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Per Quod Servitium Amisit-An Anomaly

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secution exhibited overreaching and reprosecution was barred under the Double Jeopardy Clause.

The majority of decisions which had previously considered the problem of prosecutorial overreaching and mistrial on motion of the defendant seemed to require intentional misconduct that was intended to precipitate the mistrial request of the defendant. *Kessler,* on the other hand, suggests that the commission of intentional error by the prosecution which seriously prejudices the defendant may be sufficient to constitute prosecutorial overreaching, notwithstanding that the misconduct was not calculated by the prosecution to induce a mistrial motion by the defendant.

The standard for overreaching employed in *Kessler* retains a balance between society's interest in conviction of the guilty and the defendant's right to a fair trial before a particular tribunal. While not requiring evidence of misconduct for an improper purpose, a high standard for overreaching is obtained by the requirement of intentional misconduct by the prosecution. Intentional misconduct by the prosecution, regardless of its motivating purpose, can result in extreme prejudice to the defendant and necessitate a request for a mistrial by the defendant. In these instances, it would appear that the standard for overreaching in *Kessler* is consistent with the Double Jeopardy Clause, its purpose being to avoid the subjection of the defendant to unwarranted expense, ordeal and embarassment.

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PER QUOD SERVITIUM AMISIT—AN ANOMALY?

Frank Horton & Co. v. Diggs[1]

Estel Gideon, vice-president of the plaintiff corporation, was injured when the company truck he was driving collided with a vehicle negligently operated by the defendant, George Diggs. Gideon was in charge of the company's work crew operations, and as a result of his injuries, could not recruit and field an additional crew necessary to complete installation of underground communication cables the company had contracted to lay. It was alleged that Gideon was the only man capable of performing the services causing a loss by the company of $150,000 profits. The plaintiff brought an action against Diggs to recover for the loss of Gideon's services. The trial court dismissed this claim on the ground of failure to state a claim for relief, and the Kansas City District of the Missouri Court of Appeals affirmed.[2]

1. 544 S.W.2d 313 (Mo. App., D.K.C. 1976).
2. *Id.* at 317.

The court of appeals stated that prior cases had not given effect to the common law action *per quod servitium amisit,*[3] which allows a master to recover for the loss of services of a negligently injured servant. The court held that recognition of such an action would "contradict enlighted public policy."[4] They reasoned that the common law remedy originated when service was a status and the servant was treated as little more than a chattel of the master. The court stated that in contemporary society the servant has become an independent person whose relationship with the master rests on contract. Contractual interests have not been protected from mere negligent interference because to do so would impose an undue burden on freedom of action and a severe penalty for inadvertence. The court concluded that the shift from status to contract rendered the cause of action an anomaly.

The court relied heavily on an English case, *Inland Revenue Commissioners v. Hambrook,*[5] which recognized *per quod* but limited it to recovery for loss of services of menial and domestic servants. The Missouri court cited other cases recognizing this limited form of the action, and in a footnote stated that it was not called upon to decide the validity of those decisions since Gideon was not a menial or domestic servant.[6]

Horton is in keeping with a general trend in the United States to reject the action, at least where menial servants are not involved.[7] The master's interest is deemed an economic one and application of *per quod* is equated

3. The court treats this case as one of first impression, rejecting the plaintiff's contention that Missouri recognized the cause of action in Dunn v. Cass Avenue & Fairgrounds Ry. Co., 21 Mo. App. 188 (1886). The court reasoned that *Dunn* spoke of *per quod servitium amisit* not in recognition of the action, but only because the writ in the action for the father's loss of services of his child had to comply with the "fictive formalities" of the period. Arguably, however, the *Dunn* court was recognizing *per quod,* and when they said the "[r]ight to recover is predicated on the relation of master and servant, and not on the relation of parent and child," 21 Mo. App. at 204, they were speaking not in terms of what the formal writ required, but rather were saying that the fact of a loss would not be gathered from the mere existence of a parent-child relationship. The parent must in addition plead and prove that the child did in fact serve him and that the child's services were in fact lost. While the court does not devote much of the opinion to expressing its acceptance of *per quod,* the manner in which the court refers to it appears to point to its acceptance being taken for granted.

4. 544 S.W.2d at 316.

5. [1956] 2 Q.B. 641; Annot., 57 A.L.R.2d 790 (1958).

6. 544 S.W.2d at 316 n.2.

