THE EMPLOYER'S "INDEMNITY" ACTION*

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No man, if asked, would give a warranty to his employer that he would at all times, without exception, come up to the standard of the reasonable man of the law who, so far as I know, when he is driving, never makes a slip or a mistake.—Per DENNING, L.J., dissenting in *Romford Ice and Cold Storage Co. Ltd. v. Lister*.¹

WHEN THE *Lister* case reached the House of Lords² the matter was not put so baldly, but it was held, nevertheless, that a "lorry" driver must indemnify his employer in full for the consequences of his negligence. *Lister*, the driver, had been sent with his father, a co-employee, to collect some waste material at a slaughter house, and, in backing up the truck, had negligently struck and injured his father. The trial court found that the father was one-third to blame for the accident by having failed properly to watch out. Accordingly the full damages of £2400 were reduced by one-third,³ and it was this sum, £1600 with costs, which *Lister* was required to pay his employer.⁴

The trial court, thus, put the remaining two-thirds of the blame wholly upon the driver.⁵ It is stated in the opinion of Denning, L.J., however, that the reason for the accident "was partly because the engine was defective, so

* The writer is indebted to Francis M. B. Reynolds, Bigelow Fellow at the University of Chicago Law School, for help on the English law though it should be said, Mr. Reynolds remains skeptical of the conclusions reached herein.

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¹ [1956] 2 Q.B. 180, 187 (C.A.).

² *Lister v. Romford Ice and Cold Storage Co. Ltd.*, [1957] A.C. 555. (hereafter cited: *Lister v. Romford*). The case is ably criticized by Glanville Williams, *Vicarious Liability and the Master's Indemnity*, 20 *Modern L. Rev.* 220, 437 (1957); and doubted by Davis, *Some Reflections on Lister v. Romford Ice and Cold Storage Co. Ltd.*, 33 *N. Z. L. J.* 187 (1957).

³ The Law Reform (Contributory Negligence) Act, 8 & 9 Geo. VI, c. 28 (1945), provides that where the plaintiff suffers damage as the result partly of his own fault, his claim is not defeated, but the damages recoverable "shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." See generally: Gregory, *Legislative Loss Distribution in Negligence Actions* (1936); Williams, *Joint Torts and Contributory Negligence* 162 et seq. (1951).

⁴ *Romford Ice and Cold Storage Co. Ltd. v. Lister*, [1956] 2 Q.B. 180, 181 (C.A.). (hereafter cited: *Romford v. Lister*). This result has strong support: Jolowicz, *The Right to Indemnity Between Master and Servant*, [1956] *Camb. L. J.* 101; Sandford and McMullin, *Master and Servant: Employer's Claim Against Negligent Employee*, 33 *N. Z. L. J.* 252 (1957).

⁵ *Lister v. Romford*, [1957] A.C. 555, 585 (H.L.).

that the son had to keep it going fast and, therefore, reversed more quickly than he need have done" and "partly because the son did not take sufficient steps to see that all was clear."⁶ Thus it would seem, as a matter of fireside equity at least, that the employer, too, should have been required to take some share of the blame. But this was not done.

FINDING AN IMPLIED TERM

Actually the case was brought, not by the employer, but in his name by an insurance carrier.⁷ And much of the argument dealt with the driver's submission that since the employer was required by statute to carry public liability insurance, and had done so, the court should find an implied term in the driver's employment contract that he would receive the benefit of such insurance, and hence should be exempted from personal liability to his employer.⁸ But neither the trial judge, the Queen's Bench, nor the House of Lords could be persuaded that this should be.⁹ Not that they were averse to implying terms in such a "contract," but that this was the wrong one.

The "implied term" on which the case was decided was very different, and of wider significance. As put by Viscount Simonds: "It is, in my opinion, clear that it was an implied term of the contract that the appellant would perform his duties with proper care."¹⁰ He had not done so, wherefore the loss was his. If this goes too far in the employer's favor, it can be said the alternative proposed by the driver went too far in the other direction, for he submitted that there was an "implied term" in the contract that the employer "would indemnify him against all claims or proceedings brought against him for any act done by him in the course of his said employment."¹¹ Even if reworded to cover only "civil liability for accidental injury or damage," Lord Morton said it was doubtful to him "if an employer would agree to it." And if that is so, "it cannot be implied."¹²

Strangely it was necessary to reach back to *Harmer v. Cornelius*,¹³ decided

⁶ Romford v. Lister, [1956] Q.B. 180, 185 (C.A.).

⁷ In fact there were two insurance contracts, one a motor-vehicle policy covering both employer and driver against third party liability, and the other, an employer's liability policy. The insurers paid under the latter policy, and became, as the court said, "the real plaintiffs in the action." *Id.*, at 191.

⁸ See Lister v. Romford, [1957] A.C. 555, 582, 583 (H.L.), where the two defenses mainly relied on are set out.

⁹ Of the members of the House of Lords who heard the case, two, Lord Radcliffe and Lord Somervell, voted to allow the appeal on this ground. Their most telling point was that if the third person had chosen to sue the driver first, then, when the insurance carrier had paid, that would have been an end of the matter. The rule adopted by the majority, which allowed recovery over, if the employer happened to be sued first, was said by Lord Radcliffe to involve "almost intolerable anomalies." *Id.*, at 590.

¹⁰ *Id.*, at 572.

¹¹ *Id.*, at 583.

¹² *Id.*, at 584.

¹³ 5 C.B.N.S. 236 (1858).

almost a century earlier, to find any "law" on the point. There the court had said:

When a skilled labourer, artizan, or artist is employed, there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes,—*Spondes peritiam artis*. Thus, if an apothecary, a watchmaker, or an attorney be employed for reward, they each impliedly undertake to possess and exercise reasonable skill in their several arts. The public profession of an art is a representation and undertaking to all the world that the professor possesses the requisite ability and skill.¹⁴

That seemed to cover the point. It was useless for Lister to say, as he seemed to do, that he owed no duty of care whatever to his employer.¹⁵

But the issue in the *Harmer* case was whether an incompetent scene-painter could properly be discharged before the end of his term.¹⁶ The court held that he could. Lister, however, seems to have been a "reasonably competent" driver; he had been working for his employers for ten years, from age 17 to 27, except for time out in service, and for all that appears actually possessed the "ability and skill" requisite to his job.¹⁷ It is even very doubtful, therefore, that he could properly have been discharged for a momentary and unintended lapse of care or skill.¹⁸ And, plainly, any suggestion that the *Harmer* case held that a competent driver is to indemnify his employer for the full consequences of a lorry accident in such circumstances, is without foundation. The *Harmer* case insisted on competence, not infallibility.

The dialectic by which an "indemnity" was contrived is deceptively simple. First, Viscount Simonds asked the question: "Of what advantage to the employer is his servant's undertaking that he possesses skill unless he undertakes to use it?"¹⁹ Of what, indeed? Then, since it was evidently felt to be necessary to equate "skill" with "care," he continued: "I have spoken of using skill rather than using care, for 'skill' is the word used in the cited case,²⁰ but this embraces care."²¹ Hence, there was an implied term in the driver's contract—irrespective of what he might have agreed to,²² if asked—

¹⁴ *Id.*, at 246. To the same point see *Robertson v. Wolfe*, 214 Ky. 244, 283 S.W. 428 (1926).

¹⁵ It is hard to see how Lister's case could have been presented less plausibly.

¹⁶ Plaintiff's contention seemed to be that, whether he was competent or not, he was entitled to the benefit of a term contract. *Hochster v. De La Tour*, 2 El. & Bl. 678 (Q.B., 1853), had only just been decided.

¹⁷ *Lister v. Romford*, [1957] A.C. 555, 557 (H.L.).

¹⁸ This is a bold statement for many feudal notions still cling about the master-servant relationship. In *Baxter v. London & County Printing Works*, [1899] 1 Q.B. 901, it was held that damage to a machine due to a single act of forgetfulness was cause for dismissal. See note 205 *infra*.

¹⁹ *Lister v. Romford*, [1957] A.C. 555, 573 (H.L.).

²⁰ *Harmer v. Cornelius*, 5 C.B.N.S. 236 (1858).

²¹ *Lister v. Romford*, [1957] A.C. 555, 573 (H.L.).

²² Lord Somervell was more realistic: "No driver would undertake the work if he was told his resources might be liable for damage caused by a negligent act or omission." *Id.*, at 599.

that he would hold his employer harmless from any loss which might arise because of a lack of care on his part.²³ If we accept the premise, "advantage to the employer," the result follows quite logically.²⁴

The case being disposed of in this way, it was not necessary to give attention to plaintiff's alternative claim that, as a joint tortfeasor, plaintiff should have full contribution from the driver under the Law Reform (Married Women and Tortfeasors) Act, 1935.²⁵ This was the ground, in fact, upon which the trial judge based his judgment. But in so doing he was required to find, as the Act provides,²⁶ that it was "just and equitable having regard to the extent" of the driver's "responsibility for the damage"²⁷ to give full contribution to the employer. Clearly, that was a ground upon which reasonable men might differ. But the holding on appeal, that the driver impliedly undertakes to indemnify his employer against loss, was something else again. It made inquiry into matters of comparative blame quite unnecessary, if not wholly irrelevant. The indemnity, perforce, made full recovery "just and equitable."

Thus, a full stop has been put to such cases as *Jones v. Manchester Corporation*,²⁸ where the court felt free—if not bound—to examine into matters of comparative blame. It was held there that, as between a Hospital Board and a Doctor Wilkes employed by it, ultimate responsibility for the negligent loss of a patient was not to be ruled by "implied" contract, but by what was "just and equitable" under the Act of 1935. Accordingly, although the Board and Doctor Wilkes were both held liable²⁹ to the plaintiff for the death of her husband—for clearly there had been negligence on the part of the doctor in administering the anesthetic—the blame, as between the two, was found to be very largely that of the Board.³⁰ The doctor, and her associate who was

²³ *Id.*, at 557. The English courts regard an employer, who is held liable on respondeat superior principles, to be a joint tortfeasor with his servant. See the remarks of Scrutton, L.J., in *The Koursk*, [1924] P. 140, 155. And see *Semtex Ltd. v. Gladstone*, [1954] 1 W.L.R. 945, 949. The Act of 1935, which allows contribution, was designed to obviate the holding in *Merryweather v. Nixan*, 8 Term R. 186 (K.B., 1799).

²⁴ It is doubtful that any different result would have been reached had plaintiff sued in tort for the driver's negligence. If there is such a tort, it would seem to rest on the same underlying considerations which produced an "implied" contract. See remarks of Lord Radcliffe, *Lister v. Romford*, [1957] A.C. 555, 587 (H.L.).

