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# THE ACTION PER QUOD SERVITIUM AMISIT

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# THE ACTION PER QUOD SERVITIUM AMISIT

## I. INTRODUCTION.

Following the decision of the Attorney-General v Wilson and Horton Ltd,[1] section 5 of the Accidents Compensation Amendment Act 1973, which came into force along with the principal act in April 1974, abolished in New Zealand the common law action which was available to an employer for the loss of services of his employee. The cause of action per quod servitium amisit lies at the suit of an employer against any third person who has wrongfully injured the employer's "servant". Despite recommendations for its abolition in England the action still remains extant in that country (as well as in Commonwealth countries such as Australia and Canada).

One of the authorities which the New Zealand Court of Appeal in Attorney-General v Wilson and Horton Ltd,[2] considered when deciding to what extent (if at all) the old cause of action survived in New Zealand was a decision of the English Court of Appeal, Inland Revenue Commissiones v Hambrook,[3] in which the judgment of Denning L.J. (as he was then) featured. That case held that the action per quod was restricted to relationships of master and servant where the services which the master has lost are in respect of "domestics" or "menials", thereby severely limiting the scope of the action. Hence, the action was held not to be available to the Crown for the loss of services of a tax officer. The grounds upon which Hambrook's case[4] was decided, as they are contained in the judgment of Lord Denning have been heavily criticised in a

decision of the High Court of Australia,[5] (which was approved by the New Zealand court in Attorney-General v Wilson and Horton) and by various commentators.[6] Since Hambrook's case, however, the English courts have not been called on to consider a case where the action per quod servitium amisit has been invoked; so that the fate of the action remains undecided in England.

Since the early part of this centurythe courts have been describing the action per quod as "anomalous"; and in 1963[7] and again in 1968[8] abolition of the action has been recommended in England. But the legislature in England has not been as hasty as the New Zealand Parliament, and as yet no legislative action has been taken.

This article will, firstly, in the light of a brief description of the historical basis of the action per quod servitium amisit, analyse the scope of the action as defined in Hambrook's case[9] with particular reference to the judgment of Lord Denning. It will then consider waysin which the action has been regarded as "anomalous", including a discussion on the question of damages. Finally, the article will look at the possibility of law reform in England, and will assess the future of the action.

## II THE HISTORICAL BASIS AND SCOPE OF THE ACTION.

### A. Historical Basis.

It is not intended to give here an extensive historical account of the action per quod servitium amisit, but merely to provide, briefly, the historical basis of the action as a backbround for a critical analysis of Hambrook's case which purports to define the scope of the action in England as it

stands today.

In the course of a thorough examination of the history of the action per quod Dixon J said[10]: "From early times trespass could be brought by a master for a battery of his servant whereby the master lost his services....In trespass by a master for the battery of his servant it was necessary to allege that thereby the plaintiff lost the services of his servant. In such a case 'the master might recover for the services and the servant for the battery'." In quoting Dicey[11] the same judge noted[12] that for a master to support an action per quod it did not matter how the injury was caused to the servant, but, that loss of service was essential (though the service need only be de facto, i.e. no contract of employment was required). An oft-quoted passage found in the cases on the action per quod is taken from Holdsworth[13]. In referring to the remedies of a master under the action in trespass of per quod servitium amisit he said,[14]: "They rested at bottom on the idea that the master had a quasi-proprietary interest in his servant's services, ..." And that idea, the learned author went on to say, was connected with ideas of status.

For the purposes of the following analysis of Hambrook's case and for the discussion contained in the subsequent parts of this article the important point to be extracted from the passages referred to above is that, according to the predominance of authority, the action per quod servitium amisit, originally, was based on the idea that the master was considered to have a proprietary or 'quasi-proprietory' interest in the services of his employee. It followed then, that what the master had to establish under the action was loss of services and what he recovered was "... his damages for the loss of

his [the servant's] services,..."[15]

B. Hambrook's Case

1. The Facts

Shortly, the facts of Inland Revenue Commissioners v Hambrook[16] are as follows: the Inland Revenue Commissioners brought an action on behalf of the Crown, claiming damages for the loss of services of a tax officer, B, against the defendant for negligently injuring their (alleged) 'servant', B. At first instance Lord Goddard C.J. gave judgment[17] for the defendant on the ground that the relationship between the plaintiffs and the injured civil servant, B, was wholly different in bind from the ordinary relationship of master and servant, upon which the action per quod was based, i.e. the relationship was of a public nature. The case went on appeal to the Court of Appeal where their Lordships Denning, Birkett and Parker L.J.J. upheld the decision of the Chief Justice, but, decided the appeal on the "broader ground" that the action per quod was limited to employers whose servants came within household relationships, who could be described as 'menials' or 'domestics'. The leading judgment was delivered by Denning L.J. with whom Birkett and Parker L.J.J. concurred. It is, therefore, Lord Denning's judgment which will be examined mainly.

2. Servants are 'chattels'

Lord Denning commences his judgment by analysing the ancient common law action. He states that the action per quod originated at a time when service was based on status. Because this is no longer the case today, when service is based on

contract, he concludes that the action per quod is, therefore, an anomaly seeing as it no longer fits into the principles of law as now understood. Although this conclusion itself has been challenged by Windeyer J. in Commissioners for Railways (N.S.W.) v Scott[18], at this point it is the next statement of His Lordship which the writer wishes to examine.

Lord Denning says of the action per quod that "It treats a servant as a chattel belonging to his master".[19] All throughout his examination of the history of the action His Lordship treats it as being based on the notion that the servant was the property of the master. From the beginning it is submitted, Lord Denning has erred in proceeding upon the assumption that the action per quod was founded upon the notion that the master had a proprietary interest in the person of his servant. It can hardly be doubted that, as has been observed in the above examination of the historical basis of the action, the action per quod was based upon the idea that a master had a quasi-proprietory interest in the services of his servant. In considering the judgement of Lord Denning in Hambrook's case Kitto J in Scott's case thought that "... too much has been extracted from the notion that the basis of the action per quod is the ancient idea of the master having a property in his servant."[20] He then went on to say, "But although it is true that the basic idea of the action is sometimes in the books described as the notion of a master's having a proprietary interest in his servant, the fuller and (I think) the more accurate way of stating it is more often found, namely that the master's quasi-proprietary right which founds the action is in the services which he would have received but for the defendant's wrongdoing."[21] And in the

New Zealand decision, Attorney-General v Wilson and Horton[22] Richmond J. concurring with Windeyer J in Scott's case said: "[T]he various medieaval remedies which the master had in respect of his servants, including of course the action per quod, rested at bottom on the idea that the master had a quasi-proprietary interest in the servant's services and not upon any notion that he had some form of proprietary interest in the servant himself"[24] [Emphasis added]

On the footing that the action per quod treats a servant as a 'chattel' Lord Denning attempted to illustrate an anomaly arising from the action in respect of contributory negligence.[25] However, it is in examining and setting the limits to the scope of the action by an historical survey that Lord Denning and his judicial brethren erred most seriously.

3. The action in the eighteenth century

After a brief historical examination of the law from the Middle Ages to the eighteenth century, Lord Denning boldly announces:[26] "The eighteenth century sees an important development. We find that the action per quod has become confined to menial servantsand apprentices, those who lived in the household for the very good reason that they alone could then be considered as the property of the master." At page 664 of the report, after outlining the reasons and authorities for the above limitation of the action he states: "We may take it, therefore, that at the close of the eighteenth century the action was confined to members of the household who rendered services to the head of it and who had to be kept by him in sickness and in health - sons, daughters, apprentices, and so forth - for in them alone was there a

resemblance of property."

