128/55

G.P.-S.12136—1952-3—2,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(~~Provincial~~ Division).
(~~Provinsiale~~ Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

..... *Appellant,*

versus

..... *Respondent.*

Appellant's Attorney
Prokureur vir Appellant .....

Respondent's Attorney
Prokureur vir Respondent .....

Appellant's Advocate
Advokaat vir Appellant A A Roberts, K.C.

Respondent's Advocate A. Fischer Q.C.
Advokaat vir Respondent + D. Davidson)

Set down for hearing on 9 A.S. ad. Spring.
Op die rol geplaas vir verhoor op .....

11 — 1.5 ..... 9.50 — 12.55.
2.15 — 4. — C.A.V.

— Appeal dismissed, with costs.
Steyn, Fagan
de Beer, Reynolds, + Hall, JJ.A.

Steyn
C.J. 1/12/55.

Original

IN THE SUPREME COURT OF SOUTH AFRICA
(Appellate Division)

In the matter between :-

THE GOVERNMENT OF THE UNION OF SOUTH AFRICA
Appellant

and

THE OCEAN ACCIDENT & GUARANTEE CORPORATION LTD.
Respondent.

CORAM: Schreiner , Fagan , de Beer , Reynolds et Hall JJA.
Heard : 7th ,November , 1955. Delivered 1—12—1955.

JUDGMENT:

REYNOLDS.J.A:-

In this case I have had the advantage of reading the judgment of Schreiner J.A. , with which I agree. I only wish to add a few observations indicating that the damages claimed , for loss of services based on a contract between the injured person and a third party , are not such damages as are claimable under the principles of the Lex Aquilia , even though there was negligence on the part of the driver of the insured car.

The history and scope of the Lex Aquilia were set out by Innes J.A. (afterwards C.J.) in Union Government vs Warneke 1911 A.D. 657 at page 665 where he says:-

"that it is essential to a claim under the Lex
"Aquilia that there should have been actual damnum
"in the sense of loss to the property of the injured
"person by the act complained of (Grueber page223).
"In later Roman law property came to mean the

....2....Universitas....

"Universitas of the Plaintiff's rights and duties ,
"and the object of the action was to recover the
"difference between that Universitas as it was after
"the act of damage , and as it would have been if the
"act had not been committed (Grueber page 269)".

By rights, in the passage just quoted, were clearly included (contractual) rights ~~of contract and personal rights~~ to corporeal property , including slaves etc., but not rights to the services of an ordinary servant under a contract of service . This is clear from Professor Sohm (Institutes para. 85 ,No. 3) where it is stated that :-

"Nevertheless ,it remained the rule that , as a matter
"of principle, the Actio legis Aquiliae should be
"confined to cases of damage to corporeal property".

This is further clear from the fact that even for the loss of the services of a son , injured by the culpa of a third party , the paterfamilias only received compensation on the basis of the son being his property. At page 67I of the Warneke case ,de Villiers J.A. (afterwards C.J.) put the position in the following words:-

...".From.....3.....

"From time to time the Praetors extended the remedy to "cases not covered by the Lex Aquilia by means of the "actio utilis and the actio in factum , But the furthest "they went was to give the pater familias a utilis actio "Legis Aquiliae when the filius familias was wounded "through culpa , and only for the medical expenses and "loss of service of the son. This was on the ground that "the latter was in dominio patris , and the actio was "therefore also placed on the basis of loss of property".

It is clear that in Roman Law there is no suggestion that in the Lex Aquilia , as extended , there was room for damages granted to a Master merely because of a personal contract like that between a master and an ordinary servant , who was not the property of the master. This is the more significant , since in Roman times , and certainly before the legislation of Justinian in the 6th Century, there were large numbers of freemen and freedmen , other than human property like slaves , working at least as true servants . The omission of any reference to any right given to the master to recover damages because of an

.....injury....4.....

injury to his servant due to culpa of a third party and occasioning him actual loss , is highly significant but not conclusive (Warneke's case page 664). The omission is more than significant when extensions in Roman law were given on the basis of the injury being to persons regarded as property and not persons merely giving services as ordinary servants . There seems to be no trace in Roman Law of the action being given to the master for services lost to him owing to the injury to his servant occasioned by the culpa of another person.