²⁵ See *Romford v. Lister*, [1956] 2 Q.B. 180, 181 (C.A.), where the text is set out.

²⁶ *Lister v. Romford*, [1957] A.C. 555, 557 (H.L.).

²⁷ *Romford v. Lister*, [1956] 2 Q.B. 180, 181 (C.A.).

²⁸ [1952] 2 Q.B. 852. See contra, *Semtex Ltd. v. Gladstone*, [1954] 1 W.L.R. 945.

²⁹ The Board was held liable on usual respondeat superior principles.

³⁰ Dr. Wilkes, who administered the anesthetic, had been qualified for practice for 5 months; her associate and superior, for 2 years.

to perform the operation, were admittedly competent, but without much experience, and none in the particular situation which developed.³¹ Under the circumstances, the Queen's Bench held that Doctor Wilkes should bear but twenty per cent of the loss for her negligence.

It would be hard to say that the "law" of the *Lister* case, if applied, would have brought a more "just and equitable" result. In fact, to the unversed it would seem there must be something awry, even "anomalous," with a system of law which puts ultimate responsibility upon "lorry" drivers and anesthetists, rather than on their employers, for the accidents which experience shows will happen, at times, even to the most careful and competent. But as Viscount Simonds pointed out:

The common law demands that the servant should exercise his proper skill and care in the performance of his duty: the graver the consequences of any dereliction, the more important it is that the sanction which the law imposes should be maintained. [To grant the claimed immunity] would tend to create a feeling of irresponsibility in a class of persons from whom, perhaps more than any other, constant vigilance is owed to the community.³²

A MATTER OF GOOD CONSCIENCE

Truck drivers and anesthetists come off no better in this country. The employer has an "indemnity" action, that is settled,³³ but the theory of the action has not been spelled out in the same way as in the *Lister*³⁴ case. In two of the most cited early cases—*Grand Trunk Railway Company v. Latham*³⁵ and *Smith v. Foran*³⁶—no mention was made of indemnity, but the employer nevertheless had recovery for the full amount of the third party claim. In a third—*Georgia Southern and Florida Ry. Co. v. Jossey*³⁷—the same result was reached, but here the court quoted from Story to the point that where

³¹ *Lister v. Romford*, [1957] A.C. 555, 579 (H.L.).

³² *Ibid.* Nor would it do, evidently, to have two standards. Lord Radcliffe disposed of that suggestion in this way: "[I]f, as must be the case, he [the driver] owes a general duty to all concerned not to be negligent . . . it would be a surprising anomaly that, merely because there was also a contractual relationship between himself and his employer, the standard of his obligation to his employer were to be somehow lower than the standard of his obligation to the outside world." *Id.*, at 586.

³³ Rest., Restitution §96 (1937); Prosser, Torts §109 (1941); Cooley, Torts 255 (1906); 3 Moore, Federal Practice §14.29 (1938); Mechem, Outlines of Agency §333 (3d ed., 1923); Woodward, Quasi Contracts §258 (1913); 2 Larson, Workmen's Compensation Law §71.10 (1952); Harper and James, The Law of Torts 1363 (1956).

³⁴ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

³⁵ 63 Me. 177 (1874).

³⁶ 43 Conn. 244 (1875).

³⁷ 105 Ga. 271, 31 S.E. 179 (1898).

an agent violates his duties to his principal, and any loss thereby falls on the principal, the agent is "bound to make a full indemnity."³⁸

It is fair to say that these cases went off on simple principles; in none was an indemnity agreement implied. To illustrate, in the first, the *Latham*³⁹ case, plaintiff's conductor had gotten into an altercation with a passenger, "repeatedly calling her a liar, etc., etc.," and it was held that for this "breach of duty" the railroad had an action in assumpsit for the amount which the passenger had recovered from it. The *Foran*⁴⁰ case, too, involved a common carrier; and there the court granted plaintiff an action in case against its workman for having managed his smoking with "gross carelessness,"⁴¹ thus causing a fire and damaging property of a third person which was being transported. And, in the *Jossey*⁴² case, the railroad was allowed a set-off against its "baggage master" for the amount it had to pay a passenger for the loss of her trunk. The agent had not only, by mistake, carried the trunk past its station, but had then, unwisely and at his own discretion, put it off at a later station, where it was lost. Plainly, if these were indemnity cases, they were such only in the sense that contract damages were measured by the amounts paid to the third party claimant.

It is true, of course, that had the plaintiffs in these cases chosen to sue on an indemnity theory there were precedents from which a case might have been made out. Wholly apart from contract, if plaintiffs could establish that they had conferred a benefit upon defendants, by paying a third party claim which in equity and good conscience defendants should have paid, they could recover. This was recognized as long ago as *Moses v. Macfarlan*.⁴³ Nor could plaintiffs be defeated by the rule of *Merryweather v. Nixan*,⁴⁴ which forbids contribution between joint tortfeasors, for that troublesome case has been held not to apply where one party is the active wrongdoer, the other merely

³⁸ Story, Agency §217(c) (9th ed., 1882). It is clear from the cases cited that Story, by his use of "indemnity," was merely saying a principal may have contract damages, where his agent or factor has failed to follow instructions (by negligence or otherwise) and a loss ensues.

³⁹ *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177 (1874).

⁴⁰ *Smith v. Foran*, 43 Conn. 244 (1875).

⁴¹ *Id.*, at 245. There has been considerable dispute whether a loss caused by smoking can be charged to the employer as being within the respondeat superior doctrine. See *Herr v. Simplex Paper Box Corp.*, 330 Pa. 129, 198 Atl. 309 (1938). But in the *Foran* case, plaintiffs were common carriers, and would have been liable "to the owner of the piano for its destruction or injury, even though it had been destroyed in the hands of the servant with no fault of his, as where the horses he was driving had run away. . . ." *Smith v. Foran*, 43 Conn. 244, 250 (1875).

⁴² *Georgia S. & F. Ry. Co. v. Jossey*, 105 Ga. 271, 31 S.E. 179 (1898).

⁴³ 2 Burr. 1005 (K.B., 1760): "In one word," Lord Mansfield said, "the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money." *Id.*, at 1012.

⁴⁴ 8 Term R. 186 (K.B., 1799).

passive.⁴⁵ And many courts, following the lead of Metcalf, J., in *Parsons v. Winchell*,⁴⁶ have completely unblocked, by holding that the parties in these cases are not in fact joint tortfeasors.⁴⁷

One of the most cited "indemnity" cases is *Oceanic Steam Navigation Company v. Compania Transatlantica Espanola*,⁴⁸ where Follett, C.J., said: "The right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence," and hence, without need of any special contract, "if another person has been compelled . . . to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him."⁴⁹ The case had to do with the claim of a person who had been injured through the negligence of a lessee and who, by some strange quirk, had recovered damages from the lessor. Plainly it was not hard to give the lessor, who was in no sense at fault, a recovery from the lessee by way of indemnity. And this, on familiar principles, for surely it was implicit in the court's use of "ought," that defendant lessee had received a benefit which he could not in equity and good conscience retain.⁵⁰

The cases upon which the court mainly relied were brought by cities to recover sums they had been compelled to pay to persons injured through the negligence of property owners. But, without much analysis, the court also referred to the *Foran* and *Latham* cases, discussed above, as being within the scope of the general principle. Since then, by a simple process of legal metamorphosis, a general rule has evolved which requires "a servant or other agent to indemnify his master or principal who has paid damages to a third person injured by the unauthorized tort of the servant or agent."⁵¹ It is no longer pertinent, evidently, to examine the agent's contract obligation; it is not even necessary to determine whether equity and good conscience require

⁴⁵ See generally, Leflar, Contribution and Indemnity Between Tortfeasors, 81 U. of Pa. L. Rev. 130, 146 (1932).

⁴⁶ 59 Mass. 592 (1850): "But if the master and servant were jointly liable to an action like this, the judgment and execution would be against them jointly, as joint wrongdoers, and the master, if he alone should satisfy the execution, could not call on the servant for reimbursement, nor even for contribution." *Id.*, at 594. See, as to the effect of a release, *Horgan v. Boston Elevated Ry. Co.*, 208 Mass. 287, 94 N.E. 386 (1911).

⁴⁷ In fact, some courts have carried the point so far as to deny that master and servant can be sued in one action. See *Raymond v. Capobianco*, 107 Vt. 295, 178 Atl. 896 (1935). Cf., *Bailey v. Zlotnick*, 133 F. 2d 35 (App. D.C., 1942), allowing joinder. See generally, Prosser, Joint Torts and Several Liability, 25 Calif. L. Rev. 413 (1937).

⁴⁸ 134 N.Y. 461, 31 N.E. 987 (1892).

⁴⁹ *Id.*, at 468, 989.

⁵⁰ Or plaintiff lessor might have based his action on some theory of subrogation to the rights of the injured party. See remarks of Cardozo, C.J., in *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928).

⁵¹ Rest., Restitution §96, Comment a (1937).

a recovery. Those are matters which, if the principal is "without personal fault,"⁵² are simply taken for granted.

Thus, by different routes, the English and American courts have come to much the same conclusion. Of course, there have been strangely few appellate cases.⁵³ Perhaps, in each country, that is because the law is so clear. It cannot be because a suit would not be worth while, for in a great many cases the contrary is true.⁵⁴ Perhaps, though, the employer—as in the *Lister*⁵⁵ case—has not often thought it "just and equitable" to force his employees to bear such risks. Whatever the reason, a rule so far out of line with what apparently goes on under it is in need of examination. Being fortuitous in its application, it is difficult to live with, and expensive to insure against.⁵⁶

It would be possible, in what follows, to point out further wherein the "indemnity" rule, as it has evolved, has not been a wholly inevitable outcome of common law principles. The courts have made use of premises, some not clearly stated, with which one might disagree. Their logic has not always been impeccable. It is proposed, rather, to broaden the inquiry into other comparable areas of court-made law. In such context the rule, as fashioned out of whole cloth for truck drivers, may itself appear to be "anomalous," and within the province of the courts to modify.⁵⁷

THE RISKS OF INDUSTRY

It is clear, I suppose, that losses due to carelessness or incompetence on the part of employees may occur in at least three areas: (1) injuries to fellow workmen; (2) to third persons; and, (3) to the employer or his business. For the moment it will be assumed that the employer's right to "indemnity" is the same, whichever area is affected, and regardless of the kind of tort

⁵² Rest., Restitution §96 (1937). This clause is the only stated qualification upon the master's right to "indemnity." Apparently it was merely intended to exclude those cases where the master may have directed or participated in the wrong. See also, Rest., Agency §401, Comment c (1933). The writer spent one fine summer afternoon at North East Harbor, when Comment (c) was written, insisting fruitlessly that the third person's action against the employer is one thing, that of the employer against his servant quite another.