7. Phoenix Prof. Hockey Club v. Hirmer, 108 Ariz. 482, 502 P.2d 164 (1972); Bonfanti Indus., Inc. v. Teke, Inc., 224 So.2d 15 (La. App.), *aff'd,* 226 So.2d 770 (La. 1969); Ferguson v. Green Island Contracting Corp., 44 App. Div. 2d 358, 355 N.Y.S.2d 196 (1974); Ferguson v. Rensselaer County Air Park, Inc., 75 Misc.2d 818, 348 N.Y.S.2d 943 (Sup. Ct. 1973); Myrurgia Perfumes, Inc. v. American Airlines, Inc., 68 Misc.2d 712, 327 N.Y.S.2d 861 (N.Y.C. Civ. Ct. 1971); Snow v. West, 250 Ore. 114, 440 P.2d 864 (1968); Nemo Foundations, Inc. v. New River Co., 181 S.E.2d 687 (W.Va. 1971); Seavey, *Liability to Master for Negligent Harm to Servant,* WASH. U.L.Q. 309 (1956).

with allowing recovery for negligently-caused economic loss.[8] Non-recovery for economic loss has been explained as a refusal to penalize a defendant for losses not reasonably foreseeable, a means of containing the amount of litigation arising out of a negligent act, and as a form of loss distribution.[9] Rejecting *per quod* would appear to serve these ends. Although liability insurance, if available, might serve to distribute loss and lessen the burden on an inadvertent defendant, it is arguably more efficient for potential plaintiffs to obtain insurance on their own limited interests than for potential defendants to obtain vast amounts of insurance for all types of economic loss.[10]

While the above reasoning for rejection of the action is attractive, the Missouri court may have acted too hastily in casting off a cause of action with a long history of recognition. The court relied a great extent on *Hambrook* and American cases that cite it.[11] A survey of commentaries analyzing that opinion, however, reveals a consensus that the opinion included clearly erroneous statements about the historical development of *per quod*.

The *Hambrook* case held that the action *per quod* was limited to the loss of services of menials or domestics only. The opinion set forth an elaborate historical treatment of the action's development and concluded that *per quod* became limited to menials in the 18th century. An examination of opinions from that period shows that this was not the case.[12] Thus, the *Hambrook* case with its historically ill-founded limitation is questionable authority upon which to rely.

While the Missouri court in *Horton* gave much consideration to this English decision, the opinion failed to consider cases from Canada and Australia rejecting *Hambrook* and recognizing *per quod servitium amisit* without the English-imposed limitation.[13] The leading Australian case re-

8. Seavey, *Liability to Master for Negligent Harm to Servant,* WASH U.L.Q. 309 (1956).

9. Note, *Torts, Interference with Business or Occupation—Commercial Fisherman Can Recover Profits Lost as a Result of Negligently Caused Oil Spill—Union Oil Co. v. Oppen, 502 F.2d 558 (9th Cir. 1974),* 88 HARV. L. REV. 444 (1974).

10. *Id.* at 449.

11. Steele v. J. & S. Metals, Inc., 335 A.2d (Conn. 1974); Nemo Foundations, Inc., v. New River Co., 181 S.E.2d 687 (W.Va. 1971).

12. In Commissioner for Railways (N.S.W.) v. Scott, [1959] Argus L.R. 896, the Australian High Court rejected the limitation placed on the action by the *Hambrook* decision. A detailed historical examination by the court revealed the error made in *Hambrook*. The *Scott* court in its analysis referred to research done by Gareth Jones. Mr. Jones surveyed cases dealing with *per quod* and stated that there was no evidence that the action was limited in the 18th century. He based part of this conclusion on the fact that pleading manuals of the era showed no hint of such limitation. Jones, *Per Quod Servitium Amisit,* 74 L.Q. REV. 39 (1958). Other commentators have affirmed the conclusion that the *Hambrook* limitation on the action was not historically required. 34 CAN. B. REV. 1078 (1956); 75 L.Q. REV. 460 (1959).

13. Commissioner for Railways (N.S.W.) v. Scott, [1959] Argus L.R. 896, the High Court of Australia expressly rejected the *Hambrook* decision and stated that

cognizing *per quod* was quick to point out that the action in the middle ages had its rationale in the master's property interest in the *loss of services* rather than a property interest in the servant's person.[14] The fact that a master had no right of action for injury of his servant unless he thereby lost his services was made clear in *Robert Mary's Case* where the court concluded, "[b]e the battery greater or less, if the master does not lose the services of his servant, he shall not have an action."[15] The emphasis is not on the master's proprietary interest in the servant, but rather the economic damage sustained by the loss of his services.[16] Thus, the Missouri court's rejection of the action on the grounds that it originated at a time when a master had a property interest in a servant is without cause.

Even if the court had grounds for saying the action was based on a master's possessory rights in his servant, the assumption would hardly present grounds for its rejection. Other rules of law, such as *respondeat superior*, relating to the master-servant relationship and to the effect of that relationship on third parties arose out of the master's proprietary rights.[17] These actions have not been rejected even though the background from which they arose no longer exists. A look at *per quod's* history reveals that it survived the transition from status to contract and has been recognized by courts long after this gradual transition.[18] Courts apparently felt no compulsion to reject the action after the change took place, and continued to recognize it.