When the Lex Aquilia was extended in the Roman - Dutch law the position was the same as regards the services of an ordinary servant , save with certain exceptions later to be considered . In the Warneke case , the husband was given the right under a proper but exceptional extension of the Lex Aquilia to sue for monetary loss occasioned by the death of his wife and the loss of her services , owing to the negligence of Defendant , and he was given that right since the wife , as a wife ,had the duty to help her husband , by giving her services in the upbringing of their children etc. But at page 666 Innes J.A.

.....pointed out.....5.....

pointed out:-

"So that in all the cases actually mentioned in the books , the right of the claimant to demand assistance , was a right of property , the deprivation of which by the culpa of the defendant would quite naturally found a claim for patrimonial loss . I can find no authority for the proposition that the law of Holland would have given an action of this nature to any relation not damnified by being deprived of benefits supplied by the deceased under a legal duty to do so".

It was , therefore , quite clear that there had to be a duty , existing on the part of the deceased to give services or assistance to the husband or other person , and again the extension of the Lex Aquilia was confined to a relationship of duty ~~(or to injury to some form of property , using that term in a very wide sense~~ when compensation was claimed for loss of services.). These principles , the learned Judge held , should not be departed from at all . The only trace , so far , of a contractual right to receive services by the deceased or injured person , being recognised , must come from the fact that the wife becomes a wife by virtue of the contract

.....of.....6.....

of marriage. But that is a contract quite different from an ordinary contract ,being a consensual one between the parties themselves and with the state , whereby the status of the wife is altered and she becomes a minor. Hence- on the authorities so far examined - there is no trace of a right of action given in all cases to a master, by reason of injury etc., to a servant from whom he has the right to obtain services . Indeed the exceptions giving such a right in certain limited cases , now falling to be considered , indicate the contrary.

The later Roman-Dutch Writers ,however , made some inroads into these principles , and in these inroads is to be found some right given to the master to recover damages for injuries to certain types of servants (See Grotius 3:34:3 etc., van der Keessel Dictata ad Grotium 3:34;3 etc.,). It is not necessary to go through these authorities for they are set out in the judgment of Schreiner J.A. They only apply to domestic servants , and possibly include ~~an~~ apprentices as ~~observed~~ mentioned by Roper J. in the judgment of the Court a quo. But even as regards the possible extension to the apprentice , it must be

.....remembered,,,,,..7.....

remembered that the apprentice , in the Middle Ages , and even in later times , was a person who usually dwelt with the family , and was regarded and treated on a quite different basis from the ordinary employee. The times of slavery had , however , passed in Holland itself , and it must be conceded that all these servants were persons who were with the master of their own free will , and by reason of personal contracts with the master. But what is of the greatest significance is the limited class of servants mentioned in the books, and in regard to whom the action was given to the master , if he could prove damages owing to the loss of their services.

Yet we know that both in the Middle Ages and in later times , when the Roman-Dutch law was treated by the Commentators , there were large numbers of ordinary servants in the industries ,mercantile houses and warehouses of Holland - especially during the period of prosperity of the Dutch East India Company . It is more than significant that the Commentators never included this large body of servants in giving the master the general right to sue for the loss of their services due to an injury inflicted on them by culpa .

....Still.....8.....

Still more significant would be the possible inclusion of the apprentice who adopted a trade or profession of his own free will but had to (undergo) compulsory apprenticeship with the master for some years in order to practice that trade or profession, and such a person is sharply distinguished from the ordinary servant . All this indicates that the inroads into (the principles of) the Lex Aquilia were intended to be of a limited nature . It may be that the authorities regarded the domestic servants and apprentices as roughly equivalent to the household of the pater familias of Roman times , though not all slaves in these times were domestic ones , and probably not all the domestics in Holland lived with their masters. It may be that the feudal ideas regarded the master and his domestic servants and apprentices as a kind of entity or universitas like the household of the pater familias and gave them that status. Some point is given to this view by the remarks of Lord Sumner in Admiralty Commissioners vs S.S. America I9I7 A.C. at page 60 , where is said:-

"What is anomalous about the action per quod
"servitium amisit is not that it does not extend to

"the loss of service in the event of the servant being "killed , but that it should exist at all. It appears "to be a survival from the time when service was a "status."

There may be other possible explanations as to why this right of damages for the loss of the services of domestic servants and , possibly the apprentice , was given. It is not necessary to consider them for the fact remains that there is no mention of the right being given to the master of numerous other ordinary servants and that that coincides with the fact of a lack of mention of the right being given in Roman times for the loss of the services of servants other than slaves. It must be remembered further that in its essence the right to damages under the Lex Aquilia was confined to damages to property and only extended by later Writers to cases like that dealt with in the Werneke case and by the Commentators. Its very limited extension to domestic servants and the apprentice was clearly an anomaly , as said by Lord Sumner and there is no justification for extending this anomaly at all .

....IO.....It.....

It follows then from that that the Court should hold to the original principles , and not extend the anomalous and limited inroad into these principles.

I think , therefore , that there was no liability under the principles of the Lex Aquilia for the loss to the Government of the services of the Magistrate.

Taking this view it is not necessary to consider whether the Magistrate was a servant , or consider any of the other contentions also discussed by Mr. Fischer in his able and useful argument.

30/11/33

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE GOVERNMENT OF THE UNION OF SOUTH AFRICA Appellant

and

THE OCEAN ACCIDENT & GUARANTEE CORPORATION LTD. Respondent

Coram: Schreiner, ~~van den Heever~~ Fagan, de Beer, Reynolds et Hall, JJ.A.

Heard: 7th. November, 1955. Delivered: 1 — 12 — 1955

J U D G M E N T

SCHREINER J.A. :- In July 1952 an accident occurred on a country road between an uninsured vehicle driven by a farmer and a taxi cab insured by the respondent company, which I shall call "the company", under the Motor Vehicle Insurance Act (No. 29 of 1942). In the taxi cab was a magistrate who had hired it for the purposes of his official duties. He was injured in the accident and was absent from duty for some two and a half months; in terms of Act 27 of 1923 and the regulations made thereunder, which governed his service, the Government paid him his salary, amounting to £326. 9. 6. during the period of his absence from duty. The Government and the magistrate sued the company, the farmer and the driver of the taxicab. The Government

claimed/.....

claimed £326. 9. 6. from each of the three defendants in the alternative. The magistrate claimed £2000 from the company and £100 from the driver of the taxicab; there were other alternative claims against the latter and the farmer. A settlement of the magistrate's claims was reached and the action was ~~reduced~~ combined to one for £326. 9. 6. by the Government as plaintiff against the company and the farmer as defendants. The company excepted to the Government's declaration as disclosing no cause of action against it. This exception was upheld with costs by ROPER J. and the Government now appeals ~~against the~~ to this Court.

The Government's declaration alleged that by reason of the injury to the magistrate it had been deprived of his services for about two and a half months while it was obliged to pay him his salary, namely £326. 9. 6., during the period. "In the premises," the Government went on to allege, it had "suffered damages in "the sum of £326. 9. 6. as and for loss of"the magistrate's "services," which amount the company was liable to pay to the Government.

The Roman-Dutch authorities relied upon by the Government are the following:-

(a)/.....

(a) Grotius, 3. 34. 3 (Lee's Translation page 475)"Parents "may take proceedings in respect of injuries to their minor "children. Man-servants(diensknechts) and maid-servants "(dienstmaegden) may demand redress on their own account; "and their masters or mistresses (meesters ofte vrouwen) "may do the like, so far as they have suffered damage by loss "of their service."

(b) Voet 9. 2. 10 ad fin (Gane's Translation II page 561) "So also is it" (the action on the Lex Aquilia) "granted to "those who have hired the labour of male or female slaves to "the extent that they are damaged by ever having lost their "services."

(c) Kramp (c.1780), in the Aanhangzel to Kersteman, at page 320, uses "hûurdienstbooden" instead of Voet's servi aut ancillae.

(d) van der Keesel (c.1800) Dictata at Grotius,3.34.3. This work is available only in manuscript form and I accordingly give the text, as furnished by Mr.Roberts, who appeared for the Government, and a translation composed by Mr.Roberts with the assistance of Professor van Warmelo and Dr. Gonin of the University of Pretoria :-

"Docet Grotius ob famulum domesticum vulneratum non tantum "illi utpote libero homini concedi actionem ad ea, quae "modo diximus, exigenda, sed etiam hero, qui ministerium praestat

"praestat si propter operas amissas eius intersit.

"Quod licet jure Romano constitutum non invoniatur, pro-

"ducta nunc amplius damni, quod aequitas resarciri jubet,

"contemplatione non mala hic a Grotio recipitur probante

"et Voetio ad Leg. Aq. n.10 in f."

("Grotius is of the opinion that an action is given on

"account of the injuring of a domestic servant, not only

"to the servant himself as being a freeman, for the claim-

"ing of those things which we have just mentioned, but also

"to the master to whom he renders services, if he (the

"master) has a pecuniary interest on account of the loss

"of services.