⁵³ The earliest report, cited here and in the *Lister* case, is *Green v. New River Company*, 4 Term R. 590 (K.B., 1792). But the holding in that case was merely that defendant's "turn-cock" was incompetent as a witness, inasmuch as he might be held accountable in some way to his principal if found to have been negligent. Lord Kenyon did not say that—if negligent—he must "indemnify" his master in the amount of the plaintiff's claim.

⁵⁴ Millions of American workmen own their own homes and a car; there are assets enough.

⁵⁵ The Company made it very plain that it had nothing to do with bringing the suit. *Romford v. Lister*, [1956] 2 Q.B. 180, 185 (C.A.).

⁵⁶ Jolowicz' solution, however, is to require all drivers to carry insurance, thus making many policies grow, where surely the employer's alone should suffice. See note 4 *supra*.

⁵⁷ See *Lister v. Romford*, [1957] A.C. 555, 592 (H.L.), where Lord Radcliffe said, "No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it rules. Its movement may not be perceptible . . . but . . . by some means, there is a movement that takes place."

involved, or whether any tort was committed. The historical accident that a particular careless action may result in a tort, while another does not, though the loss is as great, would seem to make no difference. Perhaps this will need further examination. In any event, it will be convenient first to look to the bearing which the Workmen's Compensation laws have on the question.

Actually, had the *Lister*⁵⁸ case come up prior to 1946, the employer's rights would have been somewhat clearer. That is, by Section 6 of the Workmen's Compensation Act, 1906,⁵⁹ the employer was entitled to be indemnified, at least to the amount of the compensation paid. The House of Lords so held in *Lees and Another v. Dunkerley Brothers*.⁶⁰ In fact, the Lord Chancellor went on to say:

I can hardly imagine a more dangerous or mischievous principle than that which it is sought to set up here. It may be right or wrong to say, as *Priestly v. Fowler*⁶¹ says, that a man is not responsible for the negligence of his agents; that is decided law, and I make no comment upon it. But it is a very different proposition to say that a man is not to be responsible for his own negligence. . . . Everyone must have an interest in maintaining the law in a sense hostile to such a proposition, and I should think that, of all classes in the community, workmen who work together in many dangerous employments, have the greatest interest of all. . . .⁶²

But the English Workmen's Compensation Act has been repealed and the Industrial Injuries Act, 1946,⁶³ which was adopted in its place, has no Section 6 regarding indemnity. As a result it would seem that the employer's right is gone, that is, as respects benefits paid under the Act. The injured English workman, though, may not only accept benefits under the 1946 Act, but also sue his employer for common law damages, free from the old fellow servant defense.⁶⁴ Moreover, he apparently may keep both recoveries.⁶⁵ So, except

⁵⁸ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

⁵⁹ The same provision, in effect, was continued in §30 of the 1925 Act: "Where the injury . . . was caused under circumstances creating a legal liability in some person other than the employer to pay damages . . . if the workman has recovered compensation . . . the person by whom the compensation was paid . . . shall be entitled to be indemnified by the person so liable to pay damages as aforesaid. . . ." Workmen's Compensation Act, 15 & 16 Geo. V, c. 84, §30 (1925).

⁶⁰ [1911] A.C. 5 (H.L.).

⁶¹ 3 M. & W. 1 (Ex., 1837).

⁶² *Lees and Another v. Dunkerley Brothers*, [1911] A.C. 5, 8 (H.L.).

⁶³ The new act substitutes "insurance benefits" for "compensation," with both employee and employer contributing part of the cost, but the coverage of the Act, while somewhat broadened, still uses in Section 1 the old formula: "all personsemployed . . . shall be insured . . . against personal injury caused . . . by accident arising out of and in the course of such employment." National Insurance (Industrial Injuries) Act, 9 & 10 Geo. VI, c. 62, §1 (1946).

⁶⁴ Law Reform (Personal Injuries) Act, 11 & 12 Geo. VI, c. 41, §1 (1948).

⁶⁵ *Id.*, at §2: "The result of this section is that an injured employee's separate right of action for damages is left unimpaired, and he is also entitled to retain insurance benefits received but the measure of damages is subject to the provisions of this section." In effect this means that "one half" of any benefits received may be applied upon those damages arising because of "any loss of earnings or profits which has accrued or probably will accrue to the injured person. . . ." *Ibid.*

as this legislation may have had an off-stage effect, the *Lister*⁶⁶ case had to be decided according to the common law. In contrast, the situation here is very different, for it was part of the basic plan on which the various Workmen's Compensation laws were promoted that, in return for a reasonably sure (and adequate?) compensation recovery,⁶⁷ the workman would give up his common law action against his employer.⁶⁸ Of course this did not dispose of the indemnity question, but it did shift attention to the immunity provision, and to its scope.

One of the early cases—*Peet v. Mills*⁶⁹—was a common law action for damages brought by a motorman against the president of the company for which he worked. Plaintiff had been injured in the course of his employment by a collision caused, it was alleged, by defendant's negligence in letting the block signal system fall into disuse. Though the act did not go so far in express terms, the court held that the president was entitled to the employer's immunity:

To say with the appellant that the intent of the act is limited to the abolishment of negligence as a ground of action against an employer only is to overlook and read out of the act and its declaration of principles the economic thought sought to be crystallized into law, that the industry itself was the primal cause of the injury and, as such, should be made to bear its burdens.⁷⁰

Many Workmen's Compensation statutes, however, are now made more explicit. The early New York statute, for example, was carefully worded to preserve to an employer (who had paid compensation) a right by way of "subrogation" against any person "not in the same employ" who may have injured a workman.⁷¹ The statute was silent, however, as to whether such a right existed as against a negligent fellow employee and, in *Judson v. Fielding*,⁷² the court refused to hold on policy grounds, as was done in *Peet v. Mills*,⁷³ that there was no right of subrogation. Shortly thereafter, however, the legislature expressly provided that when an "employee is injured or killed

⁶⁶ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

⁶⁷ See the able exposition by Mr. Justice Pitney in *New York Central R. Co. v. White*, 243 U.S. 188 (1917).

⁶⁸ See *Smith v. Lau*, 135 Ohio 191, 20 N.E.2d 232 (1939), holding this to be true only if the particular claim is covered by the statute. But see *Moushon v. National Garages*, 9 Ill.2d 407, 137 N.E.2d 842 (1956).

⁶⁹ 76 Wash. 437, 136 Pac. 685 (1913).

⁷⁰ *Id.*, at 438, 686.

⁷¹ N. Y. Workmen's Compensation Law (Cahill, 1930) c. 66, §29. See *Williams v. Harts-horn*, 296 N.Y. 49, 69 N.E.2d 557 (1946), extending immunity to a partner.

⁷² 227 App.Div. 430, 237 N.Y.S. 348 (1929), *aff'd* 253 N.Y. 596, 171 N.E. 798 (1930); *Boek v. Wong Hing*, 180 Minn. 470, 23 N.W. 233 (1930); *cf.*, *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946).

⁷³ 76 Wash. 437, 136 Pac. 685 (1913).

by the negligence or wrong of another in the same employ," compensation is his "exclusive remedy."⁷⁴ And, in *Caulfield v. Elmhurst Contracting Co.*,⁷⁵ the court said the provision "means just what it says and is a bar to an action by an injured employee . . . against his fellow employee. . . ."⁷⁶

Some statutes are worded to give immunity both to the employer and to "those conducting his business."⁷⁷ As might have been predicted, there has been difficulty in determining the scope of such clauses. The North Carolina court, though, was surely on safe ground when, in *Warner v. Leder*,⁷⁸ it decided that the president of a company came within the provision. An employee who had been injured in a highway accident, caused by the president's alleged careless driving, was accordingly denied a recovery at common law.

A closer question was presented in *Nolan v. Daley*,⁷⁹ a South Carolina case, for there the plaintiff, a brick yard workman, had been injured by the negligence of a crane operator in the same employ. But the court there also refused plaintiff a common law action:

We are not impressed with a distinction, which appears in some of the cases, that the exemption from suit extends only to those employees engaged in managerial capacities, leaving a covered employee free to sue another employee who happens to be doing the same or a similar kind of work.⁸⁰

These holdings, still a minority, cut the ground from under any contention that the employer should have an action by way of "subrogation."⁸¹ The opinion of Denny, J., in the *Warner* case, makes this very clear:

To hold otherwise would, in large measure, defeat the very purposes for which our Workmen's Compensation Act was enacted. Instead of transferring from the worker to the industry, or business in which he is employed, and ultimately to the consuming public, a greater proportion of the economic loss due to accidents sustained by him arising out of and in the course of his employment, we would, under the provisions for subrogation contained in our Workmen's Compensation Act G.S. 97-10, transfer this burden to those conducting the business of the employer to the extent of their solvency. The Legislature never intended that officers, agents and employees conducting the business of the employer, should so underwrite this economic loss.⁸²

⁷⁴ N. Y. Workmen's Compensation Law (Thompson, 1939) §29(6).

⁷⁵ 268 App.Div. 661, 53 N.Y.S.2d 25 (1945).

⁷⁶ Id., at 665, 29. See also, *Murphy v. Miettinen*, 317 Mass. 633, 59 N.E.2d 252 (1945).

⁷⁷ See 2 Larson, Workmen's Compensation Law §72.10 (1952).

⁷⁸ 234 N.C. 727, 69 S.E.2d 6 (1952). See also, *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946).

⁷⁹ 222 S.C. 407, 73 S.E.2d 449 (1952).

⁸⁰ Id., at 416, 453.

⁸¹ The employer's "indemnity" action has become lost. Most statutes were drafted with respect to the case where a third person, not in the same employ, caused the injury and there, of course, "subrogation" was the appropriate term, for no right to "indemnity" would exist in any case. However, a right by way of "subrogation" would also suffice in the usual case, if the employer is to be allowed to recover against the negligent fellow workman.

⁸² *Warner v. Leder*, 234 N.C. 727, 732, 69 S.E.2d 6, 10 (1952).

Whether the negligent employee is thus relieved of *all* responsibility—the supposed issue in the *Lister*⁸³ case—is a question. Probably not, for it has been held, at least, that the statutory “immunity” does not forbid common law action for intentional wrong,⁸⁴ either on the part of the employer or of a fellow workman.⁸⁵ Perhaps the line should be drawn right there,⁸⁶ the negligent fellow servant being held not liable, to anyone within the business family, for the daily run of inadvertent accidents. But it is evident that the Workmen’s Compensation statutes have not been geared to make distinctions of the sort, turning as they must on the exact measure of the employee’s contract obligations to his employer.

