Marquette Law Review

Volume 38
Issue 1 *Summer 1954*

Article 7

1954

Indemnity - The Right of the United States Government to Recover Indemnity from its Negligent Employee

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Of course, if the contractor buys, there is no necessity of his putting up cash (except sheriff's costs and fees), for he simply bids in his lien. However, unless he is willing to tender to the vendor the balance of the contract price himself, he must find someone willing to pay that balance due on the lands, or he has a rather hollow legal victory.

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Marquette LL.B., 1954

Indemnity—The Right of the United States Government to Recover Indemnity From Its Negligent Employee*—In an action against the United States for injuries arising when plaintiff's automobile collided with a government vehicle, the United States District Court for the Southern District of California, Central Division, gave judgment against the United States and in favor of the plaintiff, but gave judgment over in favor of the United States against the driver of the government vehicle, who had been impleaded as a party defendant. On appeal by the employee to the court of appeals, *Held:* That after suffering judgment against it under the Federal Tort Claims Act,[1] the government could not recover, by way of indemnity, the amount of such judgment from its employee, who was guilty of the negligence which caused the injuries. *Gilman v. United States, 206 F. 2nd 846* (9th Cir. 1953).

Thus the United States as an employer was not allowed to recoup its losses from its negligent employee for damages caused while acting within the scope of his employment. This holding is in direct conflict with the universally accepted common law doctrine[2] which was ably summarized by an early Wisconsin decision:

> "As between the master and a stranger, the servant represents the master, and the master is responsible; but as between the master and the servant who has committed the wrong or violated his duty no less to the master than to the stranger, no such rule prevails. A servant is directly liable to his master for any damage occasioned by his negligence or misconduct, whether such damage be direct to the property of the master, or arise from compensation which the master has been obliged to make to third persons for injuries sustained by them."[3]

Were the United States Government not the employer seeking recoupment, even the majority justices in the *Gilman* case would con-

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* The principal case was affirmed in United States v. Gilman, 74 S.Ct. 695 (May 17, 1954).

[1] 28 U.S.C.A. §1346 (b) (1948).

[2] For a discussion of the common law see especially: PROSSER, TORTS at 1114 (1941); RESTATEMENT, AGENCY §401 comment c (1933); MECHEM, AGENCY §532 (4th ed. 1952); Note, 110 A.L.R. 831 (1937).

[3] Zulkee v. Wing, 20 Wis. 408, 91 Am. Dec. 425 (1866).

cede that the common law rule would apply.[4] But according to the majority, ". . . regardless of whether state or federal law be here applied, section 2676[5] cuts the ground from under the government's claim for indemnity," and thus places the government in a class by itself, in whose favor "no cause of action ever arose."[6]

The power of section 2676[7] to protect the negligent employee is difficult to rationalize, as this provision is nothing more than a codification of the existing law of res ajudicata[8]—whereby a litigant is entitled to only one day in court on a given cause of action and to only one satisfaction for his injured rights.

Yet the holding of the *Gilman* case comes as no great surprise. As far back as 1941, although not speaking with specific reference to the Tort Claims Act, the Attorney General expressed his view that the Secretary of Agriculture was without authority to require an employee to reimburse the government for a payment made in settlement of a claim for property damage resulting from the employee's negligence. In the opinion, it was pointed out that although Congress had by general legislation progressively assumed liability to persons sustaining injuries through the negligence of officers and employees of the government, no provision had been made for the assertion of claims by the government against the officers or employees causing the damages. Secondly, that ". . . in the absence of statutory authority, express or implied, an officer or employee of the government may not be administratively deprived of his lawful compensation."[9]

In July, 1948, an attorney in the Department of Justice wrote:

> "It should be pointed out that in one of the early and well established fields where indemnity has been historically operative, that is, in the master-servant relationship, the Federal Tort Claims Act in its legislative history contemplates no action by

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[4] "The rule is one generally recognized and enforced by both state and federal courts." See principal case: Gilman v. United States, 206 F. 2nd 846 (9th Cir. 1953).

[5] 28 U.S.C.A. §2676 (1948), enacted as part of the Federal Tort Claims Act, provides:

> "The judgment in an action under §1346 (b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

[6] Gilman v. United States, *supra,* note 4.

[7] *Supra,* note 5.

[8] A prior judgment against the master is a bar to subsequent action on the same subject matter against the servant, and vice versa, where the relationship is undisputed and the action is purely derivative and dependent entirely upon the doctrine of respondeat superior, although there is neither privity nor mutuality between the master and the servant.
See: Wolf v. Kenyon, 242 Sup. Ct., App. Div. 116, 273 N.Y.S. 170 (1934); Jones v. Valisi, 111 Vt. 481, 18 A. 2nd 179 (1941); Silva v. Brown, 319 Mass. 466, 66 N.E. 2nd 349 (1946).

[9] 40 O.A.G. 38 (Mar. 25, 1941).

the United States against its delinquent employee, other than disciplinary proceedings."[10]

Furthermore, the result arrived at in the *Gilman* case, although not based on particularly sound reasoning, is not inconsistent with the views of some modern writers as to the justification of the doctrine of respondeat superior.[11] To them, the liability of the employer for the negligent acts of the employee is a cost of doing business. This burden the employer assumes but may distribute to the consumer in the form of increased prices. Social expediency, they say, requires that the cost of these "inevitable" accidents be spread so that the injured party be protected, as he for the most part is innocent of all blame. It is proper that the employer should bear the immediate burden, as he is in the best position both to distribute the cost of the loss upon the public, and to discipline his employee so as to discourage him from such carelessness in the future. As to the latter issue, the effect of the employer's pressure has even more influence than a suit against the employee himself, because the perennial financial irresponsibility of the employee in effect puts him beyond the law of torts. In the words of one author, ". . . it is impossible to do anything in a law court to discourage such wrongs directly."[12]

The whole idea of indemnity would defeat the basic purpose of this doctrine. Indemnity seeks to localize the burden upon the wrongdoer. The "entrepreneur theory"[13] seeks an opposite result, somewhat parallel in theory to workmen's compensation, whereby the cost is distributed regardless of fault, so as to protect the injured party.[14]

This was apparently the underlying philosophy of the framers of the Tort Claims Act which this court has adopted and carried to its logical conclusion in the holding of the *Gilman* case. It is a modern approach, inconsistent with the common law, but consistent with a policy of protecting the individual and distributing the burden upon the economy as a whole. Thus the common law gradually yields to changing times and conditions. Whether the philosophy of this decision will be extended further into the field of indemnity between master and servant is a crucial question for the courts of the future to decide.

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[10] Irwin M. Gottlieb, *"Some Aspects of Contribution and Indemnity in Tort Actions against the United States."* 9 FED. B. J. 391, 396 (1948).

[11] MECHEM AGENCY §359 (4th ed. 1952); Clarence Morris, *The Torts of an Independent Contractor,"* 29 ILL. L. REV. 339 (1934-5); Young B. Smith, *"Frolic and Detour,"* 23 COL. L. REV. 444 (1923).

[12] Morris, *"The Torts of an Independent Contractor," supra,* note 11 at 341.

[13] This aforementioned justification of the doctrine of respondeat superior has been called the "entrepreneur theory" by various legal writers. *Supra,* note 11.

[14] "Surprising as it may seem, by the means of the doctrine of respondeat superior, the common law has partially accomplished in the latter case what workmen's compensation statutes have accomplished in the former." Smith, *"Frolic and Detour," supra,* note 11 at 457.