"And though this rule is not found formulated in Roman Law,

"it is rightly accepted here by Grotius (with the approval

"of Voet in 9.2.10 in fin) on the ground that the concept

"of damage, which equity demands should be made good, has

"now been further extended.").

These authorities and their ap-

plicability in modern law are discussed in an interesting

article by A.F.Conradie in the Tydskrif vir Hedendaagse

Romeins-Hollandse Reg (1943) page 133.

Before ROPER J. it was argued on

behalf of the company that the rule to be extracted from

the/.....

the above authorities only applied in the case of injuries to domestic servants and was not applicable to employees generally and that in any event it had fallen into desuetude. It appears that in the court a quo both parties sought assistance from the language of section 11 of Act 29 of 1942, the Government contending that the company's liability thereunder is more extensive than that of the negligent party at common law, while the company contended that its liability under the section is more restricted. Before this Court, however, the argument proceeded on the basis that the company's liability is co-extensive with that of the negligent party at common law.

In the course of the argument on appeal the question was raised whether the Government's claim for damages could properly be based upon the amount of salary paid by it to the magistrate, seeing that there was no allegation that it had been necessary to employ someone else to do the magistrate's work, and non constat that the work had not been done, without expense to the Government, as a result of extra exertions on the part of other members of the staff, combined with the magistrate's own efforts, on his return to duty, to overtake the arrears. In the view I take of the matter, however, it is unnecessary to examine

this/.....

this aspect further, or to consider whether, for any other reason, the Government might, when temporarily deprived of an official's services, be in a less favourable position than ordinary employers to recover from the wrongdoer who caused the deprivation, or from his insurer under the Act. It was not suggested that the Government's position might be more favourable than that of other employers.

ROPER J. upheld the exception because, according to his reading of Grotius, Voet and van der Keesel, the rule entitling the master to recover from the wrongdoer only applied where the injured person was a domestic servant. The learned judge referred to certain decisions upon the action accorded under English Law to the master for personal injuries to his servant per quod servitium amisit, and observed that under that system some extension of the scope of the action had taken place. ROPER J. went on to indicate that in his view the rule, as developed by the English decisions, was not unjust or inequitable or out of harmony with modern social ideas, but, as he could find no indication of a parallel development in Roman-Dutch Law, no extension beyond the case of domestic servants seemed to him permissible.

The attention of ROPER J. was not

apparently/.....

apparently drawn to the case of Attorney-General for New South Wales v. Perpetual Trustee Co.Ltd (1955 1 A.E.R.846), in which judgment had been given some three months earlier by the Privy Council. In that case a constable in the New South Wales Police Force had been injured in an accident and the Attorney-General on behalf of the New South Wales Government sued the persons directly or indirectly responsible for causing the injury for an amount based on the salary and allowances payable to the constable while he remained in the Force and on the pension payable to him after his discharge. After a full examination of the position of a constable at various dates in the history of England and of New South Wales, and after a discussion of the origin and development of the master's action per quod servitium amisit, the Privy Council held that the action did not lie in the circumstances under consideration. The basis of the decision, as appears from the judgment, which was delivered by Viscount Simonds, was a somewhat narrow one, namely, that "there is a fundamental "difference between the domestic relation of servant and "master and that of the holder of a public office and the "state which he is said to serve. The constable falls "within the latter category. His authority is original,

"not/.....

"not delegated, and is exercised at his own discretion by "virtue of his office; he is a ministerial officer exer- "cising statutory rights independently of contract." It was not thought possible, in view of the decided cases, to cut down the established scope of the action. The judgment proceeded, " Their Lordships.....think that this "form of action should not be extended beyond the limits "to which it has been carried by binding authority or, at "least, by authority long recognised as stating the law..... "The form of action appears, as LORD SUMNER said (1917 A.C. "at page 60), to be a survival from the time when service "was a status. That status lay in the realm of domestic "relations. It would not, in their Lordships' view, be "in accord with modern notions, or with the realities of "human relationships today, to extend the action to the "loss of service of one who, if he can be called a servant "at all, is the holder of an office which has for centuries "been regarded as a public office."

We are not concerned with whether the present position in English Law, assuming it to be represented by this decision, is logical or otherwise satisfactory (see 71 L.Q.R. 308; 18 Modern Law Review 488).

But/.....