HE WHO ACTS THROUGH ANOTHER ACTS FOR HIMSELF

It is true, of course, that Workmen’s Compensation is a matter of statute, and it may be all well and good there to put the risks of industry upon industry or, as in most cases, upon the ultimate consumer.⁸⁷ But where a third person has been injured the matter must be dealt with at common law. Even so, why should it make any difference, basically, whether it is the negligent employee himself, a fellow servant, or some third person who is injured in the course of the employer’s business? It is true the third person is in no contract relation with the employer. He does not work for the employer; nor is he paid a wage. But the fact is that in the third party situation the respondeat superior doctrine *does* put the risks of industry on industry, at least in the first instance,⁸⁸ quite as effectively as the Workmen’s Com-

⁸³ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

⁸⁴ *Boek v. Wong Hing*, 180 Minn. 470, 231 N.W. 233 (1930). Cf. *Duncan v. Perry Packing Co.*, 162 Kan. 79, 174 P.2d 78 (1946).

⁸⁵ *Mazarredo v. Levine*, 274 App.Div. 122, 80 N.Y.S.2d 237 (1948): “The commission of an assault by one employee upon another in the course and arising out of the employment may properly be deemed accidental from the standpoint of the employer as an untoward event not expected or intended. The same, however, can hardly be said for the perpetrator of the assault. It seems unreasonable to suppose that the legislature intended to give statutory protection in the form of immunity from suit for a deliberate and intentional wrongful act. We have so construed the statute where an employee has been assaulted by the employer himself. . . . There would seem to be no reason why the same rule should not be applied to a co-employee committing an assault on a fellow worker.” *Id.*, at 241–2. See, Horovitz, *Injury and Death under Workmen’s Compensation Laws* 336 (1944).

⁸⁶ Many statutes draw much the same line when they deny compensation to an employee who is injured through his own wanton negligence or intentional fault. The guest statutes draw a similar line, excusing the driver from liability, except where he was “under the influence of intoxicating liquor” or where the injury was caused by “the reckless operation” of the motor vehicle. See Iowa Code Ann. (1950) §321.494.

⁸⁷ See the comments of Hand, J., in *Grain Handling Co. v. Sweeney*, 102 F.2d 464 (C.A.2d, 1939), where he said that such losses are “part of the cost of production” and the statute “throws the compensation for them upon the consumer. This is not because the consumer is at fault . . . but because a loss shared among many is less a loss than if borne by one.”

⁸⁸ It is Glanville Williams’ position that the common law doctrine would alone have justified the House of Lords in putting the ultimate loss on the employer in *Lister’s* case. See note 2 *supra*.

pensation laws do, and quite regardless of personal fault on the part of the employer.

Actually, therefore, the thing might well be turned around the other way. That is, what the statutes did—at least in the fellow servant situation—was to extend the respondeat superior doctrine into an area where the courts had refused to apply it. One may still doubt, of course, that the underlying philosophies are the same, but such doubts proceed largely from the confusion of tongues seeking to explain,⁸⁹ or to explain away,⁹⁰ the respondeat superior doctrine, while the accepted philosophy underlying the statutes has been made quite explicit.⁹¹

But Shaw, C.J., when deciding the *Farwell*⁹² case surely expressed the prevailing view of respondeat superior:

This rule is obviously founded on that great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it.⁹³

That is, in modern phrase, the risks of industry are to be borne by industry.⁹⁴

The trouble with *Farwell's*⁹⁵ case, as Shaw saw it, was that respondeat

⁸⁹ Holmes, Collected Legal Papers 49 (1920); Wigmore, Responsibility for Tortious Acts: Its History, 7 Harv. L. Rev. 315, 383, 441 (1894).

⁹⁰ Baty, Vicarious Liability 154 (1916): "In hard fact, the real reason for employer's liability is . . . the damages are taken from a deep pocket. The present is not a very propitious time for withstanding a dogma based on such a principle. But a return to simpler manners will probably bring with it a return to saner views of liability, even if it is not sooner recognized that to injure capital is to injure industry."

⁹¹ See, for example, the remarks of Mr. Justice Pitney in *New York Central R. Co. v. White*, 243 U.S. 188 (1917). And see *Smith v. Lau*, 135 Ohio 191, 20 N.E.2d 232 (1939), where the underlying philosophy of the Ohio Act is discussed quite warmly.

⁹² *Farwell v. Boston & W.R.R.*, 45 Mass. 49 (1842). This case, because of the forceful reasoning of Shaw, C. J., fairly well established the "fellow servant" doctrine in this country, in conformity with the "common employment" doctrine announced earlier by Lord Abinger in *Priestly v. Fowler*, 3 M. & W. 1 (Ex., 1837). The same result had also been reached previously by a divided court in *Murray v. South Carolina R.R. Co.*, 1 McMullen (S.C.) 385 (1841).

⁹³ *Farwell v. Boston & W.R.R.*, 45 Mass. 49, 55 (1842). Judge Beach, in *Wolf v. Sulik*, 93 Conn. 431, 446, 106 Atl. 443, 444 (1919), stated the doctrine in similar words: "But theoretically as well as practically, the master's responsibility for the negligence of his servant extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others, remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his business and within the scope of his authority."

⁹⁴ Blackburn, J., expressed much the same idea in *Fletcher v. Rylands*, L.R. 1 Ex. 265, 279 (1866): "We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape."

⁹⁵ *Farwell v. Boston & W.R.R.*, 45 Mass. 49 (1842).

superior presupposes that "the parties stand to each other in the relation of strangers. . . ." But the injured fellow servant, he said, must maintain his action, if it could be maintained at all, "on the ground of contract." Moreover, since "there is no express contract between the parties, applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant." It is idle, no doubt, to speculate why the fellow servant's contract was not written to accord also with that great principle of the law, "that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another. . . ."⁹⁶ But it was not, and the job had ultimately to be done by the legislature.

Indeed, the statutes went farther, as statutes are prone to do, for they also gave compensation to the workman injured by his own negligence.⁹⁷ Nor has anyone had the hardihood to urge that the workman in such case must indemnify his employer for the loss.⁹⁸ The result is that if one were to write an "indemnity" contract today, more comprehensive than that written by the House of Lords in the *Lister*⁹⁹ case, it would run to this effect:

In consideration of my employment I agree to indemnify and hold you harmless from all losses arising because of any negligence on my part, in carrying out your work, which may result in injury to a third person, but not for any such losses which may arise from an injury to myself or (in many states) to a fellow employee unless, in the latter case, the injury was caused intentionally or (possibly) by my gross carelessness.

But why the incongruity; if the policy of the state is to put ultimate responsibility for industrial accidents upon industry in one area, why not in the other?

There is no easy answer, except to say that insight and understanding come slowly. Perhaps the trouble lies with our notions of what makes for liability. In the two-party situation it is ordinarily enough to say that the defendant was negligent, the one at fault, and hence that he should be made to respond in damages. That should teach him a lesson, perchance, and insure greater care in future. But no serious student of tort law today would rest his case on such considerations alone. Probably they never were a complete explanation, for it was surely understood from the beginning that there is another side to the coin. Of what possible utility is a tort judgment—either to compensate the injured person for his losses (and thus to save society in many cases from the burden of caring for him) or to dissuade him and his

⁹⁶ *Id.*, at 55-56. One suspects that the courts of Shaw's day felt, and perhaps rightly, that industry needed to be freed of such risks, as a sort of subsidy to encourage enterprise.

⁹⁷ Of course, the whole common law concept of "negligence" has been written out in the area covered by the statutes.

⁹⁸ See *Zimmer v. Casey*, 296 Pa. 146 Atl. 130 (1929).

⁹⁹ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

friends from taking private vengeance—unless the judgment will also in most cases result in an actual money recovery.

The structure, it seems, rests upon a presupposition that the incidence of loss will generally fall on those in an economic position to bear it. In the early cases, when a tradesman negligently ran his horse and cart into a pedestrian, injuring him, it was both just and realistic to put liability on the tradesman. Not only was he at fault, but he presumably had the means to pay. If he chose to conduct his enterprise in a risky manner—possibly to make greater gains—what could be fairer than also to put the losses from so doing upon him? It was not incongruous at all, therefore, when the tradesman retired to the sidelines and placed his servant in charge of driving, that the tradesman should continue liable.¹⁰⁰ In Shaw's words, he must so conduct his affairs, "whether by himself or by his agents or servants," as not to injure another. It would not do—in a realistic world—to permit him to take away the profits, which in ordinary course would answer such claims, control the method of doing the work, and then, full of righteousness, point to the driver as the real "wrongdoer."

To the credit of the early courts the idea that a person could limit his liability in this fashion seems never to have occurred to them. On the contrary, they proceeded to formulate the respondeat superior doctrine, and a new writ, that of trespass on the case, was devised to give the injured person his remedy.¹⁰¹ But the employer has never ceased to point his finger at the driver. And many writers, seeing only the personal negligence factor, as if in a simple two-party case, have come to his assistance. The "tort," they say, is solely that of the driver, from which it must follow, if the employer is to be held at all, that his liability is merely a "derivative" one. Only the driver, they say, is "morally"¹⁰² wrong, the employer, at worst, being merely a conscripted "surety."

But is all this true? Judge Cardozo thought not in the case of *Schubert v. August Schubert Wagon Co.*¹⁰³ There it was urged that since the injured

¹⁰⁰ See *Jones v. Hart*, 2 Salk. 441 (K.B., 1698), where Holt, C.J., said by way of illustration: "If the servants of A with his cart run against another cart, wherein is a pipe of wine, and overturn the cart and spoil the wine, an action lieth against A."

¹⁰¹ 8 Holdsworth, *History of English Law* 449 (1926); Wigmore, *Responsibility for Tortious Acts*, *Essays in Anglo-American Legal History* 520, 523, 526, 533 (1894); Green, *Rationale of Proximate Cause* 19 (1927).

¹⁰² Cooley seems to have based the employer's right to indemnity largely on the moral factor. See Cooley, *The Law of Torts* 225 (3d ed., 1906), where he says, "the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it entrusts its business." The same view is echoed by Larson, *Workmen's Compensation Law* 179 (1952). But one's perceptions must be keen, indeed, to see a "moral" wrong on the driver's part in either the *Lister* or the *Schubert* case.