The court in *Horton* chose to call the action an "anomaly"; however, the action's historical development does not appear to cry out for its rejection, and there are additional reasons for arguing that the court's conclusion is not justified. The *Horton* court, and others rejecting *per quod*, cite the undue burden the action places upon the inadvertent defendant. The courts refer to the lack of foreseeability that the injury will also impair the services owed to the master, who is characterized as an unforeseeable plaintiff. However, in the products liability area, courts have held manufacturers of defective products strictly liable to non-using, non-contracting bystanders.[19] While many courts limit recovery to foreseeable plaintiffs,[20]

per quod was not limited to recovery for the loss of services of menials and domestics. In The King v. Richardson and Adams, [1948] 2 D.L.R. 305, Canada recognized the cause of action. While some Canadian cases decided after *Hambrook* reach opposite results, the latest Canadian opinions have reinstated *per quod* without the menial servant limitation. Genereux v. Peterson, Howell & Heather (Canada) Ltd. [1973] 34 D.L.R.3d 614; Gibson v. Dool, [1970] 12 D.L.R.3d 325; Kneeshaw & Spawton's Crumpet Co. Ltd. v. Latendorff [1966] 54 D.L.R.2d 84.

14. Commissioner for Railways (N.S.W.) v. Scott, [1959] Argus L.R. 896.

15. 77 Eng. Rep. 895, 898, [1612] 9 Co. Rep. 111, 113a.

16. 34 CAN. B. REV. 1078, 1080 (1956).

17. Commissioner for Railways (N.S.W.) v. Scott, [1969] Argus L.R. 896, 918, 935.

18. *Id.* at 914.

19. Sills v. Massey-Ferguson, Inc., 296 F. Supp. 776, 781 (N.D. Ind. 1971); Giberson v. Ford Motor Co., 504 S.W.2d 10, 12 (Mo. 1974); Codling v. Paglia, 32

some recent decisions have not required foreseeability and have made causation by a defective product the only prerequisite to recovery.[21] While the analogy is not perfect,[22] the fact that courts have reduced the prerequisites to recovery in the field of products liability weakens the basis for the *Horton* court's insistence on a strict application of proximate cause.

The court in *Horton* relied heavily on the notion that the master-servant relationship had changed from status to contract in characterizing the action as anomalous. However, some authorities say that the trend of modern social policy and labor law is away from the classic economic view of labor as an ordinary commodity, and toward regarding the employer-employee relationship as involving a complex status with rights and duties comprehending more than performance of agreed services for a contracted wage.[23] To the extent that this contention is accepted, the considerations which originally gave rise to *per quod* would lead to its continued recognition.

Another basis for arguing that the action is not an anachronism is the real anomaly that is created by the recognition of the limited action *per quod* set out in *Hambrook*. In that opinion recovery was limited to the loss of services of menial or domestic servants. However, in an age when highly specialized and qualified key employees are hired, restricting the action creates the paradoxical result of having the protection of the employer stand in inverse ratio to his loss. Under the *Hambrook* rule, the more responsible the employee's position and the greater the difficulty of replacing him, the less chance his employer would have to recover damages for the loss of his services.[24]

There is another basis for argument that limitation of the action to the loss of services of menials is unjustified. Even if the action was originally available in the case of injury to a servant by status, it is impossible to say that "menial" or "domestic" properly describe a modern equivalent for which the master can receive compensation.[25]

N.Y.2d 330, 341, 298 N.E.2d 622, 627 (1973); Howes v. Hansen, 56 Wis.2d 247, 255, 201 N.W.2d 825, 829 (1972).

20. *See, e.g.,* Passwaters v. General Motors Corp., 454 F.2d 1270 (8th Cir. 1971); Elmore v. American Motors Corp., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 625 (1969); Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971).

21. Lamendola v. Mizell, 115 N.J. Super. 514, 280 A.2d 241 (1971); Howes v. Hansen, 56 Wis.2d 247, 259, 201 N.W.2d 825, 831 (1972). *See* Jentz & Collins, *Extension of Strict Liability to All Third Persons,* 12 AM. BUS.L.J. 231, 244 (1975).

22. The analogy is not perfect because liability without fault cannot be equated with unlimited liability.

23. Annot., 57 A.L.R.2d 802, 804 n. 12 (1958). *See also,* Smith, *Is Employment Properly Analyzed in Terms of a Contract?*, 2 NEW ZEALAND U.L. REV. 413 (1960); Kahn-Freund, *A Note on Status and Contract in British Labor Law,* 30 M.L.R. 635 (1967).

24. Gibson v. Dool, [1970] 12 D.L.R.3d 325; J. FLEMING, THE LAW OF TORTS, 349 (3d ed. 1965).

25. Commissioner for Railways (N.S.W.) v. Scott [1959] Argus L.R. 896, 918,