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TORTS—INDEMNIFICATION ACTION BY UNITED STATES AGAINST FEDERAL EMPLOYEE DISALLOWED.—In a suit brought under the Federal Tort Claims Act,1 the United States was held liable for the negligence of its employee, Gilman. Prior to the adjudication of its liability, the United States, seeking indemnification, moved to implead Gilman pursuant to Rule 14 of the Rules of Civil Procedure.2 The Supreme Court held that in the absence of any legislative provision for indemnification the United States could not assert such a right against a wrongdoing employee. United States v. Gilman, 347 U.S. 507 (1954).

The common-law right of indemnity permits an employer who has been held liable for the tort of his employee to recover the amount he has paid from the erring employee.3 This right has been based upon both the theory of quasi-contract, and that of breach of an independent duty owed to the employer. The former theory proceeds on the rationale that the employee would be unjustly enriched if the employer had to bear the financial burden which the employee ought, in equity and good conscience, to have sustained. Therefore, a legally implied duty on the part of the employee to reimburse his employer may be enforced.4 In explaining the theory of breach of an independent duty owed to the employer, Chief Judge Cardozo wrote: "The servant owes the duty to the master to render faithful service, and must answer for the damage if the quality of the service is lower than the standard."5

The Court of Appeals applied the quasi-contract theory of liability to the facts of the instant case.6 It was stated that the Government was not paying a claim which the employee ought to pay,7 because the Federal Tort Claims Act bars an action by the claimant against the employee after judgment has been obtained against the United States.8 Thus recovery was denied. This reasoning ignores

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1 "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual . . ." 62 Stat. 983 (1948), 28 U.S.C. §2674 (1952).
2 "Before the service of his answer a defendant may move . . . for leave as a third-party plaintiff to serve a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." Fed. R. Civ. P. 14(a).
3 See PROSSER, Torts 1114 (1941); RESTATEMENT, Restitution §96 (1937); 2 RESTATEMENT, Agency § 401, comment c (1933).
4 See Gilman v. United States, 206 F.2d 846, 847 (9th Cir. 1953); MUNKMAN, QUASI-CONTRACTS 10, 18-20 (1950); RESTATEMENT, Restitution 327-330 (1937); LEFLAR, CONTRIBUTION AND INDEMNITY BETWEEN TORTFEASORS, 81 U. Of Pa. L. Rev. 130, 146-147 (1932).
6 See Gilman v. United States, supra note 4.
7 Id. at 848.
8 "The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same
the fact that the employee was primarily responsible for the damage and could have been held liable if the injured party did not elect to bring suit against the United States. Since the United States did pay, the employee was unjustly enriched, and since he also breached his duty to the Government under the "independent duty" theory by acting negligently, it follows that under either theory of indemnification, the United States should have been allowed to recover.

In the instant decision, the Supreme Court did not allude to either theory. Rather, it was of the opinion that the determination of whether or not the United States should be allowed indemnity involves complex considerations of fiscal policy and employee morale which properly lie within the province of Congress. The fiscal problem was considered to be analogous to that encountered in United States v. Standard Oil Co. There the Government sought to recover, as in a loss-of-service action, amounts expended for hospitalization and pay of a soldier who had been injured by the defendant. An important factor in the decision to deny recovery was the thought that such recovery would "... make whole the federal treasury for financial losses sustained ... from the injuries inflicted...." The Court believed that it was not the obligation of the judiciary to secure the treasury "... against financial losses however inflicted...." since it is the duty of Congress to determine fiscal policy. This position is untenable for if the reasoning were carried to its logical conclusion a natural result would be that the Court would in no instance grant recovery in favor of the United States without con-

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11 332 U.S. 301 (1947). However, in a case similar to the instant litigation Standard Oil was distinguished, and the United States was allowed to recover indemnity. The distinction was based upon the ground that in Standard Oil the United States was attempting to establish a novel relationship (sovereign-soldier) as a foundation for the maintenance of the ancient action of per quod servitium amisit, while the employer-employee relationship involved in an indemnification action has been recognized at common law as a proper basis for allowing the action. See Burks v. United States, 116 F. Supp. 337, 339 (S.D. Tex. 1953). It might also be noted that Congress was for many years aware of the problem involved in Standard Oil and had obviously elected not to pursue such claims, while the problem here involved is of comparatively recent origin.


13 Id. at 310-311.

14 Id. at 315.
gressional authority. Statutory permission, however, has not been considered a prerequisite to the Government’s assertion of common-law rights.

The Court in the instant case was further influenced by the fact that Congress has not provided that federal employees bear any part of the Government’s financial burden arising from suits under the Tort Claims Act. However, the protection of erring employees was not the purpose of the Act. An injured party may still bring suit against the individual who caused the harm. The only provision that in any way affects the liability of government workers is the one earlier referred to, which merely asserts that a judgment against the United States is a bar to the bringing of an action by the claimant against the actual tortfeasor.