It is quite obvious from the above passage that Denning C.J. gives as the rationale for the alleged restriction of the scope of the *per quod* action in the eighteenth century the notion that the master possessed property in his servants. As we have already discovered, by ascribing to the foundation of the action *per quod* such a proprietary notion his Lordship is clearly in error. Windeyer J remarks[27] that this hypothesis put forward in *Hambrook* proceeds upon two assumptions: (1) that the action *per quod servitium amisit* originated in the violation of a proprietary right a master had in his servants; (2) that in the eighteenth century the master's servants and apprentices were the property of the master - both of which are mistaken. If one accepts both of these assumptions it does, indeed, seem a logical step to restrict the action to members of the master's household. But if, as other authorities have found, the action is based on the interest a master had in the services of his servants, and if, during the eighteenth century, members of the master's household were not regarded as his property (the High Court of Australia did not think so,[28] nor can any other authority be found to support this conclusion), then, it does not follow logically at all, to say that the action should be limited to 'domestics' only. And from this conclusion one begins to doubt whether, in fact, as Lord Denning attempts to demonstrate, the history of the action supports the finding that its scope was limited in respect of 'menials'.

Denning L.J. relies on three sources of authority for limiting the action *per quod* in respect of menial or domestic servants (and apprentices). He relies on, firstly certain passages in the first volume of Sir William Blackstone's

"Commentaries"; secondly, certain dicta of Eyre C.J. in Taylor v Neri[29]; thirdly the decision of the Privy Council in Attorney-General for New South Wales v Perpetual Trustee Co.[30] The four judges who comprised the majority in Scott's case criticised Lord Denning's reasoning on all three grounds. Windeyer J concisely expressed their view of the reasoning adopted in Hambrook's case when he said,[31] "I do not find the view of the Court of Appeal that the action lies only in the case of menial servants convincing."

4. Blackstone's "Commentaries" - the first ground

One of Lord Denning's grounds for holding that in the eighteenth century the action per quod had come to be limited to menial or domestic servants was said to be found in Sir William Blackstone's "Commentaries", vol. 1, Book 1. Blackstone begins the relevant chapter[32] by describing the relation of master and servant as one of the "three great relations in private life". He divides servants into four categories, (1) menial servants (or domestics); (2) apprentices, (3) labourers, (4) superior servants. "The author first deals with the manner in which the relation of service affects the master and servant."[33] Then, he deals with the manner in which 'strangers' are affected by the relationship and he lists four matters: the right of a master to maintain his son's litigation; the action per quod servitium amisit; the right of the master to justify an assault in defence of his servant or vice versa; a master's action for damages in the event of his servant leaving him to go to another. Blackstone[34] after discussing the last of the four matters listed says: "The reason and foundation upon which all this doctrine is built,

seem to be the property that every man has in the service of his domestics; acquired by the contract of hiring and purchased by giving wages."

Lord Denning states: "By domestics Sir William Blackstone clearly meant the menial servants described by him in his first category. He seems to have considered a master to have a property in his menial servants, but not in others."[35] Kitto J. in Scott's case makes a rather acid comment on this interpretation: "One who reads the whole of p.429 of Blackstone, and reads it in its context, may be pardoned for thinking that the use of the word 'domestic' in the one sentence in which Denning L.J. quoted has been allowed to outweigh more important indications of the learned author's meaning." The Australia judge considered that when Blackstone was dealing with the manner in which strangers were affected by the master/servant relationship because, in respect of liability as between servant and master Blackstone differentiates each category of servants, yet speaks "quite generally, not suggesting at any point that it makes a difference in regard to a stranger whether a servant belongs to one class or another", for this reason, Blackstone must have been referring to all four categories of servants which he described.[36] To back up this view Kitto J quotes[37] a sentence from Blackstone (in connexion with matter (2) listed by Blackstone, ante) which precedes the sentence, the interpretation of which Kitto J and others in the High Court of Australia disputed: "[A] master also may bring an action against any man for beating or maiming his servants, but in each such case he must assign, as a special reason for so doing, his own damage by the lossof his service; and this loss must be proved upon the trial."

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Kitto J says[38] that "There is much difficulty in supposing that the generality of this proposition was intended to be understood as cut down by the inclusion of the word "domestic" in the final sentence of this paragraph. "He felt that too much had been made of the idea that a master had a proprietary right in his servant from which the limitation imposed by the Court of Appeal in Hambrook's case had been inferred. Then follow the words already quoted above[39] where the same judge explains the true basis of the action.

Menzies J.[40] was also of the opinion that the passage cited from Blackstone by Denning L.J. to support his finding related "not merely to servants of the first sort, i.e. menials or domestics, ..." but was of "general application". In addition, he cites a difficulty which stands in the way of Lord Denning's interpreation confining the action to menials; the difficulty being that "... the action clearly enough lay in respect of the second class, i.e. apprentices". But, further, Menzies J. observes that the action per quod was considered as but one of four matters,[41] and there would be no good reason for treating it separately from the other three, confining it to one sort of servant."

Windeyer J merely concurs with Menzies J by saying[42] that the disputed passage, when read in its context, does not support the contention of Lord Denning. But so as to leave no doubt as to the correctness of this view he adds: "If it [the passage] does [support Lord Denning's finding], it is worth noting that Professor Plucknett has said of Blackstone that 'his history was not very profound, for like so many practising lawyers of that time (and later) he expected little more in

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history than a plausibility at first sight'".[43]

5. Taylor v Neri - The second ground

Lord Denning, after he had cited Blackstone in support of his finding that the action per quod was, in the eighteenth century, restricted to menial or domestic servants, then refers to the case of Taylor v Neri[44] as an authoritative precedent in the second ground for this decision. In that case the hirer of an opera singer, Breda, was suing to recover damages for the loss of his services as the result of an assault on Breda by the defendant. Eyre L.J. (described by Lord Denning as "a most respected and experienced judge") was reported by Espinasse to have held that it was doubtful whether the action per quod had ever gone further than the case of a menial servant. His Lordship further remarks that, "Precedents of this time show that the declarations in seduction cases described the daughter as a 'menial servant'", and he cites the case of Bennett v Allcott[45] to support this latter proposition.

Concerning Taylor v Neri, Windeyer J. says[46]: "Until recently it [Taylor v Neri] has been seldom noticed judicially and then with dubious regard." And in respect of the form of declaration in Bennett v Allcott he says"... far from being typical, the declaration there seems to be unique in using the words menial servant". In summarising his finding on whether authority supports Lord Denning's conclusion his Honour concludes[47]: "Apart from the equivocal observations in Taylor v Neri and the unusual declaration in Bennett v Allcott no eighteenth century case seems to have been discovered to support the view of the Court of Appeal in Hambrook's case".

The other judges comprising the majority of the High Court also support these conclusions. Kitto J. in regard to Taylor v Neri said[48]: "[I]n 1795, if Espinasse is to be believed, Eyre C.J. said that he did not think the Court had ever gone further (in allowing a per quod action) than the case of a menial servant; but when it came to judgment he rested his decision on the broader ground that a person who had been injured by the defendant 'was not a servant at all' ... Even if taken at face value, this seems a somewhat rickety foundation for a conclusion that the common law gave the action per quod in respect of menial or domestic servants only ..." Kitto J. further elaborates the doubt he expressed in the passage quoted above in relying on the reports of Espinasse as authority by quoting Lord Denman[49] who compared Espinasse's Reports with Coke's Reports. That judge said: "Now they [Espinasse's Reports] are often cited as if counsel thought them of equal authority with Coke's Reports." Kitto J. observes that, "Lord Coke, as it happens, had spoken of the action per quod servitium amisit without any suggestion that it was or might be more narrowlycircumscribed than by the bounds of the relations of master and servant ... and in this he seems, so far as I can discover, to have been followed by every judge who dealt with the topic up to 1956 - that is, unless Eyre C.J. said what Espinasse Attributed to him."