But it is not without importance to note that the ~~expans~~ tendency to expansion ~~siveness~~, which ROPER J. detected in the English Law and which he would apparently have been content, if he had thought it possible, to apply in our own system, has been checked.

The Law of Scotland does not allow an action to the master whose servant has been injured by the fault of a third party and who has in consequence been deprived of the servant's services (Reavis v. Clan Line Steamers Ltd. 1925 Scots Law Times 386, 538). Since in our law the abovementioned Roman-Dutch authorities support the existence of such an action, it might be thought that an enquiry into its present availability and scope would not be assisted by reference to the Scottish Law. In so far, however, as the question before us falls to be examined on principle it is interesting to see how the matter has been approached in that system. The Scottish view is, I think, best brought out in a passage quoted, at page 540 of the report of Reavis' case, by the Lord President from what was said by LORD KINLOCH in an earlier case, "The "general rule on the subject of damages is that none can be "claimed except such as naturally and directly arise out of

"the/.....

"the wrong done; and such, therefore, as may reasonably be "supposed to have been in the view of the wrongdoer..... "The personal injuries of the individual himself will be "properly held to have been in the contemplation of the "wrongdoer; but he cannot be held bound to have surmised "the secondary injuries done to all holding relations with "the individual, whether that of a master, or any other."

We were referred to certain provisions of the French, Dutch and German codes. Only the German one seems expressly to accord an action for loss of services. I do not think that any guidance is to be obtained from those provisions, which may represent departures from the pre-existing common law; we were not referred to any practice that has grown up in regard to their interpretation.

So far as the question of principle in our law is to be considered, counsel for the Government relied upon the maxims sic utere tuo ut alienum non laedas and ubi ~~ami~~ jus ibi remedium for the general proposition that any person suffering patrimonial loss from the unlawful act of another can recover damages from the wrongdoer, as long as the causal relationship is not too remote. But wide general maxims of the kind referred to are commonly more ornamental than useful; they can frequent-

-ly be countered by similar ones pointing vaguely and imperfectly, it may be, in the opposite direction, such as, in this case, qui suo jure utitur nemini facit injuriam, and ubi remedium ibi jus. Although it is true that our law recognises that in applying the Lex Aquila elasticity is a valuable factor, it is equally true that growth must be controlled, not only in the interests of the systematic development of the law but also in the interests of practical convenience. Justice may sometimes be better served by denying a remedy than by granting one (cf. Ex parte Minister of Native Affairs, 1948 (1) S.A. 388 at pages 399 to 400).

To restrain the extravagances that might result from giving the widest conceivable meaning and effect to such generalisations as those contained in the maxims relied upon by counsel, it is usual to say that, to succeed in an action for damages for negligence, the plaintiff must show that the defendant owed him a duty of care and that the damage suffered was not too remote. Without venturing unnecessarily near to the problem whether remoteness rests upon foreseeability or upon directness, one must recognise some relation between remoteness and the duty of care. According to ordinary usage the former deals with the extent of the defendant's

liability/.....

liability to the plaintiff, whoever he may be, the latter with the persons who are entitled to sue the defendant. The expression "duty of care" has sometimes been criticised as introducing an unnecessary complication into the law of negligence, but, apart from the fact that it is endorsed by considerable authority in this Court, it is so convenient a way of saying that it is the plaintiff himself and no other, whose right must have been invaded by the careless defendant, that the complication seems rather to be introduced by the effort to avoid its use. The duty of care is in our case law rested upon foreseeability and this gives rise to a measure of artificiality. But this is really unavoidable for, if there is to be control over the range of persons who may sue, the test must be that of the reasonable man; what he would have foreseen and what action he would have taken may not be calculable according to the actual weighing of probabilities, but the device of reasoning on these lines helps to avoid the impression of delivering an unreasoned moral judgment ex cathedra as to how the injurer should have behaved. The duty of care fits conveniently into the reasoning process and even if it is no more than a manner of speaking it is a very useful one.

The enquiry whether in any

particular/.....

also be a wide class of plaintiffs who could bring actions when persons insured by them were negligently injured or, presumably, killed, if the extension of liability contended for were recognised. In fact it would be a rare accident that did not give occasion for a crop of actions at the suit of persons who had made contracts with the injured party. The question whether in any particular case there is a liability under the Lex Aquilia towards a particular person cannot be satisfactorily answered by any such wide proposition as that contended for on behalf of the Government.

The more promising line of argument for the Government was that there are these Roman-Dutch authorities, who cover a period of about 200 years and whose writings, it was argued, suggest that there was some development in regard to the classes of servants, for the deprivation of whose services their masters could sue. But it does not seem to me that more can fairly be deduced from the passages in question than that the action of the master, like that of his English counterpart, arose when servants were slaves, or at any rate serfs, in whose services the master had, in effect, a proprietory interest;

and/.....

and when that ceased to be the position those house servants, who were included in the extended notion of the family, continued to be treated as if their masters had special, almost proprietary rights, to their services.

We were referred by counsel for the Government to the case of In re Acutt's Insolvent Estate (4 N.L.R. 15) where the question was whether Indian immigrants who were in service were entitled to preference for their wages under the Natal law of insolvency. The case turned largely on the interpretation of certain Natal laws, but at page 18 CONNOR C.J. discussed the use of the expression famulus domesticus by van der Keesel in Thesis 454, which deals with the subject of preference for wages. The learned Chief Justice said " famulus includes every "servant , and that domesticus also has an extensive mean-"ing, just as the term residence may include a place of "business." After quoting various other authorities he went on to say that it was not easy to see why in the case of an insolvent tradesman shop servants should be worse off than house servants. But interesting though the remarks of CONNOR C.J. are, they were made in relation to a very different problem from that with which we are concerned. I do not regard them as providing authority for the view that

when/.....

when van der Keesel in the Dictata referred to a famulus domesticus he had in mind every person in employment.

To apply the rule which, for the purposes of the argument may be assumed still to exist, over the whole field of employment would undoubtedly involve a considerable extension of its scope. We were invited to say that such extension was necessary in order to keep our law "in "touch with the expansion of legal ideas and to keep pace "with the requirements of changing conditions." But with this well-known passage from the judgment of INNES C.J. in Blower v. van Noordon (1909 T.S. 890) must be read what was said on the subject of extending remedies in other cases, such as Die Spoorbond v. S.A.R.& H (1946 A.D. 999 at pages 1008 and 1013), and Essa v. Divaris (1947(1)S.A.753 at pages 764 to 765). Each problem of this kind must be dealt with on its own merits. Apart from the kind of case under consideration the only example of the existence of rights to damages for loss occasioned through injury to another person of which I am aware is the dependants' action, where death has supervened, which in our law has always been regarded as exceptional. Though it is not a decision of this Court, the case of de Vaal v. Messing (1938 T.P.D. 34) furnishes support for the view that, even in the field of the dependants'

action/.....

action, the law takes a conservative view on the subject of expansion of the Aquilian remedy beyond what the authorities have recognised in the past (and cf. Warschel v. Mrupe, 1954(3) S.A. 464).

It should be observed that the employer's right, if it exists, must presumably stand on a similar footing to that of dependants in regard to the effect of the killed or injured person's contributory negligence, not amounting to the decisive cause of the injury; such negligence would presumably not avail the injurer or his insurer. This is a result that could hardly be regarded as satisfactory. It is tolerated in the dependants' action for what may be sufficient reasons, but it is difficult to see why the jointly negligent defendant, or his insurer, should be in a similarly unfortunate position vis-a-vis the employer of the injured person, if, but only if, it happened that the terms of service departed from the common law by providing for payment of salary during absence from duty in consequence of injury.

In this connection we were pressed with the inequity of allowing the company, in a case like the present, to escape all liability in respect of the incapacitation of the injured person, which would result, seeing that an essential feature of the Government's claim is that

that/.....

there was, as both parties assumed, no liability on the company to compensate the magistrate on the basis of loss of salary, ~~seeing that~~ because there was no such loss. But, as was pointed out by counsel for the company, the Government could apparently have avoided this result by providing by contract or regulation that the magistrate's salary should not be payable to him during any period of absence for which any other person would in law be liable to pay him compensation.

Upon a review of the various factors involved, I do not think that the extension of the rule so as to make the injurer or his insurer liable to the employer of the injured party, where the latter is not a domestic servant, is required by considerations of justice or convenience. This view makes it unnecessary to decide whether even as applied to domestic servants the rule is in existence today or whether it has disappeared by obsolescence.

The appeal is dismissed with costs.

Fagan
~~van-den-Heever~~, J.A.
de Beer, J.A.
~~Reynolds, J.A.~~
Hall, J.A.

} Concur

D. W. Schreiner
1.12.55