In addition, the Court reasoned that the maintenance of an indemnification action is a disciplinary proceeding affecting employee morale. Although it is true that the power to discipline federal employees is within the province of Congress, an indemnification action is not disciplinary in nature. It is essentially a procedure whereby one who has been held vicariously liable seeks to be made whole. Discipline is not a factor either in its purpose or operation. It was the position of the Government that morale would not be affected because, as a practical matter, indemnification would be sought only

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15 See 3 Moore, Federal Practice 507, 514 (2d ed. 1948).
16 See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (“In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.”); Cotton v. United States, 11 How. 229, 231 (U.S. 1850) (In this case, an action by the United States of trespass *quare clausum fregit* was sustained.); United States v. Savage Truck Line, Inc., 209 F.2d 442 (4th Cir. 1953), cert. denied, 347 U.S. 952 (1954) (Government employees were negligent in loading airplane engines on a truck belonging to a common carrier. The driver of the truck, who was an employee of the carrier, had knowledge of the carelessness of the federal employees, yet was negligent in operating the truck so as to cause injury. The United States was held liable to the injured third party; but because the carrier had the last clear chance to prevent the accident, the court required it to indemnify the United States.); see United States v. Yellow Cab Co., 340 U.S. 543, 551 (1951) (It was stated in this case that the United States would be permitted to implead a joint tortfeasor for the purpose of maintaining an action for contribution.); United States v. Standard Oil Co., 332 U.S. 301, 315 n.22 (1947) (“Of course it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the sovereign is protected from tortious interference.”).
17 The Act merely pronounced the Government’s legal liability in an area where moral responsibility had long been recognized. It was designed to eliminate the large number of private bills for relief which were introduced into Congress each year. See, e.g., Dalehite v. United States, 346 U.S. 15, 24-25 (1953); United States v. Yellow Cab Co., supra note 16 at 548-550; Feres v. United States, 340 U.S. 135, 139-140 (1950).
18 See note 9 supra.
19 See note 8 supra.
in those situations where the employee was protected by liability insurance. Thus, it would be the insurance company, rather than the federal employee, which would bear the burden and expense of defending an indemnity suit by the Government. Indeed, the Supreme Court has already declared that when an insurance company sues as subrogee of a person injured by the Government (a right not specified in the Act but one recognized by the Court) it is regarded as the "real party in interest." The Court, however, did not consider this line of reasoning, stating that "... the decision we could fashion could have no such limitations, since we deal only with a rule of indemnity which is utterly independent of any underwriting of the liability."

Although it may be argued that the instant case merely restricts the common-law rights of the United States as to federal employees, it has been more broadly interpreted. In United States v. Hendler, the court, relying on the Gilman decision, withdrew the recognized right of the United States to collect from ex-servicemen the amount of life insurance premiums for which it had been held liable as guarantor. Another result of this decision is the possible collusion of federal employees with claimants who are suing the United States. The way is now open for bribed employees to assist in the prosecution of manufactured claims or to sell their testimony in order to increase the size of judgments. Moreover, claimants may now extort sums from employees in consideration for not proceeding against them. Prior to this case there would have been no point in the employee paying, since they might also have been held liable to the Government.

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20 See Brief for Appellants, p. 11 n.6, United States v. Gilman, 347 U.S. 507 (1954). This would seem to rebut the contention that an opposite conclusion by the Court would have resulted in the burden of the loss falling upon one person, rather than being borne by the community at large. See Note, 63 YALE L.J. 570, 573 (1954).
21 See United States v. Aetna Casualty & Surety Co., 338 U.S. 366, 380-381 (1949). "The broad sweep of its [the Act's] language assuming the liability of a private person, the purpose of Congress to relieve itself of consideration of private claims, and the fact that subrogation claims made up a substantial part of that burden are also persuasive that Congress did not intend that such claims should be barred." Id. at 380. When such a liberal interpretation is given the Act in an assertion of common-law rights against the sovereign, it is difficult to understand why the Government was restricted in the instant case.
25 See Gilman v. United States, 206 F.2d 846, 850 (9th Cir. 1953) (dissenting opinion). Now that federal employees are no longer financially responsible for their own conduct, they are a "different class" of workers who are to be rewarded for laxity of conduct in the performance of their duties. Ibid.
When the United States is subject to the liabilities of a private employer, it should have the concomitant equitable rights of such an employer. Appropriate legislation to accomplish this is necessary to forestall the noted deleterious effects of this decision.

TORTS—PARENTAL IMMUNITY UPHELD IN WRONGFUL DEATH ACTION.—An unemancipated infant plaintiff sued his mother for the wrongful death of his father caused by her negligent operation of an automobile. The plaintiff contended that the Nevada wrongful death statute, which does not expressly except suits by minors, directly repealed the common-law rule of immunity of a parent from suit by a minor child. The Supreme Court of Nevada affirmed a summary judgment for the defendant, holding that the wrongful death statute did not abrogate the common-law rule. Strong v. Strong, 267 P.2d 240 (Nev. 1954).

Up to and including the latter part of the nineteenth century, there was no rule declaring parents immune from tort actions by their minor children. In 1891, the common-law rule establishing parental immunity had its inception in the celebrated case of Hewellette v. George. The Mississippi court, citing neither judicial precedent nor text material, based its decision solely on the ground that public policy prohibited tort suits between parent and child. Thereafter, other states adopted the rule, stating that maintenance of a suit by a child against the parent would be disruptive of family harmony; that immunity should be extended to parents so as not to hamper their disciplinary function; that recovery by a child would result in a depletion of the family resources to the detriment of the other children; and, that the child is sufficiently protected by the criminal laws of the state from abuse at the hands of his parent.

The broad terms of the parental immunity rule have led to injustice. The most extreme application of this rule occurred in Roller v. Roller, where a minor child was precluded from maintaining a civil suit against her father who had raped her. The court para-

26 See note 1 supra.
1 See PROSSER, TORTS 905 (1941).
2 68 Miss. 703, 9 So. 885 (1891); see PROSSER, TORTS 905 (1941).
3 See Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).
7 See note 5 supra.