Menzies J. at p.437 says that "[T]he observations of Eyre C.J. in Taylor v Neri are expressed tentatively and if they mean that the action was confined to servants of the menial sort, they are ... not consistent with later statements made by great masters of the common law. That case stands alone and in the light of the cases before and after it, I can-

not regard it as a foundation sufficient to support th conclusion that the action was so limited." Windeyer J makes the comment concerning the authority of Taylor v Neri : "The decision of the Common Pleas in Martinez v Gerber in 1841, may I think, be described as 'an authority long recognised as stating the law'. But surely the same cannot be said of Eyre C.J. in Taylor v Neri at nisi prius in 1795."[51]

6. The nineteenth century

Having sought to establish that the action per quod was restricted to menial servants in the eighteenth century Lord Denning then examines the rare nineteenth century authorities. In Hodsoll v Stallebrass[52] the plaintiff's servant who was serving as an apprentice watch-maker was bitten by the defendant's dog. The plaintiff sought damages for the loss of the apprentice's services as a result of the injury. Lord Denning considers that this case did not depart from the view of the action which defined the scope of the action per quod as being limited to domestics.[53] He comes, next, to the case of Martinez v Gerber[54], "which looks at first sight as if it was an extension; to the scope of the action as the Court of Appeal defines it. In that case, Goss, who was a servant and traveller of the plaintiffs was driving his horse and 'phaeton' along the highway when the defendant negligently ran into Goss with his gig and injured him. The plaintiffs sued for damages through the loss of Goss' services. Tindal C.J. held the defendant liable. Denning L.J. in Hambrook's case thought that it should be assumed that the servant lived in themaster's house, otherwise the case "would be an illegitimate extension of the law as it was understood by Eyre C.J." It has already been noted how Windeyer J regarded the decision of Martinez v

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Gerber[55]. As for the assumption that the servant must have lived in the master's house Taylor J. in Scott's case says[56]: "With the greatest respect I find myself unable to make this assumption, particularly when I observe from the report of the case in the "LawJournal Reports' that the argument made the point that, consistently with the allegations made in the declaration, the injured servant might have been 'a traveller paid only for the journey when he performed.'"

The majority in Scott's case sought additional support for their interpretation of Martinez v Gerber from a passage in the decision of the Privy Council, Perpetual Trustees case[57]. Lord Simonds, delivering the judgemtn of the Judicial Committee concluded: "The decision must, however, be regarded as establishing that at this date a person described as a servant and traveller stood in such a relationship as to support the action, and thus probably represents some advance from the limit suggested by Eyre C.J. [and set by the Court of Appeal in Hambrook's case]"[58]. Menzies J. in Scott's case regarded this statement "as plain recognition" that in the middle of the nineteenth century the law was as it appears from Martinez v Gerber."

7. The Privy Council decision - the third ground

The third main ground for his limiting the per quod action to menials Lord Denning purports to find in the Australian decision of the Privy Council, Attorney-General for New South Wales v Perpetual Trustee Co. (Ltd)[59], and in the preceding case, The Commonwealth v Quince.[60]

The question which arose for decision in those cases was whether an employee of the Crown-in Quince's case, a member

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of the Armed Forces, and in the Perpetual Trustee case, a member of the police force - was a person in respect of whom an employer could recover damages against a negligent party who injured the employee for the loss of his services. The decision resolved itself on the point whether the employee could be described as a "servant" for the purposes of the action, i.e. whether he fitted into the "ordinary relationship of master and servant". It was held by the High Court in Quince's case[61] that the action per quod was not available to the Crown in respect of members of the Armed Forces because the relationship between those employees and the Crown was of a different than that of master and servant. The same court in Perpetual Trustee's case[62] followed Quince's case in holding that the action per quod was not available to the Crown in respect of a member of thePolice Force of New South Wales because there was no relationship of master and servant "in its strict sense".[63]

On appeal to the Privy Council the decision of the High Court was upheld on the ground that "... constables do not fall into the class of servants the loss of whose services will give their 'employer' a cause of action per quod"[64] Viscount Simonds, delivering the judgment of the Committee found that the relation between the Crown and its employees "... is not that of master and servant in the sense in which the terms are ordinarily used."[65] Later is said "[T]here 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 bound to serve,"[66] The relationship in the case before the Privy Council was found on the facts to fall within the latter category, so that it was held that

the action per quod did not lie at the suit of the Crown.

Denning L.J. in Hambrook's case in referring to the Perpetual Trustee decision, by implication, at least, found support in his holding the action to be limited to menial or domestic servants. He quotes a passage from the judgement where Viscount Simonds says that the action only lay in the realm of 'domestic relations" beyond which their Lordships were unwilling to see it extended.[67] Lord Denning defines those servants embraced by the phrase "domestic relations" as domestics or menials within the household of the master. And he held that the action does not lie where the relationship of master and servant exists. According to his Lordship, if it did so lie, then, "... there are many cases where the Crown could sue."[68] But in his opinion "... the action does not lie wherever the relationship of master and servant exists. It only lies when the servant can properly be regarded as a member of the master's household, that is, as part of the family. A servant has long since ceased to be regarded as a slave." The court in the Commissioner of Railways v Scott held, however, that the Privy Council decision does not support Lord Denning's, and the Court of Appeal's decision in Hambrook's case.

8. Scott's case

In Scott's case the Commissioner for Railways on behalf of the Crown sought to recover damages in respect of an injured engine driver. The Crown on this occasion was successful; although the High Court followed the cases of Perpetual Trustee and Quince. The majority held that, on the facts, the relationship of master and servant existed; therefore, the

Crown could sue. In so holding, the High Court of Australia found that the action was available wherever the relationship of master and servant existed and was not confined to cases where the person injured was a domestic or menial servant. The Court pointed out, correctly, in the writer's opinion, that the Privy Council's decision was decided on the distinction between public officers and servants in the "ordinary relationship of master and servant, i.e. "domestic relations". The Judicial Committee was adverting to this broad distinction when it referred to the passage from Blackstone's "Commentaries"[69] which made the very same distinction - "Having thus commented on the rights and duties of persons, as standing in the public sphere of magistrates and people; the method I have carried out now leads me to consider the rights and duties in private economical relations"[70] According to the Privy Council it was in connexion with this latter subject that Blackstone "...discourses on the relation of master and servant and, amongst other things, on the actions which a master may maintain in respect of his servant, including the form of action now under review."

It has already been noted how the Privy Council regarded Martinez v Gerber[71] as representing an advance on the law as stated by Eyre C.J. in Taylor v Neri, assuming that he was, indeed, correctly stating the law as it stood in the eighteenth century. Viscount Simonds cites[72] Quince's case in support of the view that the master and servant relationship upon which the action per quod is said to rest is wholly different in kind from the relationship between the Crown and members of the armed forces or police constables. It can be seen,

therefore, when Viscount Simonds refers to "domestic relations" at p.490 of the report, this reference must be read in the context of the broad distinction the Privy Council was making between the 'ordinary' relationship of master and servant and the relation of a public nature which Blackstone mentioned. The relevant passage cannot reasonably be given the interpretation Denning L.J. attributed to it. He was relying on a different passage in Blackstone from thatwhich the Privy Council relied on.

Lord Denning was on unstable ground when he cited Dixon C.J. in the High Court decision of Perpetual Trustee's case to support his restrictive definition of the scope of the per quod action. Dixon C.J. only concurred with the majority view that the action was not available to the Crown because he felt that the Court was bound to follow its own decisions, namely Quince's case. The other judges did not share his view that had thematter been res integra the action would have lain in respect of the Crown whether the employment was of a public nature or not. On an historical examination Dixon C.J. did not find that the action per quod servitium amisit had at any stage been confined to menial servants.