¹⁰³ 249 N.Y. 253, 164 N.E. 42 (1928).

wife could not sue her husband, the negligent driver, it followed that she had no action against the company, his employer.¹⁰⁴ But Judge Cardozo said:

The employer must answer for the damage whether there is trespass by direct command or trespass incidental to the business committed to the servant's keeping. In each case the maxim governs that he who acts through another acts for himself.¹⁰⁵

The statement that the employer's liability is "derivative and secondary," he continued, means this and nothing more: "That at times the fault of the actor will fix the quality of the act. Illegality established, liability ensues."¹⁰⁶

THE NON-FEASANCE CASES

These cases are another illustration of the dichotomy between liability and fault. How can it be that an employer is held liable to a third person, while the employee, who by his *inaction* made the accident possible, may not even be subject to suit? Needing to find a personal wrongdoer, some courts,¹⁰⁷ and some torts writers¹⁰⁸ too, have struggled manfully to contrive a "duty" to third persons on the part of the employee. It has not been enough for them, to quote Shaw again, that it is the employer who must so manage his affairs, "whether by himself or by his agents or servants,"¹⁰⁹ as not to injure another. But, it is as true today as when Lord Holt laid it down in 1701,¹¹⁰ that

a servant or deputy, *quatenus* such, cannot be charged for neglect, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer.¹¹¹

To illustrate, in *Franklin v. May Department Stores Co.*¹¹² the plaintiff had been injured in a revolving door, which someone had failed to repair. She named the manager of the department store as a co-defendant, though a dozen other persons from the board of directors on down may have had some responsibility in the matter. But Judge Collet held that plaintiff had failed to state a cause of action. Fault there was, and fault on the part of

¹⁰⁴ Some courts so hold: *Riegger v. Bruton Brewing Co.*, 178 Md. 518, 16 A.2d 99 (1940).

¹⁰⁵ *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 257, 164 N.E. 42, 43 (1928). *Broom v. Morgan*, [1953] 1 Q.B. 597, involved the same issue as was before the court in the Schubert case, and was also decided for the plaintiff. The opinion of Cardozo, C. J., was quoted with approval.

¹⁰⁶ *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 256, 164 N.E. 42, 43 (1928).

¹⁰⁷ See *Murray v. Cowherd*, 148 Ky. 591, 147 S.W. 6 (1912).

¹⁰⁸ Seavey, *The Liability of an Agent in Tort*, 1 So. L. Q. 16 (1916); Jaggard, *Torts* §98 (1895).

¹⁰⁹ *Farwell v. Boston & W. R.R.*, 45 Mass. 49, 55 (1842).

¹¹⁰ *Lane v. Cotton*, 12 Mod. 472 (1701).

¹¹¹ *Id.*, at 488.

¹¹² 25 F.Supp. 735 (E.D.Mo., 1938).

personnel, but liability to plaintiff was to be put on the corporate employer.¹¹³ In a sense these cases apply a sort of privity: it simply will not do to permit third persons to probe around in a business organization to assess blame.¹¹⁴

Of course, no one suggests today that the "artificial being, invisible, intangible, and existing only in contemplation of law,"¹¹⁵ which we call a corporation, can do no wrong. Fiction here, in Holmes's words,¹¹⁶ has had to be accommodated to good sense. But in the doing of it we have still other illustrations where liability is put on the proprietor, rather than upon the agents who brought the loss about.¹¹⁷ For example, there are such cases as *Dangler v. Imperial Machine Co.*,¹¹⁸ where the action was to restrain patent infringement and to recover damages for the alleged tort. In the nature of the case the infringement, if established, was the work of the defendant officers, for they determined what was to be done and set the wrong in motion. But the court said liability should be put solely on the corporation:

It is when the officer acts willfully and knowingly—that is, when he personally participates in the manufacture or sale of the infringing article (acts other than as an officer), or when he uses the corporation as an instrument to carry out his own willful and deliberate infringements, or when he knowingly uses an irresponsible corporation with the purpose of avoiding personal liability—that officers are held jointly with the company.¹¹⁹

To change the setting only slightly, consider the much debated case of *Ultramares Corp. v. Touche*,¹²⁰ or its English counterpart, *Candler v. Crane Christmas & Co.*¹²¹ In these cases it was ruled that a negligent firm of accountants could not be held liable to third persons who had relied upon their

¹¹³ In *Murray v. Usher*, 117 N.Y. 542, 23 N.E. 564 (1889), an injured workman alleged that the superintendent of a mill where he worked had negligently let a platform fall into disrepair, causing the injury, but the court denied recovery: "[T]he agent or servant is himself liable, as well as the master, where the act producing the injury, although committed in the master's business, is a direct trespass. . . . In such cases the fact that he is acting for another does not shield him from responsibility. . . . But the breach of the contract of service is a matter between the master and servant alone; and the non-feasance of the servant causing injury to third persons is not, in general at least, a ground for a civil action against the servant in their favor." *Id.*, at 565, 547. But see *Osborne v. Morgan*, 130 Mass. 102 (1881).

¹¹⁴ See *Wall v. Howard*, 194 N.C. 310, 139 S.E. 449 (1927), where the court refused to allow depositors in a failed bank to sue the officers and directors personally for mismanagement.

¹¹⁵ *Marshall, C. J.*, in *Dartmouth College v. Woodward*, 4 Wheat. (U.S.) 518, 636 (1819).

¹¹⁶ *Holmes*, *Collected Legal Papers* 49 (1920).

¹¹⁷ See *Said v. Butt*, [1920] 3 K.B. 497, where a theater manager was held not liable for inducing breach of obligation on the part of the theater. See generally, *Avins*, *Liability for Inducing a Corporation to Breach its Contract*, 43 *Cornell L.Q.* 55 (1957).

¹¹⁸ 11 F.2d 945 (C.A.7th, 1926). There is a conflict in the cases, as the court pointed out.

¹¹⁹ *Id.*, at 947.

¹²⁰ 255 N.Y. 170, 174 N.E. 441 (1931).

¹²¹ [1951] 2 K.B. 164.

work. As stated by Judge Cardozo in the *Ultramares* case: "The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling."¹²² But, as he went on to say, "negligence alone is not a substitute for fraud,"¹²³ and absent fraud, or gross carelessness, the plaintiff had no cause of action. Again the torts lawyer would like to raise a duty to third persons on the part of the firm of accountants¹²⁴ and, logically, on the part of the particular clerk who was personally at fault, though they do not appear to have pushed their case that far.

Of course, the legislature has now taken a hand, at least in the securities field,¹²⁵ and the law of *Derry v. Peek*¹²⁶ upon which Cardozo, C.J., relied in part, has been reversed.¹²⁷ Directors, underwriters and others, who sell an issue of securities upon a false prospectus may be held personally liable to an investor, though they were innocent of any purpose to defraud. But, even so, the rule of the *Ultramares*¹²⁸ case remains intact. In all too many cases, if officers and underwriters were not to be held, there would be no one who could be made to respond in damages. It is not unlawful under the act of Congress to put out an issue of securities with little else back of it but "the smile of the promoters," providing there are no false representations. Investors, as a class, it seems, need special protection.¹²⁹

CONTRACT LIABILITY WITHOUT CONSENT

It may be a digression to turn from tort to contract, but that is not necessarily true. The problem of liability, as distinguished from fault, may perhaps be seen more clearly in another context. At all events much the same argument has gone on in the undisclosed principal situation. Starting with notions of contract liability worked out in simple cases, where the two contracting parties meet face to face, it has seemed highly "anomalous" to some that another person, the undisclosed principal, can also be brought in as a party. In the very nature of things, Ames said,¹³⁰ there can be only one contract, that

¹²² *Ultramares Corp. v. Touche*, 255 N.Y. 170, 179, 174 N.E. 441, 444 (1931).

¹²³ See Bohlen, *Negligent Misrepresentations*, 18 Va. L. Rev. 703 (1932).

¹²⁴ See *Negligent Misrepresentation*, 65 Harv. L. Rev. 355-57 (1951).

¹²⁵ See Shulman, *Civil Liability and the Securities Act*, 43 Yale L. J. 227 (1933).

¹²⁶ 14 App.Cas. 337 (1889). The case was criticized by Pollock, *Derry v. Peek* In the House of Lords, 5 L. Q. Rev. 410 (1889); approved by Anson, *Derry v. Peek* In the House of Lords, 6 L. Q. Rev. 72 (1890).

¹²⁷ See Douglas and Bates, *The Federal Securities Act of 1933*, 43 Yale L. J. 171, 192, 198 (1933).

¹²⁸ *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

¹²⁹ Some states make a similar exception to hold an editor liable, though he may have been without fault, and received none of the profits of the enterprise. *Faulkner v. Martin*, 133 N.J. 605, 45 A.2d 596 (1946). Cf. *Folwell v. Miller*, 145 Fed. 495 (C.A.2d, 1906).

¹³⁰ Ames, *Undisclosed Principal—His Rights and Liabilities*, 18 Yale L. J. 443 (1909). Cf. Lewis, *The Liability of the Undisclosed Principal in Contract*, 9 Col. L. Rev. 116 (1909).

between the agent and the third person. And, he warned, any rule to the contrary is so far out of keeping with "fundamental legal principles" that "it should be recognized as an anomaly, to be reckoned with of course, but not to be made the basis of analogical reasoning."¹³¹

But there are other "fundamental legal principles" than those Dean Ames had in mind. In the much cited case of *Watteau v. Fenwick*,¹³² for example, the plaintiff had sold cigars to Humble, upon the assumption that Humble was the owner of the business. Actually Humble had sold out his interest to Fenwick, the defendant, and, unknown to plaintiff, was merely acting as Fenwick's manager. On two-party contract principles, there would be no contract between Watteau and Fenwick; they had never heard of each other, much less come to an agreement. But the hotel was owned by Fenwick, and was being operated for his profit. Had Humble committed a tort in the scope of his employment, unquestionably his employer would have been subject to liability. There is nothing so sacred about contract principles, the court held, that they too may not be written to provide for direct liability.

The basis of this liability, which is the significant thing, was made quite explicit in the early partnership cases. The "quality of the act,"¹³³ as Cardozo would say, may be determined by what the active partner or agent does. But, partnership existing, liability—either in tort or contract—may be placed upon the other partner, regardless of fault or express consent on his part, and no one has thought the result particularly "anomalous." The court in *Waugh v. Carver*¹³⁴ put it this way:

He who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.¹³⁵

No doubt this was too broadly stated, as a general test of partnership,¹³⁶ but as a ground for fixing liability upon a master, a principal or a partner, whether disclosed or not disclosed, it is both good sense and good law. One betrays a certain lack of perspective, it seems, to be squeamish about "liability without fault."

¹³¹ Ames, op. cit. supra note 130, at 443.

¹³² [1893] 1 Q.B. 346.

¹³³ *Ultramares Corp. v. Touche*, 225 N.Y. 170, 174 N.E. 441 (1931).

¹³⁴ [1793] 2 Bl. H. 235.

¹³⁵ *Id.*, at 247.

¹³⁶ See *Cox v. Hickman*, 8 H.L. Cas. 268 (1860). This case dealt with a composition agreement among creditors, to be terminated when their claims were paid. The House of Lords decided that a taking of profits in such circumstances was not a conclusive test. Probably for economic reasons, it has seemed wise to the courts to relieve lenders, landlords, and employees from liability, notwithstanding they may receive a share in profits. See Steffen, *Cases on Agency* 621 et seq. (2d ed., 1952). But nothing has been decided to say that *Waugh v. Carver*, which dealt with an ordinary profit-sharing agreement, is not perfectly good law today on its facts.

THE DIRECTOR'S DUTY OF CARE

It is not suggested in all this that personnel has no responsibility for losses. For, of course, the contrary is true; it is the extent of that responsibility, and the theory on which it is put, that are at issue. One point, though, should have been made clear by the non-feasance cases, and cases of their kind; an agent's responsibility within the business family should not turn on whether some third person has a tort action against him. From the standpoint of the employer a tort loss due to the failure of personnel to repair a revolving door,¹³⁷ for example, may be quite as grievous as one resulting from a driver's failure to back up a "lorry" carefully.¹³⁸ The circumstance that, in the latter case, the injured person has an action against the employee, and in the other not, is surely beside the point. The breach of duty to the employer may have been quite as great—or as non-existent—in the one case, as in the other. "Negligence, like risk," we are told, "is . . . a term of relation."¹³⁹

One may not quarrel too much, therefore, with the House of Lords for having disposed of *Lister's*¹⁴⁰ case on a basis of contract.¹⁴¹ The employee's duties to his employer, if they may be differentiated from those to third persons,¹⁴² can perhaps be seen more clearly in that way. Also, it will be recalled, Shaw, C. J., in *Farwell's*¹⁴³ case, ruled that the fellow servant's action must be maintained, if at all, on a footing of contract. But, if this is done, it must as a matter of even-handed justice, be done consistently. That is to say, if a truck driver may be said to agree to hold his employer harmless from losses caused by his careless driving, a store manager must also be said to contract in the same way.¹⁴⁴ He, too, must not only possess the "ability and skill" requisite to his job, but, to use Viscount Simond's language in the *Lister* case, he too surely "undertakes to use" his skill, for otherwise it would be of no possible "advantage to the employer."¹⁴⁵

¹³⁷ Note 112 supra.

¹³⁸ Note 2 supra.

¹³⁹ Cardozo, C.J., in *Palsgraf v. Long Island R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁴⁰ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

¹⁴¹ Denning, L.J., took strong exception to this way of deciding the case, presumably because it ruled out any consideration of what was "just and equitable" in the circumstances. *Romford v. Lister* [1956] 2 Q.B. 180, 187. But the case on which he mainly relied, *Wilsons & Clyde Coal Co. v. English*, [1938] A.C. 57, which decided that the employer was under obligation to its employees to maintain safe working conditions, had a strong flavor of contract.

¹⁴² Lord Radcliffe thought this would be "a surprising anomaly" (see note 32 supra), but his attention had not been called to the non-feasance cases.

¹⁴³ *Farwell v. Boston & W.R.R.*, 45 Mass. 49 (1842).

¹⁴⁴ The point was recognized by Cardozo, C.J., in *Ultramares Corp. v. Touche*, 225 N.Y. 170, 179, 174 N.E. 441, 444 (1931), when he said: "The defendants owed to their employer a duty imposed by law to make their certificate without fraud, and a duty growing out of contract to make it with the care and caution proper to their calling."

¹⁴⁵ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

Logically, of course, there is no place to stop. Directors also, it would seem, must warrant that they possess,¹⁴⁶ and will use without fail, the "ability and skill"¹⁴⁷ requisite to manage the corporate businesses put in their charge. They, too, must not be encouraged in "a feeling of irresponsibility,"¹⁴⁸ for their capacity to do harm in the community is even greater than that of truck drivers or store managers. But, if this is true, the courts—including the House of Lords—have been most derelict in holding them to their duties.

Of course, the director's case does not come up, ordinarily, in the immediate context of a personal injury suit; the matter of liability, if any, takes on a neutral pecuniary hue. Nor do directors arouse those parental feelings of discipline, to be administered regretfully but resolutely, for the servant's good. Directors have been treated most considerately. But, perhaps for this reason, the courts have come closer to the mark in their case than elsewhere.

At all events, in the carefully considered case of *Overend & Gurney Co. v. Gibb*,¹⁴⁹ the House of Lords stated the director's contract in very different terms. The defendant there was charged with having put the funds entrusted to him into an insolvent venture, after having learned of facts which should have brought matters to a halt. But, to make out a case, Lord Hatherley said it must be shown that there was "*crassa negligentia*"¹⁵⁰ on the director's part. That is, assuming the directors had not "exceeded the powers entrusted to them," the question was whether

they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence acting on their own behalf, would have entered into such a transaction as they entered into?¹⁵¹

If not, plaintiffs must lose—and they did.

It is not necessary to belabor the point, for it is evident that the test used in *Gibb's* case was much more generous than in *Lister's*. Of course, the "gross negligence" test has been criticized, both as a matter of dialectic and of substance. It was pointed out long ago by Rolfe, B., in *Wilson v. Brett*,¹⁵² that "gross negligence is the same thing as 'negligence' with the addition of a vituperative adjective."¹⁵³ The criticism had the approval of Power, J., in *Re The City Equitable Fire Insurance Co.*,¹⁵⁴ with this qualification:

I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expressions are used for the purpose of a distinction between the duty that is owed in one case and the duty that is owed in another.¹⁵⁵

¹⁴⁶ It was so held in *Hun v. Cary*, 82 N.Y. 65 (1880).

¹⁴⁷ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

¹⁴⁸ *Ibid.*

¹⁴⁹ L.R. 5 H.L. 480 (1872).

¹⁵⁰ *Id.*, at 487.

¹⁵¹ *Id.*, at 487.

¹⁵² 11 M. & W. 113 (Ex., 1843).

¹⁵³ *Id.*, at 115.

¹⁵⁴ [1925] Ch. 407 (C.A.).

¹⁵⁵ *Id.*, at 427.

At most this is a lawyer's quibble. It is true that if "negligence" is a term which always signifies liability, the use of "gross" or "culpable" adds nothing. But the point is that in the director's case "negligence" does not result in liability; there must be something different, to wit: "gross negligence." Or, if you will, a director must really be quite careless, before he may be held liable to his company.

But, even when stated as a matter of duty, there is criticism, for it is said that directors should be required to meet a higher, not a lower, standard of care.¹⁵⁶ In part this has proceeded from an unwillingness to grant that directors have only limited duties.¹⁵⁷ But, even if directors were to be selected with greater attention to skill and ability, and should be given greater responsibilities, it is by no means clear that the "gross negligence" test would be a bad one.

Of course, the term by itself is misleading; the gist of the test lies in the standard of comparison. In *Gibb's*¹⁵⁸ case there was no disposition at all to adopt that of the reasonable man of the law, who can never make a mistake. Directors, most assuredly, are not guarantors. Rather, the House of Lords said, they should be liable only if the questioned transaction was one which "no men with any ordinary degree of prudence acting on their own behalf, would have entered into[.]"¹⁵⁹

Directors are not business owners, but agents.¹⁶⁰ Nevertheless, within charter restrictions, they enjoy much the same freedom of action as an individual proprietor would have, and should be encouraged to take the risks that he would take. It would be quite unreasonable to charge them with personal liability for so doing. At all events, the test, however loosely stated, is plainly designed to draw a line—in the negligence area—between what may be called business risks, on the one hand, and those, on the other, which arise when a director has made the risk his own, so to speak. Beyond this, if a director has no purpose honestly to forward his principal's business,¹⁶¹ or acts fraudulently,¹⁶² or without regard to charter restrictions,¹⁶³ or serves his own inter-

¹⁵⁶ See Dwight, *Liability of Corporate Directors*, 17 Yale L. J. 33 (1907).

¹⁵⁷ Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305 (1934). Cf. *A Defense of Non-Managing Directors*, 5 U. of Chi. L. Rev. 668, 671 (1938).

¹⁵⁸ *Overend & Guernsey Co. v. Gibb*, L.R. 5 H.L. 480 (1872).

¹⁵⁹ *Id.*, at 487.

¹⁶⁰ See Steffen, *What Now About Agency?* 5 J. of Legal Ed. 26 (1952).

¹⁶¹ "Directors are bound to use fair and reasonable diligence in the discharge of their duties and to act honestly." Per Jessel, M.R., in *Re Forest of Dean etc. Co.*, 10 Ch.D. 450, 452 (1878).

¹⁶² See cases cited, *Palmer's, Company Law* 190 et seq. (19th ed., 1949).

¹⁶³ *Hill v. Murphy*, 212 Mass. 1, 98 N.E. 781 (1912).

ests before those of his principal,¹⁶⁴ or simply fails to do anything,¹⁶⁵ there is no dearth of authority to hold him liable.

SKILL "EMBRACES" CARE

It is time to look more carefully at the contract which has been written for "lorry" drivers, and their sort. Plainly it is most incongruous. Of course, the driver is no director; he is held to a much higher standard of competence,¹⁶⁶ for one thing, and, for another, he works much harder.¹⁶⁷ But, putting such matters aside, it is a mistake to say that it is only the director who has to make decisions calling for initiative and good judgment. The truck driver on the road, under orders to make a schedule, perhaps furnished with defective equipment, makes more decisions of the kind per mile, than many directors do in a month. Whether or not to pass the car ahead, and thus to forward the employer's affairs, involves serious business risk, and surely calls for skill and good judgment. Why then does the "law" say that if the driver makes even one mistake, it is at his risk; while any good faith error on the part of a director merely results in a "business" loss?

The answer, perhaps, is the ancient one that a money sanction, it is supposed, must be imposed in the servant's case, to insure greater care. Clearly the decision of the House of Lords in *Lister's*¹⁶⁸ case was influenced by this consideration.¹⁶⁹ But, if any one thing has been established by our experience with Workman's Compensation over the last half century, it is that the way to reduce industrial accidents is to put the principal sanction on industry.¹⁷⁰ It is the employer, not the employee, who can take the steps—by the inauguration of training programs, the purchase of improved equipment and so

¹⁶⁴ *Loft, Inc. v. Guth*, 23 Del.Ch. 138, 2 A.2d. 225 (1938), aff'd. 23 Del.Ch. 235, 5 A.2d 503 (1939); *Kaufman v. Wolfson*, 153 F.Supp. 253 (S.D.N.Y., 1957).

¹⁶⁵ Per Lord Hardwick, L.C., *Charitable Corporation v. Sutton*, 2 Atk. 400, 405 (1742).

¹⁶⁶ See the remarks of Neville, J., in *Re Brazilian Rubber Plantations, etc., Ltd.*, [1911] 1 Ch. 425, 437; a director may properly "undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance." Also, of Judge L. Hand in *Barnes v. Andrews*, 298 Fed. 614 (S.D.N.Y., 1924): "Directors are not specialists, like lawyers or doctors. They must have good sense, perhaps they must have acquaintance with affairs; but they need not—indeed, perhaps they should not—have any technical talent." *Id.*, at 618.

¹⁶⁷ It is not essential, in fact, that he attend all board meetings or that he take part in every transaction which is considered at those meetings which he does attend. Per Jessel, M.R., in *Re Forest of Dean etc. Co.*, 10 Ch.D. 450, 452 (1878).

¹⁶⁸ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

¹⁶⁹ *Id.*, at 579.

¹⁷⁰ See Reede, *Adequacy of Workmen's Compensation* 324 (1947): "All available evidence supports the view that workmen's compensation is a stimulus to prevention of industrial injuries. It will be noted later that categorical statistical demonstration of prevention is impossible, but that other evidence, including related statistical indications, is reasonably conclusive."

on—which alone will effectually reduce accidents. Moreover, as only a little analysis would show, there is no suggestion that there should not be any money sanction. The driver who is grossly or intentionally careless, or who acts without cause contrary to instructions, or who has no purpose to serve his employer, is surely liable—just as a director would be. It is doubtful that any greater sanction would have additional deterrent value.¹⁷¹

But, even so, how is it possible to escape the force of Viscount Simond's reasoning? It is true, as he says, that a "lorry" driver, or an accountant, professes to his employer, at least,¹⁷² that he possesses the "ability and skill" requisite to his job. So also, the second step in the argument would seem to be sound, for surely drivers and accountants "undertake to use"¹⁷³ their ability and skill. The fallacy, if any, therefore, must lie in the conclusion, that *every* failure to use their "ability and skill" is a breach of contract. This, surely, is a *non sequitur*; "skill" may not be made so easily to embrace "care." The director cases alone should establish the point, for directors too must agree to use the ability and skill requisite to their job, and yet, their contract has not been construed to call for infallibility. They must use their skill and ability, must act honestly in furtherance of the company's business, but no one suggests that they agree never to make a mistake.

It may fairly be said, therefore, that the "lorry" driver undertakes to use his skill and ability only with that degree of care which other competent drivers use in similar circumstances. Or perhaps the matter should be put the other way round, as Lord Hatherley did in *Overend & Gurney Co. v. Gibb*,¹⁷⁴ that is, the question is whether no driver with any ordinary degree of prudence, having equal competence and experience, using the same equipment, and under the same instructions, would ever have had such an accident in the course of his work.

What Viscount Simonds and his colleagues failed to see, it seems, is that "lorry" drivers are not independent contractors, who, indeed, could be held to full responsibility.¹⁷⁵ But contractors demand to be free from control as to the

¹⁷¹ It would be interesting to see a psychological study of what goes on in a truck driver's mind while on the road—and not on a "frolic," for that would be a different matter. It may be doubted that he makes fine distinctions between gross and ordinary carelessness. From private sources it is gathered that, in his words, he simply does not want to do *anything* to get "a teat in the wringer." For this reason, and because he takes pride in his ability and skill, he tries to do a "good job."

¹⁷² The non-feasance cases, see discussion in text at 480 *supra*, establish that he does not necessarily make a profession to the world.

¹⁷³ *Lister v. Romford*, [1957] A.C. 555, 586 (H.L.).

¹⁷⁴ L.R. 5 H.L. 480 (1872).

¹⁷⁵ See Steffen, *Independent Contractor and the Good Life*, 2 U. of Chi. L. Rev. 501 (1935).

manner in which their work is done;¹⁷⁶ also as to the equipment they shall use; and, of greater significance,¹⁷⁷ are ordinarily able to exact a fee¹⁷⁸ for their work calculated to cover incidental risks and yet return a profit. Plainly the choice is the employer's to make, either to buy insulation at market rates, or to so conduct his own affairs, "whether by himself or by his agents or servants," as not to injure another.

"FOR THE CONSEQUENCES OF HIS OWN NEGLIGENCE"

Had Lord Hatherley's test been applied in *Lister's*¹⁷⁹ case, the result might very well have been different. Certainly the fact that Lister was given a crotchety truck to drive would have figured in the calculations. What his instructions were for the morning, might also have been significant, particularly if, as is not unusual, he was under special pressures to get on with the job. As for competence, though, there is no reason to suppose that Lister was not satisfactory to his employers. Otherwise, in the course of his ten years of service, he would long since have been discharged or, more likely, transferred to other work. Whatever Lister may have "professed" to his employers, when hired, was immaterial; they must have known exactly what his abilities were, well before the time of the accident. *Harmer v. Cornelius*¹⁸⁰ decided nothing to the contrary. Thus, so far as appears, there was no breach of contract on Lister's part, unless, indeed, it could be shown that *no other driver* of equal ability, driving a similarly defective truck, and using all ordinary prudence in the circumstances, would ever have had such an accident.

In plain words, this means that the daily run of inadvertent accidents and mistakes which seem inevitably to occur in a business day, are "business risks." Other tests may be proposed than that contrived by Lord Hatherley,

¹⁷⁶ Control, or right to control, may very well be significant only as an evidence of the fact that it is the employer who has the benefit of the work. That is, profit-taking established, control follows as an incident. See *Poutre v. Saunders*, 19 Wash. 2d 561, 143 P.2d 554 (1943).

¹⁷⁷ See Douglas, *Vicarious Liability and Administration of Risk*, 38 Yale L. J. 584, 595 (1929).

¹⁷⁸ Shaw, C. J., in *Farwell's* case, assumed that the injured servant had bargained for a wage sufficient to permit him to carry the risk of injury by a fellow servant. No evidence has ever been adduced to establish the point, but the Workmen's Compensation statutes were predicated on the assumption that this is not true. As a matter of simple logic, of course, Shaw, C.J., could quite as validly have assumed the opposite proposition, that the employer was paying a lower wage in order that he could assume ultimate responsibility for the carelessness of fellow servants.

¹⁷⁹ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

¹⁸⁰ 5 C.B.N.S. 236 (1858). In the *Harmer* case the plaintiff, a scene-painter, was discharged within the first two or three days of his employment. In that context a workman truly does profess the competence of his calling. But an employment relationship is a continuing one, and just as the employee is asked to accept the changing duties and conditions of work, so the employer accepts the workman, after a trial period, for what he knows his abilities to be.

but he came close to the essence of the thing. After all, it is the employer who, for his own gain, sends a fallible human being out to do his work, using the employer's machines, and following his instructions. If one must assess "moral" blame, therefore, it might well be put on the employer.¹⁸¹ His is the opportunity to minimize risk, by employing better-trained men, supplying better equipment, easing the demand for hurry.

What then, of the broad principle announced by Follett, C.J., in the *Oceanic*¹⁸² case, "that every one is responsible for the consequences of his own negligence[?]"¹⁸³ In the sense that the negligent driver may be held in damages by the injured third person, it is, of course, a truism. Perhaps some day, in limited areas, a system of insurance¹⁸⁴ may be set up which would obviate this result, but that day is not yet. The injured third person still may recover of either employer or employee. But it will not do to say, as Follett, C.J., did, that, since the action in either case is based on the driver's "negligence," it must follow that, if the employer has had to pay the third person, he may recover his losses from the driver, as "damages which ought to have been paid by the wrongdoer."¹⁸⁵

If the employer is to pitch his case on this ground, it has been essential since long ago,¹⁸⁶ that it be "just and equitable." It is not enough that, as respects third persons, the driver is a "wrongdoer." So, too, in a sense, is the employer, if it is just a matter of name-calling. The point is that, as between employer and employee, the thing turns on the contract of employment, just as the House of Lords decided.¹⁸⁷ And, if that contract may be written as above suggested, contrary to the holding in *Lister's* case, it is plain that the employer might fail to make out a case. It would not be "just and equitable" to put a "business risk" on the driver.¹⁸⁸ Nor does this involve the "surprising anom-

¹⁸¹ See comments by Denning, L.J., in *Broom v. Morgan*, [1953] 1 Q.B. 597, 607-8: "The reason for the master's liability is not the mere economic reason that the employer usually has money and the servant has not. It is the sound moral reason that the servant is doing the master's business, and it is the duty of the master to see that his business is properly and carefully done."

¹⁸² *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 31 N.E. 987 (1892).

¹⁸³ *Id.*, at 468, 989.

¹⁸⁴ See the stimulating study by Ehrenzweig, "Full Aid" for the Traffic Victim (1954), ably reviewed by Kalven in 33 *Tex. L. Rev.* 778 (1955).

¹⁸⁵ *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 468, 31 N.E. 987, 989 (1892).

¹⁸⁶ See Jackson, *History of Quasi-Contract in English Law* 118 (1936); Belsheim, *The Old Action of Account*, 45 *Harv. L. Rev.* 466 (1932).

¹⁸⁷ *Lister v. Romford*, [1957] A.C. 555 (H.L.).

¹⁸⁸ Our courts appear to have fallen into the logical error of supposing that since, in some cases, the employer should be indemnified, he should in every case. That is, because one Indian walks in single file, all Indians do. No one could well object to the holding in *Latham's* case, for there the conductor had clearly made the tort his own. But the same cannot be

ally"¹⁸⁹ of setting up a double standard: for one is a matter of contract;¹⁹⁰ the other is imposed by a changing social policy for the protection of third persons.¹⁹¹ Indeed, it would be a surprising coincidence if the two duties were the same.

THE GOVERNMENT DRIVER

The issue came up recently in *United States v. Gilman*,¹⁹² with this difference, the driver was employed by the government. The original action was against the United States, under the Federal Tort Claims Act,¹⁹³ but the government filed a cross complaint¹⁹⁴ against Gilman, the driver. Negligence being established in the original action, the trial court held for the government on its cross complaint, presumably upon the principle that the driver, as the "real wrongdoer," would be unjustly enriched upon payment by the government of the injured person's claim. Whether Gilman was less than flagrantly careless, did not appear, or if it did, was given no significance. Nor did anyone inquire what his contract was. But, nevertheless, the case was reversed by the Court of Appeals,¹⁹⁵ upon the interesting though highly tenuous ground that under the Act, when a third person has obtained judgment against the government, no further claim may be made against the employee.¹⁹⁶ Judge

said for Schubert's or Lister's cases. In the latter, if judgment had been taken first against the driver, he should have been able to recover the amount, or so much as might seem just and equitable, from his employers, by way of indemnity. See *D'Arcy v. Lyle*, 5 Binn. (Pa.) 441 (1813).

¹⁸⁹ *Lister v. Romford*, [1957] A.C. 555, 586 (H.L.). See note 32 supra.

¹⁹⁰ Nor may such a contract be condemned on public policy grounds, as an agreement to excuse the employee for careless conduct. An agreement to apportion losses is perfectly legal. See *Western Union Tel. Co. v. Tompa*, 51 F.2d 1032 (C.A.2d, 1931). If this were not true, even an insurance contract would be subject to criticism.

¹⁹¹ A good illustration is the duty imposed on the employer to maintain safe working conditions. See *Wilkerson v. McCarthy*, 336 U.S. 53 (1949), and compare *Wilsons & Clyde Coal Co. v. English*, [1938] A.C. 57. Since a corporation may act only through agents, the losses in these cases must be the fault of personnel. But there is no suggestion whatever that the employer may automatically put the increasing social burden on them, as the "real wrongdoers." Their contract was not geared to such risks. For a review of the "safe place" cases, see Alderman, *What the New Supreme Court has Done to the Old Law of Negligence*, 18 *Law & Contemp. Prob.* 110 (1953).

¹⁹² 347 U.S. 507 (1954).

¹⁹³ 60 Stat. 842 (1946), 28 U.S.C.A. §§1346, 2671 et seq. (1950). The comparable English statute is the Crown Proceedings Act, 10 & 11 Geo. VI, c. 44 (1947). It does not appear to have been construed in the circumstances of the *Gilman* case.

¹⁹⁴ This procedure was sanctioned in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

¹⁹⁵ *Gilman v. United States*, 206 F.2d 846 (C.A.9th, 1953). This decision was roundly criticized in the law review case notes: 34 B.U.L. Rev. 120 (1954); 23 *Fordham L. Rev.* 107 (1954); 8 *Miami L.Q.* 655 (1954); 28 *So. Cal. L. Rev.* 176 (1955); 32 *Tex. L. Rev.* 624 (1954); 7 *Vand. L. Rev.* 286 (1954); 40 *Va. L. Rev.* 352 (1954); cf. 102 *U. of Pa. L. Rev.* 809 (1954).

¹⁹⁶ 62 Stat. 984 (1948), 28 U.S.C.A. §2676 (1950). The evident purpose of the provision is to avoid time-consuming and disturbing litigation involving employees, when by hypothesis the judgment against the government is good. Lord Holt, in *Lane v. Cotton*, 12 Mod. 472 (1701), cut the non-feasance cases from much the same cloth.

Pope reasoned that Gilman could not be "unjustly enriched," for "when or if the government paid the judgment against it, it was not paying a sum which the employee ought to have paid, for, as we have seen, any obligation on his part was completely wiped out."¹⁹⁷

It should be said at once that Judge Pope was greatly influenced by a probable legislative purpose to exonerate the employee from any indemnity action in the situation before the court. When the Act was before Committee, in Congress, the Assistant Attorney General who presented the draft statute was asked: "What is the arrangement when the government has an employee who is guilty of gross negligence and injury results? Is there any requirement that the employee should in any way respond to the government if it has to pay for the injury in the event of gross negligence?"¹⁹⁸ To which he replied: "Not if he is a government employee. Under those circumstances, the remedy is to fire the employee."¹⁹⁹ Of course, as a hard-eyed matter, it is one thing to have no purpose to provide for an indemnity, and another to deny one. The provision forbidding a third person to sue an employee after having obtained judgment against the government, is plainly not such a denial. At best the statute is silent on the point.

Thus, when the Supreme Court got the case, the question was squarely presented whether it should import the "indemnity" rule applied in private employments. But that was something a unanimous court refused to do, for, as stated by Mr. Justice Douglas: "That function is more appropriately for those who write the laws, rather than for those who interpret them."²⁰⁰ In the course of his opinion, Mr. Justice Douglas pointed out that the problem was a complex one:

We have no way of knowing what the impact of the rule of indemnity we are asked to create might be. But we do know the question has serious aspects—considerations that pertain to the financial ability of employees, to their efficiency, to their morale. These are all important to the Executive Branch.²⁰¹

¹⁹⁷ 206 F.2d 846, 848 (1953). Both case and result are criticized by Prof. Seavey: "Irrespective of other considerations . . . indemnity should be granted under the ordinary rules of restitution because the employee caused a loss which in equity and good conscience should be paid by him." Seavey, "Liberal Construction," and the Tort Liability of the Federal Government, 67 Harv. L. Rev. 994, 1002 (1954).

¹⁹⁸ Hearings before Committee on the Judiciary on H.R. 5573 and H.R. 6463, 77th Cong. 2d Sess. 9-10 (1942). This colloquy is set out both in the Supreme Court's opinion and in that of Judge Pope in the Court of Appeals.

¹⁹⁹ Ibid. It has been suggested that the Government has never had a right of indemnity against its employees. Blanton, Subrogation, Indemnity, Contribution and Election of Remedies Aspects of the Tort Claims Act, 7 Vand. L. Rev. 190, 200 (1954).

²⁰⁰ *United States v. Gilman*, 347 U.S. 507, 513 (1954). The result reached in the court below was approved on this ground: see 63 Yale L. J. 570 (1954).

²⁰¹ *United States v. Gilman*, 347 U.S. 507, 510 (1954). As a matter of fact, as is considered in *Burks v. United States*, 116 F.Supp. 337 (S.D.Tex., 1953), the government does have regulations in some departments which do exempt employees from personal liability except

It would have been more seemly, at least, had the House of Lords shown a similar deference, if not to Parliament,²⁰² at least to the facts, before writing Lister's contract of indemnity.²⁰³

FINALLY, AN INSTRUCTION

Thus it would seem, anomaly-wise, that it is the "law" imposed on truck drivers—that is, on those drivers in private employment who are so unfortunate as to have injured a third person—which is out of step. The driver there must take the full ultimate loss, in law, if not often in practice. But if by chance he should have injured a fellow servant (entitled to Workmen's Compensation), the trend is to put the ultimate loss on the industry. If the accident, in either case, was due in some part to the non-feasance of fellow servants (in failing to keep the truck repaired, for example), there is no direct sanction, and that applied by the employer, within the business family, is likely to be met with many off-setting considerations. Finally, if the whole enterprise was carelessly, but honestly, mismanaged by the directors—thus setting the stage for trouble—they may be excused entirely, on the theory that, at most, their's was an error of business judgment. Only when the driver happens to have been working for the government, is he treated with equal consideration.

Surely that is "anomaly" enough, and to spare. But *Lister's* case, with its insistence upon contract—however fictitious—has made it easily possible to work out a non-anomalous result. Truck drivers do not engage, anymore than store managers and directors do, to hold their principals harmless according to the test of the reasonable man of the law, who, it seems, "never makes a slip or a mistake."²⁰⁴ Their wages are geared more nearly to the cost of living, than to the increasing hazards of the highway. Nor do they correspond more closely to the increasing burden of tort liability, which, for social reasons, is being imposed generally on an expanding industry, amply insured, with no thought that in the last analysis it should be borne personally by some workingman. So, if the result is to be "liability without fault" in the employer's case—or even fault without liability in the driver's, at least as to so-called

"when gross negligence is involved." The court, however, at the request of the Attorney General, ignored the administrative disposition of the case as one not involving gross negligence, and found for the government, on that inflexible principle of the common law, "that the person actually at fault ultimately should bear the loss resulting from his wrong, and would be unjustly enriched," etc., etc. *Id.*, at 339.

²⁰² It was urged, it will be recalled (see discussion in text at note 25 *supra*), that the case should have been decided as one for contribution under the Law Reform (Married Women and Tortfeasors) Act, 1935.

²⁰³ Probably no member of the court supposed for a moment that Lister, if asked, would have made such an agreement. See note 22 *supra*.

²⁰⁴ *Romford v. Lister*, [1956] Q.B. 180, 186 (C.A.). Already, distinctions are being raised; see *Harvey v. O'Dell*, [1958] 2 W.L.R. 473.

business risks—so be it; within the business family the matter is one of contract.

Our action of "indemnity," too, rests on the supposition that truck drivers—and all other workmen—contract never to make a slip or a mistake.²⁰⁵ For, on no other premise would it be just and equitable to give the employer his action, without regard to whether the accident was an intentional wrong, or one which might happen at some time to any competent driver, even as in *Lister's* case. But, really, our action merely masquerades as one in equity, for no one appears to have given any thought to what the employee's contract might actually be, or as to what the conditions were under which he was required to work.²⁰⁶

With deference to Lord Hatherley, therefore, and to make the point of this article very clear, the following instruction is respectfully suggested as a proper statement of the law:

You are instructed that, in order to hold for the plaintiff, the employer, you must find that the accident was one which no driver with any ordinary degree of prudence, having the same competence and experience as the defendant, using the same equipment, and acting under the same instructions, would ever have had in the course of his work.²⁰⁷

²⁰⁵ In actions for wrongful discharge, where the issue is competence, there is recognition that the reasonable man test is unrealistic. For example, in *Carroll v. Cohen*, 28 Del. 233, 91 Atl. 1001 (1914), the court gave this instruction: "Plaintiff [a store manager] must show a substantial compliance with all the provisions of his contract, and an occasional mistake which might have been made by any competent manager of such a business is not inconsistent with a substantial compliance. . . . On the other hand, mistakes made by plaintiff in the performance of his duties, of a nature that would substantially affect the business of the defendant, is evidence to justify the dismissal of the plaintiff by the defendants. However, the plaintiff neither insured nor guaranteed the results of his work." *Id.*, at 239, 1003.

²⁰⁶ His contract surely is not that of an independent contractor, where indemnity may be appropriate. *Dunn v. Uvalde Asphalt Paving Co.*, 175 N.Y. 214, 67 N.E. 439 (1903). Cf. *Ryan Co. v. Pan-Atlantic Corp.*, 350 U.S. 124 (1955).

²⁰⁷ The response of the common law to changing social developments "may not be perceptible," as Lord Radcliffe has so well said (note 57 *supra*), but "no one really doubts" that "by some means, there is a movement that takes place."