GOVERNMENT RECOVERY OF INDEMNITY FROM NEGLIGENT EMPLOYEES: A NEW FEDERAL POLICY*

Employers are liable for the torts of employees acting within the scope of their employment.1 But, having paid a judgment, an employer can maintain against the employee who committed the tort an indemnity action for the amount of the judgment.2 For various reasons, however, employers almost never bring such actions against their negligent workers.3

*Gilman v. United States, 206 F.2d 846 (9th Cir.), cert. granted, 74 Sup. Ct. 275 (1953).


Employers can normally also recover the cost of defending the original action against them. Restatement, *Restitution* § 80, comment b, § 96 (1937); Restatement, *Judg-ments* § 107, comment i (1942). However, such additional recovery may be contingent upon the employer’s having given his employee an opportunity to defend the original suit. See McCormick, *Damages* 250 (1935).

3. No especial difficulties inhere in the indemnity action itself. Possible reasons for the failure of employers to bring indemnity actions against their employees are: (1) the adverse effect on employee morale, (2) the inability of the employee to satisfy the judgment, and (3) the opposition of labor unions.

Research indicates only six reported cases in the Twentieth Century: Opper v. Tripp Lake Estates, Inc., 274 App. Div. 422, 84 N.Y.S.2d 461 (1948) (defendant summer camp sued by injured plaintiff impled its truck driver as a third party defendant for indemnity); Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1935) (defendant oil company sued by injured plaintiff impled its salesman-driver for indemnity); State v. Yellow Baggage & Transfer Co., 211 Wis. 391, 247 N.W. 310 (1933) (plaintiff moving company sued its driver and another employee for indemnity after paying a judgment to the state for damages to a bridge); Fedden v. Brooklyn Eastern District Terminal, 204 App. Div. 741, 199 N.Y. Supp. 9 (1923) (defendant company sued by injured plaintiff impled its negligent employee for indemnity); Gaffner v. Johnson, 39 Wash. 437, 81 Pac. 859 (1905) (owner of steamship having paid judgment for damages to another ship, sued his negligent ship master for indemnity); Costa v. Yoachim, 104 La. 170, 28 So. 592 (1900) (owner of wagon, after paying judgment for damages sustained in collision, sued his negligent driver).

Other Twentieth Century cases are commonly cited for the proposition that an employer may recover indemnity from his negligent employee. *E.g.*, Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896); Scott v. Curtis, 195 N.Y. 424, 88 N.E. 794 (1909); Rumpf v. Callo, 16 La. App. 12, 132 So. 763 (1931). Examination of these
The Federal Government, on the other hand, has recently adopted the policy of claiming indemnity. In many instances it has recovered either by judgment or settlement. Despite one appellate holding denying the Government's asserted right to indemnity, Government claims against its employees continue.

The tort liability of the United States flows from the Federal Tort Claims Act, which waives the Government's common law immunity from suit for the torts of its employees. Prior to the Act, claimants injured by Government workers could be compensated by the Government only after special congressional action. The Act was designed to relieve Congress of the burden of cases reveals either that the party sued for indemnity was not an employee or that the case does not involve indemnity at all and hence the proposition stated therein is dictum.

In two other recent cases employers have brought actions against their negligent employees, for different purposes. In Buhl v. Viera, 328 Mass. 201, 102 N.E.2d 774 (1952), a druggist sued his negligent employee for the benefit of his insurance company which had paid damages to the person injured by the employee's negligence. And in Darman v. Zilch, 56 R.I. 413, 186 Atl. 21 (1936), an automobile owner sued his chauffeur for damage to his automobile caused by the chauffeur's negligence.

In only one case has a subrogated insurance company sued its insured's employee for damages it has had to pay on behalf of its insured because of the employee's negligence. Ohio Casualty Insurance Co. v. Capolino, 65 N.E.2d 287 (Ohio App. 1945).


6. Gilman v. United States, 206 F.2d 846 (9th Cir. 1953). For discussion of this case, see text at note 27 infra.

7. See Pitcher v. United States, Civil No. 3896, D. Conn., June 16, 1953, presently on appeal, Civil No. 22854, before the United States Court of Appeals for the Second Circuit. See also note 4 supra.

8. 28 U.S.C. § 1346 (b) (1946): "Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."


10. H.R. Rep. No. 2245, 77th Cong., 2d Sess. 5 (1942): "[C]laims, if adjusted at all, are handled individually by private bills, which either make a direct appropriation for the payment of the claim, or else remit the plaintiff to suit either in the Court of Claims or
such private bills and to provide claimants with a judicial remedy against the United States.

Prior to Government liability, the loss was borne by the injured victim unless he was covered by insurance, could recover from the negligent employee, or was compensated by private bill. Rarely was the victim fully protected by insurance. Usually the Government employee was financially unable to reimburse the injured party, and redress by private bill was not often forthcoming. Hence the Government's assumption of liability shifted pecuniary losses from injured parties to the Government.

However, heads of executive agencies had authority to settle property claims up to $1000. And the heads of certain specified executive agencies also had authority to settle injury and death claims. E.g., 50 Stat. 321 (1937), 16 U.S.C. § 584-o (1946) (Civilian Conservation Corps); 41 Stat. 1054 (1920), 33 U.S.C. § 853 (1946) (Coast and Geodetic Survey, subject to the approval of the Secretary of Commerce); 49 Stat. 1184 (1936), 5 U.S.C. § 300(b) (Supp. 1950) (Department of Justice for the Federal Bureau of Investigation); 48 Stat. 1207 (1934), 5 U.S.C. § 392 (1946) (Post Office Department).

Today the heads of executive agencies are authorized to settle claims for property damage or personal injuries or death up to $1000. 28 U.S.C. § 2672 (1946). And the Attorney-General has authority to compromise or settle any claim after a suit has been commenced. 28 U.S.C. § 2677 (1946).

11. Approximately 2000 private relief bills were introduced in each Congress during the 25 years prior to the Act and the amount claimed has exceeded $100,000,000. However, only a small percentage of those bills ever became law. See Hearings before Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 25, Appendix III (1942); H.R. Rep. 1287, 79th Cong., 1st Sess. 2 (1946).

See also United States v. Yellow Cab Co., 340 U.S. 543, 549-50 (1951): "The bill became Title IV of the Legislative Reorganization Bill of 1946 at a moment when the overwhelming purpose of Congress was to make changes of procedure which would enable it to devote more time to major public issues." And see Dalehite v. United States, 346 U.S. 15, 24-5 (1952).

Title I of the Legislative Reorganization Act of 1946 banned private relief bills in cases where suit could be brought under the FTCA, 60 Stat. 831 (1946).


This statutory suit is a non-jury action. 28 U.S.C. § 2402 (1946).

13. See Health Insurance Council, Accident and Health Coverage in the United States 7 (1952). As of December 31, 1951, nearly 86,000,000 people had insurance covering some hospital expenses—generally room, board, and miscellaneous services; 65,500,000 people were covered for some medical expenses, commonly for in-hospital treatment and sometimes for home treatment also.

Approximately 40,000,000 of the nation's 61,000,000 employed civilians had insurance which would provide some income during periods in which injury or illness prevented them from working. Id. at 15. In addition, various types of insurance are provided under federal and state government social security programs. Id. at 22.


15. See first paragraph of note 11 supra.
Sound policy requires that the Government bear the cost of losses resulting from the negligence of its employees. Since the Government originated the activity causing loss, and could have foreseen the probability of the loss, it should shoulder liability as an additional expense of the activity. Moreover, the Government can distribute the cost of liability through taxation. Such distribution spreads the loss over a large number of people according to ability to pay. Each taxpayer pays only a small portion of the loss, thus avoiding the ruin which may be visited on an individual who is required to carry the entire burden of what is to him an unpredictable loss.

Successful prosecution of Government indemnity claims, however, will shift the full loss back to an individual, the Government worker. Employees will be unable to distribute the loss except through insurance. However, employees are rarely insured against liability for negligent acts incident to their employment. And to insist that Government workers bear the cost of insurance would place them in an economically disadvantaged position in comparison with private employees, who do not fear indemnity actions and do not insure against them. Private employers bear the cost of insurance as a busi-


17. See James, Contribution Among Joint Tortfeasors, 54 Harv. L. Rev. 1156, 1157 (1941):

"[Another] way of looking at tort liability is to regard it as a means for distributing losses over society as a whole or some fairly large segment of it. This approach leads to an altogether different set of consequences. Most important among them is that some good accrues from the fact of distribution itself. It is true that the total cost of the direct loss—through accident, for example—cannot be diminished by its distribution and indeed, is increased by the cost which the distribution itself entails. Social gain accrues, nevertheless, since consistent distribution of losses over a large group tends to substitute (through the operation of the law of large numbers) a certain and calculable cost for the uncertain risk of ruinous losses to individuals. This removal of risk and uncertainty, moreover, eliminates fear inhibiting desirable enterprise, activity and progress. Finally, the protection of its members from financial ruin or great financial shock is a benefit to society as a whole quite apart from the gratification of humanitarian impulses."


19. See note 3 supra.

20. See note 18 supra. There appear to be no insurance policies written to protect against indemnity itself. However, a policy against liability would cover an employee's liability on an indemnity action.
ness expense and attempt to distribute it to the consumer through higher prices. The indemnity action cannot be successfully defended as necessary to deter negligence. Liability is of questionable value as a negligence deterrent. And the Government has command of other disciplinary devices—including dismissal and demotion—with which to combat employee negligence. Moreover, modern methods of preventing negligence, proved effective, are available to the Government.

Although fear that his employer may bring an indemnity action against him may deter an employee from colluding with an injured party, this possible deterrent effect is not a sufficient justification for the indemnity action. The law should not give the Government an action against all of its employees because some may be dishonest. Private employers have not found the danger of collusion sufficiently great to justify either bringing or threatening indemnity actions.


22. See Douglas, Vicarious Liability and Administration of Risk-I, 38 Yale L.J. 584, 586 (1929); Seavey, Speculations as to "Respondeat Superior" in Harvard Legal Essays 433, 450 (1934).


25. "[T]he large business or governmental unit is in a far better position to reduce accidents than is the isolated individual. ..." James & Dickenson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769, 780 (1950). This article suggests that psychological studies of the accident prone employee may be utilized to reduce accidents. Private employers have successfully used techniques developed from these studies.

See also McMurry, Handling Personality Adjustments in Industry (1944), where it is suggested that psychological factors are of prime importance in employee efficiency and safety, and that employers may use psychological techniques in the selection, training, and educating of employees with great effect in eliminating negligence and inefficiency.

26. This fear was judicially expressed for the first time by Harrison, D.J., in Gilman v. United States, 206 F.2d 846, 850 (9th Cir. 1953) (dissenting opinion). See discussion of this case, text at note 28 infra.

27. See note 3 supra.
In the recent case of Gilman v. United States, the Ninth Circuit denied indemnity to the Government, reasoning primarily from an inadequate explanation of the indemnity action. The court stated the rationale of indemnity thus: "the defendant is unjustly enriched by the plaintiff's payment of the injured party's claim." Since the FTCA makes judgment in a suit against the Government a bar to any action by the claimant against the employee, the court concluded that the judgment extinguished the employee's liability to the injured party. Hence the employee could not be enriched by the Government's payment of the judgment and was not subject to an indemnity action. But the court's theory of indemnity does not account for those cases which allow indemnity to the plaintiff despite the defendant's immunity from liability.

28. Gilman v. United States, 206 F.2d 846 (9th Cir. 1953).
29. Id. at 847, quoting from Brief for Appellee, p. 7, Gilman v. United States, supra note 28.
30. 28 U.S.C. § 2676 (1946) provides: "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 subject matter, against the employee of the government whose act or omission gave rise to the claim.”

This section alters the common law rule that a claimant may obtain judgment against all persons liable for the same tort. See Prosser, Torts 1105 (1941); Restatement, Judgments § 93, comment b (1942). At common law, only satisfaction of the judgment discharges those liable on the tort. See Prosser, Torts 1106 (1941); Restatement, Judgments § 95 (1942). The innovation is justified by the assurance that a judgment against the government will be satisfied.

The section was designed to permit the government to continue its practice of defending suits instituted against its employees without risking the necessity of defending two suits. See Hearings before Committee on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 9-10 (1942). See also note 34 infra. Absent this provision, the Government might find itself defending claimant's suit against the negligent employee after it had defended claimant's suit against itself. If the claimant lost his statutory non-jury action against the Government he might then have proceeded against the employee, hoping to win the common law jury action. Or if the claimant won his suit against the Government, he might then have proceeded against the employee in the hope of receiving a larger jury verdict. See Restatement, Restitution § 96, comment j (1942).

A literal construction of the section would preclude an action against the employee whenever any prior suit against the Government reaches judgment. This result is palpably unfair where judgment is rendered for the Government on the grounds that the employee acted outside the scope of his employment. See note 1 supra. In such case the claimant is deprived of his remedy against the negligent employee merely because he mistakenly attempted to avail himself of his statutory remedy. Cf. United States v. Lushboough, 200 F.2d 717 (8th Cir. 1952). This result may be avoided by interpreting the word "judgment" in the section as meaning judgment on the merits of the tort case.

Section 2676 does not prevent duplicate suits when the claimant brings action against the employee first. However, in such case a successful defense of the suit would bar subsequent proceedings against the Government. E.g., Prichard v. Nelson, 55 F. Supp. 505 (W.D. Va. 1942), aff’d, 137 F.2d 312 (4th Cir. 1943); Restatement, Judgments §§ 96, 99 (1942). If claimant won the suit against the employee and the judgment was not satisfied, the claimant may then proceed against the Government. However, the Government often satisfies judgments against its employees. See note 34 infra.
on the obligation which the plaintiff paid. Since the defendant has not been enriched in these cases, the basis for indemnity cannot be unjust enrichment.132

31. E.g., Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1935) (indemnity granted to company which had paid judgment to employee's wife for negligent injury by employee despite employee's immunity from tort suit by his wife); Briggs v. Philadelphia, 316 Pa. 48, 173 Atl. 316 (1934) (affirming lower court's award to city of indemnity from house owner whose negligent maintenance of sidewalk rendered city liable to plaintiff despite owner's immunity from tort suit from plaintiff, his minor child). Cf. Reed v. Humphrey, 69 Kan. 155, 76 Pac. 390 (1904); Boardman v. Paige, 11 N.H. 431 (1840); Haddens v. Chambers, 2 Dallas 236 (Pa. 1795). See also Schubert v. Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928), where Cardozo, J., speaking obiter, stated that indemnity would be allowed to an employer who paid a judgment for his employee's tort to the employee's wife despite the employee's immunity from tort suit by his wife. Compare McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933); Poulin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929) (both cases allowing tort suits by wife against husband's employer despite husband's immunity from suit by wife and despite employer's admitted right to indemnity against husband), with Emerson v. Western Seed & Irr. Co., 116 Neb. 180, 216 N.W. 297 (1927) (disallowing tort suit by wife against husband's employer because husband was immune to tort suit by wife and because employer's right of indemnity would destroy immunity). See also Restatement, Restitution §§ 76, comment b, 78, comment a, 86; Restatement, Judgments § 96, comment g (1942).

Alternative theories for indemnity between employee and employer have been suggested. Cardozo, J., in Schubert v. Schubert Wagon Co., supra states that the basis for indemnity is the breach of the employee's duty to render faithful, non-negligent service to his employer. See also Mechem, Agency §§ 324, 333 (3d ed. 1923); Prosser, Torts 909 (1941); Restatement, Restitution, Coercion, Topic 3, p. 327 (1937); Tiffany, Agency §§ 142-5 (2d ed., Powell, 1924). Another suggested basis for indemnity is that each person is responsible for the consequences of his own tort. Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903). Accord: Oceanic S.N. Co. v. Compania Transatlantica, 134 N.Y. 461, 31 N.E. 987 (2d Div. 1892).

32. Furthermore, the court's reasoning is faulty in that it relies on an assumption that the court specifically declines to make. That assumption is that the right to indemnity does not arise on judgment but arises only on satisfaction of the judgment. If the contrary is assumed, then, by the court's theory, the Government's claim of indemnity becomes theoretically the same as the private employer's claim. The private employer is allowed indemnity because his payment to claimant discharges his employee's liability and thus unjustly enriches the employee. If the right to indemnity arises on judgment, then the Government would be entitled to indemnity because judgment which statutorily discharges the employee's liability to claimant, unjustly enriches the employee. However, if the right to indemnity arises only on payment, then the court's theory is consistent. For then, the Government's payment to the injured party would not enrich the employee, whose liability was discharged by the judgment, and would not give rise to indemnity. However, although this assumption is crucial to the court's conclusion, the court explicitly declines to make the assumption, Gilman v. United States, 206 F.2d 846, 848 n.2 (1953), and does not criticize the lower court for awarding indemnity to the Government on judgment and before payment.

For the proposition that indemnity can arise only on payment, see Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903); Oceanic S.N. Co. v. Compania Transatlantica, 134 N.Y. 461, 31 N.E. 987 (2d Div. 1892). For the statement that indemnity can arise on liability and before payment, see L.B. Laboratories, Inc. v. Mitchell, 237 P.2d 84 (Cal. App. 1952).
A better ground for denying indemnity to the Government is that it runs counter to the congressional intent embodied in the FTCA. This intent is evident from the legislative history of the Act: it is shown also by Congress' continuing practice of reimbursing by private bill those Government workers who have been sued instead of the Government. Moreover, when Congress paid plaintiffs by private bill prior to the FTCA, the Government could not recover indemnity from its employees. If Congress had intended to grant the Government a right against its workers in the Act which created

33. See Hearings before Committee on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 10 (1942):

"The Chairman. What is the arrangement when the government has an employee who is guilty of gross negligence and injury results? Is there any requirement that that employee should in any way respond to the Government if it has to pay for the injury, in the event of gross negligence?

"[Assistant Attorney General Francis M.] Shea. Not if he is a Government employee. Under those circumstances, the remedy is to fire the employee.

"Mr. McLaughlin. No right of subrogation is set up?

"Mr. Shea. Not against the employee."

See also Sen. Rep. No. 1196, 77th Cong., 2d Sess. 5 (1942): "It is just and desirable that the burden of redressing wrongs of this character be assumed by the Government alone, within limits leaving the employee at fault to be dealt with under the usual disciplinary controls."

The 77th Congress had under consideration an earlier edition of the oft-proposed Federal Tort Claims Act which was passed by the 79th Congress in 1946. Although the Supreme Court in United States v. Yellow Cab Co., 340 U.S. 543, 550 n.8 (1951), questioned the force of the 1942 legislative history in the interpretation of the 1946 Act, the Court in Dalehite v. United States, 346 U.S. 15, 26 (1953), indicated that, concerning issues on which the 79th Congress held no relevant hearings, the hearings and reports of the 77th Congress must control on the question of legislative intent.

Cf. Opinion of Attorney General Robert H. Jackson, 40 Op. Atty Gen. 38, 40 (1941): "... Congress has by general legislation progressively assumed liability to persons sustaining injuries through negligence of officers and employees of the Government and in doing so has not made provisions for the assertion of claims by the United States against the officers and employees causing the damage." See, however, Sen. Rep. No. 2025, 83d Cong., 2d Sess. 2 (1952), which indicates a belief that the Government has a right to indemnity from its negligent employees. However, this subsequent expression of the 83d Congress, made after the Government instituted its policy of claiming indemnity and before indemnity was denied by the Ninth Circuit, does not state the legislative intent of the 79th Congress, which passed the Federal Tort Claims Act.


And the Department of Justice often defended negligent government employees when tort suits were brought against them. See Statement of Assistant Attorney General Francis M. Shea in Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 9 (1942).

35. Since private bills were voluntary payments by the Government, no right of in-
Governmental liability for its employees' torts, it would have made its intention explicit.\textsuperscript{36}

Government indemnity is an issue for the sole determination of Congress.\textsuperscript{37} In view of clear congressional intent to omit the right of indemnity from the FTCA, and indemnity's patently injurious effects, the current administrative policy of attempting to recover indemnity from Government employees should be discontinued. Economy does not demand so much.\textsuperscript{38}

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