Windeyer J. could find "nothing which establishes that the action was available only in respect of servants of a low degree"[73] This judge commented at the endof his judgment that the limitation of the action per quod by Lord Denning and the other two members of the Court of Appeal in Hambrook's case "... is not supported by authority, logic, precedent or history."[73] The writer sympathises with the sentiments expressed by Menzies J. that merely because the action may be anomalous in present day conditions of employment that fact

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does not justify "judicial reduction" of a cause of action.[74]

9. Inconsistency

The approach Lord Denning took towards the scope of the action in Hambrook's case seems plainly inconsistent with the statement he made, obiter, in an earlier decision reported in the same year as Hambrook's case. In Lee v Sheard he said[75] in respect of the action per quod: "But that is a cause of action which is now in disfavour and must be limited to cases of master and servant, and not extended to any new cases. That was so held by the Privy Council in Attorney-General for New South Wales v Perpetual Trustee Co. Ltd." This dicta, it is submitted, represents a correct statement of the law as found in the Privy Council case. But Lord Denning, in Hambrook's case held that the action was not even available as regards the ordinary relationship of master and servant, but only in respect of servants within the domestic household.

10. Dicta

Although it is probably true, owing to the public nature of B's employment (i.e. a civil servant), Hambrook's case would have been decided with the same result, had it come before the judges who decided Scott's case[76], itwould, nevertheless be straining the meaning of "radio decidendi" to suggest[77] that what the Court of Appeal said in respect of the action being available only to menial servants was merely dicta; so that the House of Lords in a subsequentcase, while disapproving of what Lord Denning said in respect of the scope of the action, could, nevertheless, uphold the decision. Yet Lord Denning seemsto indicate in his judgement that a court in a subsequent case might do this if it disapproved of his definition of the scope of the action. This would seem to

be the only reason for a rather feeble attempt to provide, in one sentence, an alternative ground for hisdecision.

Having decided the case on the broad ground that the action only applied to menial or domestic servants, the alternative ground he provides is on the basis that the injured employee did not come within "the category of a servant to whom this cause of action applies. This appears to be a rather guarded acknowledgement of the ground upon which Quince's case and the Privy Council's decision were decided.

11. The New Zealand Decision

In the recent New Zealand case, Attorney-General v Wilson and Horton Ltd.[78] the Court of Appeal adopted the approach of the High Court in Scott's case towards the action per quod, and in doing so approved of the majority judges' criticisms of Hambrook's case[79] The facts of the New Zealand case were similar to those in Scott. The injured employee was employed by the Railways Department as a forklift operator. The Court[80] affirmed the distinction made by the Privy Council between the ordinary relation of master and servant and that of apublic nature[81]. On the facts, it held, as in Scott's case the relation between Crown and the injured employee fell into the former category. The Crown was unable to recover, however, because it was unable to prove calculable damages.

12. Conclusion

From the above examination of Hambrook's case, it would appeal that the Court of Appeal was led astray by Lord Denning in its finding as to what constitutes the scope of the action per quod servitium amisit. One would think, therefore, that the House of Lords might well refuse to adopt the view of the inferior court in a subsequent case, assuming that there is no intervening legislation concerning the action in the meantime.

## III AN ANOMALOUS ACTION

### A. Economic Loss.

#### 1. Reluctance to compensate for economic loss

There has always been a reluctance amongst courts to award damages for purely economic loss in tort actions.[82] The action per quod has been regarded as an exception to this general rule. Starke J. in Commonwealth v Quince[83] expressed this view: "Ordinarily one person has no claim against and cannot recover from another merely becuase that other person has committed a tort against a third person which indirectly injures the firstnamed person."[84] The judge then describes the action as being an anomalous exception to the rule.

#### 2. The English Court of Appeal decisions

The majority decision[85] of the Court of Appeal in the Sharton Steel case[86] followed an earlier decision of thesame court.[87] The facts in both cases are similar. In both cases the defendants had negligently severed power cables which caused the power to theplaintiffs' factoriesto be cut off and were held to have breached duties of care to the respective plaintiffs. The question of law in both cases was what could be claimed as permissible heads of damage. In SCM v Whittal[88] the plaintiffs claimed damages for loss caused by damageto their machinery and the consequential loss of profit asa result of the defendants negligently severing the cable, but not the 'pure' economic loss which resulted from shutting down the factory. In the Sharton Steel case the plaintiffs managed to avoid much physical damage to their furnaces so that the physical damage plus loss of profit consequent thereon was far less than the pure economic loss which they sought to recover as well.

The court in the latter case followed SCM v Whittal, in particular, the dicta of Lord Denning, in holding that only economic damage consequent on physical damage was recoverable, but not the pure economic loss consisting of the loss of profits which resulted from shutting down the factory. The ingenious Lord Denning says the reason for the distinction between the two types of economic loss is based on policy.[89] In stating this he was following his own dicta in SCM v Whittal where he had said[90]: "In actions of negligence, when the plaintiff has suffered no damage to his person orproperty, but has only sustained economic loss, the law does not usually permit him to recover that loss. The reason lies in public policy. It was first stated by Blackburn J. in Cottle v Stockton Waterworks Co., and has been repeated many times since." According to Lord Denning the wayin which the courts give effect to this public policy of restricting the type of damages which are recoverable is by declaring certain kinds of damages to be too remote. "At bottom," his Lordship states, "I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy to limit the responsibility of the defendant. Whenever the courts set bounds to the damages recoverable - saying that they are, or are not, too remote - theydo it as a matter of policy so as to limit the liability of the defendant."[91] In other words, in Lord Denning's view, one cannot logically reconcile the cases on liability purely by reference to duty of care and forseeability,[92] or the cases on damages purely by reference to ideas of remoteness and forseeability.[93] These ostensible grounds upon which cases are decided are really based on public policy.[94]

It is rather interesting, and, perhaps, significant to note that in discussing the matter of damages, Denning L.J. in SCM v Whittal[95] dared to suggest that, in Hambrook's case, concerning the action per quod the employer could not recover damages for the loss of services of the employee because such damage was too remote, thereby implying the decision was really grounded in public policy - that pure economic loss should not be recoverable. Lord Denning said: "Suppose next, that the servant isinjured and the employer is not, but the employer suffers damage owing to the loss of his services. He cannot recover from the wrongdoer: see Inland Revenue Commissioners v Hambrook."[96] And later, referring, inter alia to the case of an employer losing the services of his employee he stated: "If you refuse to allow the plaintiff in such cases to recover for economic loss, it is not because there is no duty owed to him, nor becuase it was not caused bythe negligence of the defendant, but simply, becuase it is too remote to be recovered as a head of damage"[97] [Emphasis added]

Now, with due respect to the learned judge, to include Hambrook's case in the above statement is plainly misleading. To begin with, there was no question of damages involved in Hambrook's case and, therefore,to suggest the ground for the decision was one of remoteness of damage is absurd. That decision, as his Lordship would have been well aware, was decided on the basis that the action per quod was available only in respect of menial servants;[98] this was the reason why, in Hambrook's case the employee could not recover damages. In fact, the learned judge in the latter case, expressly adverted to the possibility of an employer recovering damages (which would be purely economic loss) by briefly stating the criteria for

measuring such damages, "supposing the action did lie."[99] The reason for the action per quod is based, not on notions of duty of care and forseeability, but on the idea that a master had a quasi-proprietary interest in the services of his servant, and damages resulted from wrongful interference with such services.

3. The dicta of Speight J.

Speight J. in Attorney-General v Wilson and Horton after agreeing with Richmond J. on the general approach to be taken in relation to the question of damages,[1] states: "I concur with the observations of Richmond J ... but I add that not all loss suffered consequent upon the absence of the employee will be recoverable. For, if the damages canvassed by Turner P. and Richmond J. were not enough, one contemplates with apprehension problems of remoteness of damage, especially in the field of economic loss. If losses accrue or profits diminish is there any distinction when they are occasioned by loss of a servant's special skill as against loss of electric power from a severed cable?"[2]

We have seen that the damages recoverable in the action per quod constitute an exception to the general rule economic loss is not generally permissible as a head of damages. One cannot say, therefore, as Mr Justice Speight appears to say that it is anomalous to allow such damages under the action per quod. It is wrong, the writer submits, to apply those principles founded in negligence such as duty of care to the action per quod which is founded in trespass or interference with the services of an employee, on the matter of damages. If one accepts the basis for recovery of damages under the action per quod as enunciated by Richmond J.[2a] no question of

remoteness or forseeability can arise.

It may be true that there is no distinction between losses which have accrued or profits which have diminished as the result of loss of power from a severed cable, and those which have resulted from the loss of a servant's special skill. But the dilemna posed here, disappears once it is realised that damages are assessed on a different basis in negligence actions, on the one hand, and under the action per quod, on the other. Once it has been established that some loss (which may include lost profits) is directly consequential on the loss of services (but only on the loss of services), then, it is irrelevant that the type of damage was not forseeable. If the courts wish to restrict the recovery of economic loss in the action per quod on the grounds of public policy they ought not to do so by declaring the damages sought to be too remote.[3] Lord Denning in SCM v Whittal tried to suggest that, in fact, this was the basis for the decision in Hambrook's case. It was mentioned earlier that it was perhaps, significant that he should make such a statement. The reason for this statement may be that although it is quite plain from the examination of Hambrook's case that the decision was not based on remoteness of damages, the underlying reason for restricting the action in the manner he did, was one of public policy. This might also explain the conclusions reached from hishistorical survey, and the definition of the action's foundation in that case.

B. Contributory Negligence.

1. Lord Denning's "anomaly"

In Hambrook's case, Lord Denning argues that one of the anomalies which results from the action per quod arises in the

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situation where the employee has been contributorily negligent. The anomaly, his Lordship asserts, is that the employer in an action for loss of services does not have his damages reduced. He says that this anomalous situation is the result of treating the servant or employee as a chattel, and he gives an illustration:

> "If the owner of a motor-car sends it out with a driver and while he is driving in the course of his employment, the car is damaged in a collision by the fault of both drivers, the owner must take responsibility for his own driver's negligence. He only gets reduced damages. But if the driver takes the car out "on a frolic of his own", outside the course of his employment, the owner recovers full damages for the car because he is not then responsible for the driver's negligence."[4]

Lord Denning distinguishes two situations. The first is where the employee was acting outside the course of his employment - on a 'frolic' of his own. In this situation the master can recover the full amount of damages which represents the damage done to his vehicle. The other situation is where the employee was acting in the course of his employment at the relevant time, in which case the employer's damages are reduced according to the extent of his employee's negligence. According to Denning L.J. the Crown's position in the case before him was analagous to the former of the two situations. Providing the action was available to it, the Crown would be able to recover in full from the defendant despite B's contributory negligence, becuase he was on a frolic of his own at the relevant time.

2. Criticism of the contributory negligence anomaly

Two basic points can be made in relation to the 'anomaly' concerning contributory and the action per quod. Firstly, if, as has been suggested above,[5] the action is based, not on a proprietory right which the master had in his servant, but on the quasi-proprietory interest in the services of the servant, the fact that the employer can recover in full despite contributory negligence on the part of his employee cannot be the result of his servant being treated as a chattel. It is simply because the Law Reform (Contributory Negligence) Act (U.K.) 1945 does not embrace the action per quod. This anomaly is easily remediable by legislation. "Any anomaly which exists in respect of contributory negligence is not so much on account of any notion upon which the action is based, as the result of "recent statute law."

Secondly, even if the basis of the action was founded upon a proprietory notion, the illustration Lord Denning gives concerning contributory negligence and itscomparison with the results arrived at by allowing the action per quod, is basically mis conceived and inapt. Even if the employer's servant is on a frolic of his own the employer still cannot recover in full for damage to his vehicle from the negligent third party where the employee has been contributorily negligent. Only by joining the employee as defendant would he recover in full. Whether the employee was on a frolic of his own at the time of the accident is irrelevant to the question of whether the employer can recover against the third party.

In giving his illustration, Lord Denning has confused two situations; one, where there has been personal injury, the other where there has been damage to property. In the former

situation, when the third party has been injured, partly through his own negligence and partly becuase of the negligence of an employee, the question whether the employee was on a frolic of his own is relevant to the matter of the employer's vicarious liability. But whether an employee who was in control of the master's e.g. vehicle was acting in the course of his employment is quite irrelevant as regards the liability of the third party whom the master is suing for negligently damaging his vehicle. Neither in Lord Goddard's judgment at first instance, nor in Lord Parker's (Birkett L.J. did not find it necessary to consider the matter) was there a suggestion that, whether B was on a frolic of his own or not could in any way affect the question of contributory negligence.

A possible reason why the employer's ability to recover damages under the action per quod has not been affected by contributory negligence is that originally the action was in the form of trespass, e.g. to the person by maiming or assault, and notions of negligence or duty of care are concepts which arose much later. In an action in trespass damage is the gist of the action. Once a trespass is shown to have been committed, fault, thereafter, becomes irrelevant and the damage consequent on the trespass becomes the sole issue. The particular consequence in issue under the action per quod had to flow from the loss of services of the servant. Thus, the very nature of the action does not easily enable notions involving fault, such as negligence which can be shared, to be applied to the ancient cause of action.

C. Modern Notions of Employment.

In the examination of the historical basis of the action per quod and of Hambrook's case, it has been suggested that the basis upon which Lord Denning criticised the action per quod

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servitium amisit - that the master had a proprietary interest in the person of the servant - is unfounded. But that does not answer the overwhelming (though not unanimous) view of the courts in England, Australia and New Zealand that the action is anomalous under present day conditions because the notion upon which the action is said to be based - that an employer has a quasi-proprietary interest in the services of his employee[6] - isno longer in accord with modern ideas of employment.

Criticism fromthe courts began as early as 1916 with the House of Lords in Admiralty Commissioners v. S.S. Amerika. Lord Sumner said[7]: "Indeed, what is anomalous about the action per quod servitium is not that it does not extend to the loss of service in the event of the servant being killed,[8] but that it should exist at all. It appears to be a survival from the time when service was a status."

While some judges are prepared to resort to "Judicial reduction" of the action because of its 'anomalous' nature, the Court of Appeal in New Zealand, in considering it to be "anomalous in the extreme" called upon Parliament to consider abolishing the action.[9] The President of the Court of Appeal, Mr Justice Turner stated in the Attorney-General v Wilson and Horton[10]: "I echo, after forty six years, the observations of Lord Sumner[11] with which I began this judgment. Their force has increased rather than diminished during the half-century which has all but elapsed since their utterance." His Honour implored the legislature to consider abolishing the action, although he "would not go so far asLord Denning did or Fullagar J. ..." (who would have held that the action was not available to the Crown, even if Quince's case had been wrongly decided). He

"unwilling to agree to legislating" to abolish or "arbitrarily limit, a cause of action which must be recognised as an established part..." of New Zealand law.[12]

Windeyer J has challenged the argument that because the action per quod is based on notions in respect of employment which are out of date the action itself is, therefore, "out of harmony with the economic and social conditions of today."[13] As to this conclusion he boldly replies: "This seems to me to be, in the abstract, a questionable assertion, especially if by such an action an employer is entitled to recover from the wrongdoer medical expenses he paid for and wages he paid to an injured servant during his absence from duty." And continuing his Honour said: "[A]ssuming medical expenses and sick pay, to be recoverable, this seems to me not inconsistent with the social and industrial conditions of today. An employer's right to be indemnified by a wrongdoer for expenses he has been put to because of the injury of his employee is well recognised in workman's compensation law." He makes the point that, in the case before him, had the appellant claimed under the Workman's Compensation Act (N.S.W.) he would have been able to recover the amount claimed, "And no-one would ... have thought this was out of harmony with modern conditions."[14]

D. Damages

1. The 'anomalous' action and damages

A point which emerges from the kind of argument which Windeyer J. put forward is that the answer to the question whether the action per quod is anomalous, in that it serves no useful socio-economic purpose, depends upon the type of damages which are recoverable by the employer once he has established that the action does not against the tortfeasor

who injured his (the employer's) employee. Yet, most of the authorities have devoted little attention to the matter of damages and when they have it has been in an inconsistent manner. Richmond J. in theNew Zealand decision has provided a clear and comprehensive summary of the question of damages and it is considered below.

2. The four approaches

In Attorney-General v Wilson and Horton Ltd.[15] the Crown was seeking to recover "make-up" pay which represented the amount required to bring H's payments up to the sum which he would have received if there had been no accident, i.e. the difference between Workers' Compensation together with various expenses met by the Crown (which sums had been settled between the parties), and the total amount he would have received had he not been injured. Richmond J said that "One would regard this "make-up" pay either as sick pay or accident pay or part payment of wages. The problem would be the same if an employer continued full payment of wages to an injured employee." The learned judge regarded the cases as having approached the matter of make-up pay infour different ways:

(1) Make-up pay can in certain circumstances be recovered in an action per quod as a "distinct and permissible" head of damages - but only where the employer is under a legal obligation to make such payments.[16] In the S.S. Amerika case[17] Lord Sumner considered that payment of such wages was not recoverable because damages must be measured by the value of the employee's services lost and not by the "incidents of his remuneration under the terms of his contract of employment."[18] The paymentof such wages, according to his Lordship results from the pre-existing obligation to pay under the contract of employment and not from the loss of services. Richmond J. notes

that on this first approach where wages paid for no return are recoverable as such, damages are regarded as consequential on the loss of servitium.

(2) The second approach is said to be found in the judgment of Latham C.J. "and some of the other members of the High Court in Commonwealth v Quince ..." - "The question which arises in relation to pay is whether it was reasonable to pay these moneys, for which no service was received, and whether they were so paid, that is, paid without service being rendered, in consequence of the defendant's tort ... A master is not bound to dismiss a servant as soon as he is injured and to leave him to the mercies of charity. He is entitled to behave reasonably, and the payment of his wages for a period while an attempt is being made to restore him to health is a proper head of damage."[19] Richmond J. pointed out that it is not quite clear whether this is the same view as expressed by McKinnon J.[20] who seemed to say that wages paid for nothing were recoverable if "reasonably and necessarily, but not voluntarily incurred," or whether "it is founded on the general principle that moneys reasonably expended in an attempt to mitigate loss are themselves recoverable as damages",[21] although voluntarily incurred.

(3) The third approach is to treat the payments to an employee as "some evidence" of the value of the "services lost", and, on that basis, recoverable. This is the approach adopted by Denning and Parker L.J.J. in Hambrook's case. Lord Parker asserted:[22] "I am, however, inclined to think that they could claim that amount, not because it represents sick pay but because it is some criterion by which the loss of services could be measured. If instead of taking on and training a new

servant the master reasonably chooses to keep on the injured servant and to pay him, it seems to me that the sums so paid, assuming they are reasonable, are some measure of the value of his services."[22]

(4) The fourth approach is that which takes the measure of damages to be "the pecuniary loss actually sustained through the loss of services of the servant," which is not the same thing as wages paid to the employer for no return. Nor are wages paid for nothing even prima facie evidence of this pecuniary loss.[23]

3. The correct approach

In order to ascertain what was the correct approach Richmond J. examined the true nature of the action per quod. A Court of Appeal decision, National Insurance Co. of New Zealand Limited v Joyes[24] is referred to. In the course of deciding a claim against an insurance company, the Court had to consider the nature of the action per quod. This was because there was a question as to whether the indemnity against an owner's liability for injury to a third party in a motor vehicle accident extended to indemnifying him against liability for damages per quod servitium amisit. The Motor Vehicle Insurance (Third Party Risks) Act 1928 provided an indemnity against owners' liability to pay damages "on account of the death of or of bodily injury to any person or persons." The court agreed, unanimously, that the indemnity did not extend to damages per quod. In respect of the old form of action Myers C.J. said,[25] in a passage cited by Richmond J,: "The master's cause of action arises 'because of' or by 'reason of' the loss of service, and not ... the servant's bodily injury." Richmond J. then adverts to the conclusion reached by Turner P. that the remedies of a master in respect of his servants were

based on the idea that the master had a quasi-proprietary interest in his servant's services "and not upon any notion that he had some form of proprietary interest in the servant himself."[26]

His honour concludes[27] that the wrong done in an action per quod is the interference with the right to the services of his servant and that, accordingly, the damages recoverable "should be measured exclusively by the consequences which follow from that interference." [Emphasis added], and not from all the consequences which "follow merely from the fact that the servant was injured ... Put in another way, the real damage suffered by the master can be determined only by inquiry ... as to the extent by whichthe master is worse off as a result of his being deprived of his servant's services than he would have been had those services continued."[28] This approach, says Richmond J, is essentially the same as that of Fullagar J (the fourth approach described above); that the measure of damages should be the pecuniary loss actually sustained through the loss of services. But the New Zealand judge thought that, in addition, damages for inconvenience could also be included.[29] The learned judge also agreed with Fallagar J in treating medical and hospital expenses recoverable under a separate principle of law from the action per quod, but thought that they may be regarded as consequential on the loss of services if incurred to mitigate the loss.

The "value of the services lost" test expressed in Hambrook's case was seen by Richmond J as directing attention away from the real issue in the damages inquiry. He considered (rightly, in the writer's view) that the judges who have employed this test have not appreciated the difference between

describing the damages recoverable as being the value of the services lost - to be measured, therefore, prima facie by wages paid for no return, as being some criterion by which to measure the value of the services lost - and describing them as a measure of the value of the damage caused to the employer as a consequence of the loss of services. The latter approach is the correct one having regard to the true nature of the action.

The reason for making this "subtle" distinction is that the value of the employee's which have been lost is not necessarily the measure of the loss or damage to the employer occasioned by the loss of services, because those services which are no longer rendered by the employee (whose services are lost) may be rendered by other employees or by a substitute. If the services are performed by co-employees, the measure of the loss will be the overtime paid to them, if in fact, such payments are made, otherwise the employer will have suffered no (pecuniary) loss. If the lost services are performed by a substitute, then the measure of the loss is the wages paid to the substitute (providing the employer continues to pay the injured employee whose services he has lost).

Although wages paid for no return are not recoverable as such, nevertheless, in the opinion of Richmond J they may be recovered if reasonably made to mitigate the employer's loss[30] (approach (2) ante). His Honour stated, obiter, that because damages are assessed on the assumption that had the employee's services continued so also would his wages have continued, any savings in wages which the employer "has or ought reasonably to have made after his employee was injured" should be set off

against the damages prima facie suffered by the employer through the loss of the services.[31] Workers Compensation payments should be regarded as savings. The true measure, then, of the damage suffered by the employer "must be determined by enquiring to what extent, if any, his position over all has been rendered worse as a result of the loss of his employee's services than it would have been if those services had continued in the normal way."[32]

4. Damages in the New Zealand Decision

On the facts before him, Richmond J held that the make-up payment made by the Railways Departmentpursuant to a discretion under section 49A of Principle Order No. 161 was a "voluntary" payment and was not recoverable as an item of damage in its own right.[33] As the ground had not been pleaded the Crown could not recover on the basis that it was expenditure reasonably incurred in order to mitigate theloss.[34] Counsel for the Crown had urged the Court to treat the make-up pay as evidence of the value of the services lost.[35] For the reasons discussed above in relation to the third approach Richmond J. held that it could not be treated in this way and felt that the case before him was one where the remaining staff of the employer had absorbed theduties normally carried out by H. The only loss that the Crown could recover was overtime for the extra work.[35] But, because they were not capable of assessment - the records of the department were not able to provide sufficient information on which to base calculations - no damages could be quantified. "In any event," his Honour concluded, "I would expect it to have been less in amount than the sum of $2,268 paid as workers compensation and

accordingly saved as wages."[36]

While not prepared to express formal approval of the whole of the judgement of Richmond J, Turner P concurred in the conclusion and the approach adopted to reach that conclusion, i.e. that the question of damages involves inquiry as to what is the overall loss to theemployer, measured by placing a value on the services which he has lost."[37] According to the President of the Court of Appeal, in the case of a single employer and a single employee the cost of employing a substitute would represent the prima facie value of the loss of services; but along with Richmond J the learned judge regarded the instant case as one where the other employees had been able to "take up the slack." So that the work which the employee, whose services the master had lost, had been doing was continued, "doubtless at some inconvenience to a number of people, but in a manner in which it is impossible to contend that the master had fared worse than would have been the case had the servant never been injured at all."[38] He held that there was no proof of extra payment for the extra work performed by the other employees' hence, the employer did not have a good claim in that respect. Turner P held that it was not possible to quantify in money any inconvenience suffered by the plaintiff and in doing so appears to implicitly agree with Richmond J that inconvenience constitutes a permissible head of damage.[39]

4. Summary of the New Zealand approach

To summarise the general approach of the New Zealand Court of Appeal towards the matter of damages in the action per quod servitium amisit, we can say that the inquiry must be directed to the pecuniary loss (and inconvenience[40]) suffered by the

employer as a consequence, only of the loss of servicesof the employee. Wages paid for no return are not recoverable as such. Payments made voluntarily or gratuitously are not recoverable in their own right. However, payments may be treated as consequential on the loss of services if reasonably made in orderto mitigate such loss, even voluntarily made.[41] The measure of the extent to which the employer has overall become worse off as a result of the loss of services of the employee (another way of saying the damage consequential on the loss of services) may be the amount paid to a substitute, or if the work normally rendered by the injured employee is absorbed by fellow-employees, the extra payments made to the latter to "take up the slack." In both cases, any savings the employer has or ought reasonably to have made as a result of his employee being off work must be set off against such payments for replacement services. The obvious case where an employer makes a saving is when he is indemnified out of Worker's compensation.

## IV THE FUTURE OF THE ACTION

### A. The Position in England

On the assumption that the correct approach on the matter of damages was that enunciated by the Court of Appeal in Attorney-General v Wilson and Horton, i.e. that the "gist" of the action is the loss of service,[42] not the services lost, damages being assessed accordingly, would the House of Lords adopt this approach? If it is accepted would the action still be considered anomalous? Notwithstanding the basis of the action may be anomalous, does itstill perform a useful function, today; and if it does, would it continue to do so if the House of Lords were to adopt the New Zealand approach in relation to

damages? In the course of this part of the article, the writer will endeavour to provide answers to these questions.

1. New justification for an old rule

In an article, "Lawyers' Usesof Legal History,"[43] Professor Enid Camptbell points out[44] that, "Although the original justification for a legal rule may have disappeared a new justification may have taken its place. A rule created for one purpose may in time come to serve another purpose, agreeable to present day needs." Campbell takes as a particular example the action per quod, itself, which has managed to survive centuries.

Windeyer J[45] thought that the action per quod serves a purpose agreeable to present day needs by allowing an employer recovery of medical and hospital expenses which could also be recovered under workers compensation legislation.[46]

The English Law Commission[47] has given a reason for regarding the action per quod as fulfilling a modern function. The action, in England, allows the employer recovery from a fortfeasor of damages, which the tortfeasor is relieved from paying when the employee, whom the wrongdoer has negligently injured, sues to recover damages in a negligence action. This result is achieved, however, by the courts adopting the "value of the services lost" test mentioned in Hambrook's case, and by treating wages as some criterion for that test.[48]

2. A caution

The Law Reform Committee[49] and the Law Commission in its Working Paper[50] have both considered whether or not the old common law actions for loss of services, loss of consortium, seduction and enticement ought to be abolished. Both bodies considered that they should be abolished. The Law Commission,

however, issued this warning: "Our provisional opinion is that the ancient common law remedies, though they are inadequate and in some respects clearly do not reflect social assumptions which are no longer acceptable cannot safely be swept away ...", until, in respect of the action per quod, it is considered whether the employer "should have a remedy against the tortfeasor in respectof wages paid to the victims of his tort, his employee, during the period of incapacity - and the scope of any such remedy."[51]

3. The Law Commission's Interpretation of Hambrook's case

The Commission referred to Hambrook's case as representing the present scope of the action in England, i.e. confined to menial servants. Moreover, it accepts[52] that decision as good law which would be followed by the House of Lords. The Law Commission glosses over the criticisms of Hambrook's case found in Scott's case by merely stating that "This restriction has not yet been adopted by the High Court of Australia ..."[53] [Emphasis added] as though it will be just a matter of time before the Australian courts adopt Lord Denning's restriction of the action. But it is clear from our examination of the decision in the latter case that only legislation could restrict the scope of the action in the manner in which the English Court of Appeal has so done.[54] The question which the House of Lords may be asked to decide is, not whether to "extend" the action to any case of master and servant, but whether the restriction of the action to menial servants in Hambrook's case is the correct view of the law. In the light of Scott's case the Privy Council decision in Perpetual Trustees[55] and more recently Attorney-General v Wilson and Horton, the latter course would be the correct approach to take. If the

House of Lords were to do so, then, according to the Law Commission the action would be sufficiently wide in scope to enable it "to play a role in the economic life of the 20th century"[56], by allowing an employer to recover the amount by which the tortfeasor's liability to the injured employee has been reduced by the employer continuing to pay wages to the employee.

4. A matter of justice

At para. 9 of the Working Paper the Commission said: "We think it would generally be accepted that there can at the present time be little justification for entitling an employer to a remedy merely because someone's wrongful act has deprived the employer, temporarily, or permanently, of the services of his employee." It regarded the loss of services of an employee as a normal risk, which an employer accepts these days, one which he can insure against. It considered that there was no justification for retaining the action merely in order to compensate an employer for such loss. But the Commission did consider it unjust that, by virtue of an employer continuing to pay wages while an employee is injured, a tortfeasor should thereby have his liability reduced and that if the action per quod remedied this injustice whereby an employer subsidises the tortfeasor's liability, it is worthwhile retaining the action. This "injustice" has arisen by the adhereing strictly to the compensatory principle often said to be the basis of damages in civil actions[57]. The position in England is that if an employee is entitled to receive wages or a pension during his absence from work because of an injury, in his claim against a tortfeasor he must give

credit for those amounts.[58] The Commission considers that the beneficial result of allowing actions per quod, "if it is extended beyond the realm of menial servants" (or more correctly, if the true scope of the action is not limited to the realm of menial servants[59]), is that it enables the employer to recover from the tortfeasor wages and other benefits paid to the employee "thereby counterbalancing the reduction of the amount of damages payable to the victim of the tort by the tortfeasor."[60]

5. Damages - the Law Commission's approach

The Commission does not accept the approach of the Court of Appeal in New Zealand as regards damages because such an approach might prevent the above 'just' result being achieved - "It might be thought that in an action for loss of services the damages should be measured by the cost of replacing the services rather than by the wages paid to the injured servant.", i.e. damages should be measured by the damage consequential on the loss of services not by the value of the services lost. But the Commission seems to think that such an approach is "'more appealing to the literal-minded than to those with a teleological concern with purposes and means to achieve desirable ends.'".[61] In other words, like Windeyer J and Dixon C.J. in Scott's case the Commission considers that so long as the action per quod is able to fulfill a modern function by the type of relied it can offer, it matters not that the reasons upon which the action was originally founded are no longer valid, nor if that relief given does not result directly from the nature of the action.

One of the rare English cases involving the per quod action in the twentieth century, which supported the view that wages

could be some evidence of the value of the services lost, but were not recoverable as a distinct head of damage.[62] But it is the writer's opinion that the courts in England need not depart from the approach of Richmond J, which appears to be the strictly correct one, if they were to treat wages, even although voluntarily paid as a reasonable attempt to mitigate loss, and thereby consequential on the loss of services. It seems hard to imagine a situation where it would not be 'reasonable' for an employer to pay wages while the employee is off work. If the Commission had considered this line of approach, it would not have needed to defend itself against the view of Lord Sumner[63] on the question of measuring the damages by wages paid with the statement that, "It smacks of legal pedantry to argue that the loss borne by the employer flows, not from tort, but from the employer's own generosity or contract and that the tort is not the causa causans but only the causa sine qua non of the loss"[64] (i.e. that wages paid for no return result not from the loss of service but from the voluntary act of the employer or from a pre-existing term in the contract of employment to pay wages).

6. Proposal for Reform

Whichever way the Law Commission thought the matter of damages should be approached, because it held the view that the House of Lords would probably follow Hambrook's case as regards the scope of the action, it considered the ambit of the action would be too narrowly circumscribed to serve any useful purpose as far as rectifying the unjust situation described above. The Commission, therefore, recommended the abolition of the action per quod, but also recommended the consideration of a remedy to compensate the employer for the wages paid

which subsidise the tortfeasor's liability. Without going into all the types of remedies canvassed, the Commission's provisional recommendation was that an employer should be allowed indirectly to recover from the tortfeasor by means of the employee's action, damages which include inter alia wages paid by the employer while the employee is incapacitated[65]. This proposal differed from the Law Reform Committee's recommendation that a direct action against the Tortfeasor be given to the employer.[66] Lack of information and unanimity amongst interested parties as to the type of remedy which should replace the per quod action meant that proposals were only tentative. Six years after the Working Paper of the Law Commission was published there has been no further moves to abolish the action, nor to the writer's knowledge, have there been any indications that legislation is imminent.

B. The Position in New Zealand

It is quite clear after the amendment[67] to the Accident Compensation Act 1972 that the cause of action per quod servitium amisit is no longer available to an employer in New Zealand. One might, perhaps, wonder whether the legislature has been too hasty in heeding the call of the Court of Appeal[68] to abolish theaction. It is true that, because an employee under the earners' scheme in the Act no longer has a direct action against the tortfeasor who negligently injured him, the situation described by the LawCommission (which also applied in New Zealand) whereby the tortfeasor's liability was reduced at the expense of the employer,[69] no longer arises.

Now, even if one accepts that it is desirable that an employer, under the Act should pay the wages of the first

week of his employee's incapacity,[70] excepting that fact, there will still be situations where an employer suffers loss through losing the services of his employee where it might be considered proper that the employer should be compensated for such loss. Even if one regards the notion that an employer has a quasi-proprietary interest in the services of his employee is anomalous, that does not prevent one from saying that an employer should be compensated for the damage caused to him through the loss of those services. As the Court of Appeal pointed out, an employer of a reasonably large work force suffers only minimal loss by one employee being incapacitated, because the other employees "take up the slack."[71] But what of the small family business, or the small employer, who loses an employee's services which are vital to the economic running of the business, and are not easily replaceable; for instance, highly developed technical skills? In the case of a large and wealthy employer, substantial damage may, nevertheless be incurred; but for the small family business even the temporary loss of that employee's services may have a disastrous effect on the viability of the business. It would, perhaps, be anomalous if an employer were still able to sue the tortfeasor because his negligence indirectly caused damage to the employer, while the employee who is directly injured has, now, no action against the tortfeasor. Yet, for the same reasons why an injured employee is compensated under the Accident Compensation Act in the manner provided, i.e. that it is in the interests of society that the community as a whole should bear that responsibility, ought not the employer also be compensated in the same way? It may be possible for the

larger employer to insure against the type of loss we are discussing but for the smaller employer it is often just not feasible.

In conclusion, it can be said that while under our legislation theemployee has been well taken care of, it has neglected to provide for an employer what might be regarded as a desirable remedy; yet by abolishing the action per quod servitium amisit, has closed the door on one means of providing such a remedy. It may be that Parliament should give consideration to providing for the situation where an employer suffers economic loss through the loss of services of his employee.

CAMERON, A.M. The action per quod servitium amisit.

## FOOTNOTES

1. [1973] 2 N.Z.L.R. 238
2. Ibid
3. [1956] 2 Q.B. 641
4. Ante
5. Commissioner for Railways (N.S.W.) v Scott (1959) 102 C.L.R. 392
6. Guest, 34 C.B. Rev. [1956] 1078; Jones, (1958) 74 L.Q.R. 39
7. In the Report of the Law Reform Committee (1963; Cmd 2017)
8. The Law Commission, Working Paper No. 19
9. Supra
10. In Attorney-General for N.S.W. v Perpetual Trustee Co.(Ltd) (1951) 85 C.L.R. 237, at 245
11. "Parties in an Action" (1870), p.326
12. At p.246, supra
13. "A History of English Law", 2nd ed., vol. VIII
14. Ibid.
15. Y.B. 19 H.VI pl 94 (fo.45)
16. Supra
17. [1956] 2 Q.B. 641, at 649 et. seq.
18. See post, Part III, C.
19. [1956] 2 Q.B. 641, at 660
20. (1959) 102 C.L.R. 392, at 417; see also per Menzies J. at 493
21. Idem.
22. Supra
23. At p.450 supra
24. [1973] 2 N.Z.L.R. 238, at 256
25. See post, Part III, B.
26. [1956] 2 Q.B. 641, at 662-663
27. In Scott's case, ante, at 446

28. Ibid, per Menzies J at 433, "Furthermore ...."

29. (1795) 1 Esp. 385; 170 E.R. 393

30. [1955] A.C. 457; [1955] 1 All E.R. 846

31. (1959) 102 C.L.R. 392, at 443

32. Ch. 14

33. Per Kitto J. in Scott's case supra at p.416

34. At p.417 of "Commentaries", ante

35. [1956] 2 Q.B. 641, at 663; see ante, as to the notion of 'property' in the servant.

36. See ante.

37. In Scott's case, at p.417

38. Idem.

39. Ante, p.4 (in the text)

40. Scott's case, at 432

41. See ante, p. 6 (in the text) "... and he lists four matters ...."

42. At p.443 in Scott's case, supra

43. Idem.

44. Supra

45. (1787) 2 Term Rep. 166

46. (1959) 102 C.L.R., at 444

47. Ibid, 445

48. Ibid, 412

49. In Small v Nairne (1849) 3 Q.B. 840, 844

50. (1959) 102 C.L.R. 392, at 413

51. