I have found only four square decisions in the United States in the last century and a half which support the rule.[17] In addition are a few dicta to the same effect,[18] a couple of modern English cases,[19] and a number of other cases sometimes cited,[20] improperly I believe, in sup-

15. See note 7 *supra*.

16. 7 LABATT, MASTER & SERVANT § 2628 (1913); CLERK & LINDSELL, TORTS 201 (1929); 2 COOLEY, TORTS § 180 (4th ed. 1932); PROSSER, TORTS 722 (2d ed. 1955); SALMOND, TORTS § 118 (11th ed. 1953), stating that the doctrine is "a historical relic" and seems "anomalous."

17. Woodward v. Washburn, 3 Denio 369 (N.Y. Sup. Ct. 1846) (defendant unlawfully imprisoned a clerk causing the loss of his services for half an hour; the court citing only English cases); Coal Land Development Co. v. Chidester, 86 W. Va. 561, 103 S.E. 923 (1920) (on demurrer, held without discussion that a master may maintain an action for negligent harm to his servant); Darmour Productions Corp. v. Herbert M. Baruch Corp., 135 Cal. App. 351, 27 P.2d 664 (1933) (based upon the California Civil Code, now over 100 years old); Jones v. Waterman S.S. Corp., 155 F.2d 992 (3d Cir. 1946) (dealing with Pennsylvania law and relying among others upon a Massachusetts case, Ames v. Union Ry., 117 Mass. 541 (1875), dealing with an apprentice, subsequently distinguished by dictum in Standard Fire Ins. Co. v. Boyce-Harvey Mach., Inc., 202 F.2d 871 (5th Cir. 1953) and Farrell v. United States, 167 F.2d 781 (2d Cir. 1948), reliance being chiefly placed upon statement in 39 C.J., *Master & Servant* § 1604 (1925)).

18. Voss v. Howard, 28 Fed. Cas. 1301, No. 17013 (D.C. Cir. 1805) (no liability for negligent harm to a servant unless loss of services); The Federal No. 2, 21 F.2d 313 (2d Cir. 1927) (no liability for extra expense caused by sickness of a seaman); Fluker v. Georgia R.R. & Banking Co., 81 Ga. 461, 8 S.E. 529 (1889) (same); Blackman v. Iles, 4 N.J. 82, 71 A.2d 633 (1950) (loss of services of a daughter); Trow v. Thomas, 70 Vt. 580, 41 Atl. 652 (1898) (negligent harm to plaintiff's child).

19. Mankin v. Scala Theodrome Co., 62 T.L.R. 728 (K.B. 1946); McKenzie v. Hardinge, 23 T.L.R. 15 (K.B. 1906).

20. Cain v. Vollmer, 19 Idaho 163, 112 Pac. 686 (1910) (recovery denied for harm to an apprentice jockey; damages too speculative); Ames v. Union Ry., 117 Mass. 541 (1875) (harm to an apprentice); St. Johnbury & L.C.R.R. v. Hunt, 55 Vt. 570 (1882) (engineer of train arrested in order to embarrass railroad).

port of the rule. On the other side I have found only one case, but that excellently well-reasoned.[21]

If the early theory were still in existence, it would seem that in a group of recent cases in which soldiers, firemen, and policemen were injured by the defendant's negligence, there would be a basis of recovery by the employer for loss of services. It is true that in all of these cases the court is careful to point out the distinction between such persons and servants; but it would appear that the distinction is made wholly for the purpose of denying recovery. Thus, under the Federal Torts Claims Act[22] the government is liable for the negligence of a soldier when driving a car on government business, yet the government is not allowed to recover for the loss of services of the same soldier.[23] In other cases it has been held that a municipality has no action for negligently caused harm to its firemen,[24] who if privately employed, would clearly be servants. The same general refusal to allow actions for harm to public servants appears in English and Australian cases.[25]

It is clear that the cases allowing recovery by way of subrogation for expenses paid under the workmen's compensation acts have no relation to the theory by which a master recovers for a loss of services. Subrogation is allowed and ordinarily allowed only where the act permits it.[26]

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21. Chelsea Moving & Trucking Co. v. Ross Towboat Co., 280 Mass. 282, 182 N.E. 477 (1932), 32 COLUM. L. REV. 1444 (1932).

22. 28 U.S.C. §§ 1291, 1346(b)-(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411 (b), 2412(c), 2671 (1952).

23. United States v. Standard Oil Co., 332 U.S. 301 (1947) (distinction between a soldier and the ordinary servant, although it would seem that the bond is much closer than in the case of the industrial servant).

24. Employers' Liab. Assurance Corp. v. Daley, 271 App. Div. 662, 66 N.Y.S.2d 661 (4th Dep't 1947) (town cannot recover for harm to a volunteer fireman); Philadelphia v. Philadelphia Rapid Transit Co., 337 Pa. 1, 10 A.2d 434 (1940) (city not allowed to recover for negligent harm to a fireman on the ground that the only right of the city is by way of subrogation, the court saying that it was very doubtful whether the right of action by a master has any reason for continued existence).

25. Attorney General for New South Wales v. Perpetual Trustee Co., 85 Commw. L.R. 237 (Austr. 1952), *aff'd*, [1955] 1 All E.R. 846 (P.C.), on the ground that "the action of a master for personal injuries to a servant, per quod servitium amisit, being a survival from the time when service was a status should not be extended to the loss by the Crown of the service of a constable. . . ."

26. Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940), *cert. denied*, 312 U.S. 702 (1941); Travelers' Ins. Co. v. Great Lakes Engineering Works Co., 184 Fed. 426 (6th Cir. 1911); Weintraub v. John B. Sexton & Co., 327 Ill. App. 348, 64 N.E.2d 235 (1945); Northern States Contracting Co. v. Oakes, 191 Minn. 88, 253 N.W. 371 (1934); Henry Steers, Inc. v. Turner Constr. Co., 104 N.J.L. 189, 139 Atl. 42 (Ct. Err. & App. 1927); Interstate Tel. & Tel. Co. v. Public Serv. Elec. Co., 86 N.J.L. 26, 90 Atl. 1062 (Sup. Ct. 1914); Noblin v. Randolph Corp., 180 Va. 345, 23 S.E.2d 209 (1942); Martell v. Kutcher, 195 Wis. 19, 216 N.W. 522 (1927).

In Northern States Contracting Co. v. Oakes, *supra*, the court refused recovery for the amount of additional workmen's compensation premiums occasioned by defendant's negligent harm to a servant.

Finally, it may be said that there are many cases, especially the English cases, which suggest that the action for loss of services is outmoded because the relation between master and servant is no longer close and because the liability is out of step with the other cases which involve only pecuniary loss.[27]

May I suggest that with most of the work of the world today performed by servants, some of whom are of great value to their employers, it is a matter of great significance that, in the last 150 years, in only five cases has action been brought for the loss of services. It would appear that American lawyers have not believed in the existence of such a cause of action. It would appear, therefore, that this action is obsolescent; and that there is no valid reason for reviving it.

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27. Standard Oil Co. v. United States, 153 F.2d 958 (9th Cir. 1946) (court said that "the master's cause of action for loss of his employee's services remains as an anomaly in the law," this being under California Code which provided for the continuance of such actions); Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940), *cert. denied*, 312 U.S. 702 (1941) (The court indicates that in general a third person owes no duty to the master except where he does something intending to cause harm.); United States v. Atlantic Coast Line Ry., 64 F. Supp. 289 (E.D.N.C. 1946) (points out that old rule, if it survives, is an archaism and is no longer consistent with modern life).

In Admiralty Comm'rs v. S.S. Amerika, [1917] A.C. 38, the court, denying an action to the master against one who had negligently caused the death of a servant, said:

> [W]hat is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.

In Jones Bros. v. Stevens, [1954] 3 All E.R. 677 (C.A.), the court, in denying liability against one who retained the services of a servant thereby preventing him from returning to his master, stated that today the relation between master and servant is essentially different from that which created the action of trespass against a negligent tortfeasor.

POLLOCK, TORTS 66 (13th ed. 1929), in dealing with the cases denying recovery to a master for causing the death of a servant, says:

> [T]hese very learned opinions indicate a feeling that a master's action for loss of service is itself no better than a surviving archaism in our modern law and does not deserve encouragement.