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MASTER-SERVANT—SUBROGATION—RIGHT OF THE UNITED STATES TO RECOVER FOR INJURIES TO A SOLDIER CAUSED BY THE NEGLIGENT ACT OF ANOTHER—On February 7, 1944, an enlisted soldier in the Army of the United States was injured in a traffic accident in Los Angeles, California, through the negligence of an agent of appellant; he was incapacitated for duty for a period of twenty-nine days. The United States paid his hospital expenses,[1] and also his salary during this period, amounting to a total of $192.56. In March, 1944, the soldier, in return for three hundred dollars, executed a release to appellant "from any and all claims and demands" [2] on account of the accident. The United States sued in the Federal District Court for the Southern District of California to recover the total of its payments during the soldier's incapacity,[3] basing its claim on an extension of the common law action of a master for damages resulting from loss of services of a servant.[4] The district court gave judgment for the United States. On appeal, *held*, reversed. The United States cannot recover for hospital expenses and salary of a soldier injured by the negligence of a third person. *Standard Oil Company of California v. United States*, (C.C.A. 9th, 1946) 153 F. (2d) 958.

This case is one of first impression in the circuit court of appeals; the extent of precedent elsewhere is meager. In the only other case on the subject in the United States,[5] recovery was denied. Cases in the British Empire and Commonwealth add little. The question arose first in England, in *Attorney-General v. Valle-Jones*,[6] in 1935. The right to recovery was evidently not in issue; the bulk of the opinion was directed at the question of damages. The court answered the defendant's fear of double liability by stating, as a matter of course, that the injured soldier could collect only once.[7] This is contrary to the usual American rule,[8] followed in California, which states that recovery by the injured party is not diminished by the receipt of payments through insurance, a contract of employment, or gratuity. A similar question arose in Canada, in 1943, in an action against the Crown.[9] The Exchequer Court held that the relation of government and soldier was not that of master and servant; Parlia-

[1] The duty of the United States to pay hospital expenses of members of the armed services is established by statute. 54 Stat. L. 885 at 886 (1940), 50 U.S.C. (1940), Appx., §303(d); Army Regulations 40-505, §2.

[2] United States v. Standard Oil Co. of California, (D.C. Cal. 1945) 60 F. Supp. 807 at 813.

[3] Id., 60 F. Supp. 807.

[4] See note 15, infra.

[5] United States v. Atlantic Coast Line R. Co., (D.C. N.C. 1946) 64 F. Supp. 289.

[6] [1935] 2 K.B. 209.

[7] Id. at 218.

[8] Cunnien v. Superior Iron Works Co., 175 Wis. 172, 184 N.W. 767 (1921); 18 A.L.R. 678 (1922); Shea v. Rettie, 287 Mass. 454, 192 N.E. 44 (1934); 95 A.L.R. 575 (1935); 4 TORTS RESTATEMENT, §920, comment e, §924, comment c and comment f (1939). For the rule in California, which determined the law applicable to this case, see Peri v. Los Angeles Junction Ry., 22 Cal. (2d) 111, 137 P. (2d) 441 (1943).

[9] McArthur v. The King, [1943] Exch. Can. R. 77, [1943] 3 D.L.R. 225.

ment amended the Exchequer Court Act to provide that such is the relationship,[10] and since then recovery against the Crown as master has been allowed.[11] In Australia, the sole appearance of the question was the case of *Commonwealth v. Quince*,[12] where recovery was denied, the court being unwilling to invent a new liability arising out of a status "that in some way resembles the relationship of master and servant." [13] Following the lead of the *Valle-Jones* case,[14] where the answer evidently was taken for granted, the question has uniformly been argued as one of master and servant. It is felt that the differences between the government-soldier relation and the relation that at common law supported a master's action for loss of services of his servant are sufficiently radical to preclude extending the older action to the instant situation.[15] It can be argued that

[10] Exchequer Court Act, §50 A, Can Rev. Stat. (1927) c. 34, as amended, 7 Geo. 6, c. 25, §1. The relevant portion of the statute is as follows: "For the purpose of determining liability in any action or other proceeding by or against His Majesty, a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown."

[11] Gauthier & Co. Ltd. v. The King, (Can. Exch. 1944) [1944] 2 D.L.R. 273; Tremblay v. The King, (Can. Exch. 1944) [1944] 2 D.L.R. 338; LaPerrière v. The King, (Can. Exch. 1945) [1946] 1 D.L.R. 431.

[12] [1943] Queensland St. Rep. 199; affirmed on appeal, [1943] 68 Commonwealth L. Rep. 227.

[13] [1943] Queensland St. Rep. 199, 201. The court adds, at p. 205, "The services of the airman were made due by statute and I feel that I cannot extend the anomaly of a master's right to sue for loss of contracted services to a right in the Crown to sue for loss of statutory services; I think it proper to leave to the legislature the responsibility for introducing such an action."

[14] Note 6, supra.

[15] Some text writers have stated the common law doctrine very generally, e.g., WOOD, MASTER AND SERVANT, §223 (1877), and DIAMOND, THE LAW OF MASTER AND SERVANT, art. 103 (1932). The cases, however, do not support the broad proposition. Most of the cases relied on fall into two classes: actions arising out of injury to a member of plaintiff's immediate family or his menial servant, and actions arising out of the seduction of plaintiff's daughter or his menial servant, where recovery was based on the fiction of loss of services. Latterly, though actions are generally allowed for intentional interference with the master-servant relation [See 4 TORTS RESTATEMENT, §766, §767 (1939)], the overwhelming trend is against allowing recovery based on negligence, except as limited to personal servants. See 31 HARV. L. REV. 1017 (1918); Carpenter, "Interference With Contract Relations," 41 HARV. L. REV. 728 at 738 (1928); Green, "Relational Interests," 29 ILL. L. REV. 1041 at 1043 (1935); 23 CAL. L. REV. 420 at 424 (1934). Wigmore, "Interference With Social Relations," 21 AM. L. REV. 764 (1887), points out the limited scope of the original action. For a view favoring extension of the action, see 18 CORN. L. Q. 292 (1933). The only recent case in the United States allowing recovery by a master for loss of services of a servant from the negligence of another is Darmour Production Corp. v. Herbert M. Baruch Corp., 135 Cal. App. 351, 27 P.(2d) 664 (1933), criticized in 23 CAL. L. REV. 420 (1934). Of older American cases, there are two that support this position: Woodward v. Washburn, 3 Denio (N.Y.) 367 (1846), and Ames v. Union Ry. Co., 117 Mass. 541 (1875).

since the government is under a duty to pay salary and hospital expenses of an injured soldier,[16] it might well be subrogated to the soldier's right. It is possible to take the position, following the conclusions of the trial court, that though the relation between government and soldier is not strictly one of master and servant, nonetheless there exists a status, of which the controlling incidents are a right to services and control over their performance, and that therefore the essential elements of the master-servant relation are present. Though the logical force of these analyses is recognized, it is felt that since the relation in question is one wholly created and delineated by statute, it is the part of Congress rather than the courts to embellish it with further rights and remedies, and that failure of Congress to provide for such an action as the present one can safely be taken to indicate that it is not desired.[17] *John R. Dykema*

[16] Note 1, supra, as to hospital expenses. As to salary, see the principal case, 153 F.(2d) 958 at 963, note 7.

[17] The Federal Employees' Compensation Act, 5 U.S.C. (1940) §§751-800 at §776, and the World War Veterans' Act, 38 U.S.C. (1940) §§421-576 at §502, provide for assignment of claim to the government as a condition of receiving benefits under them.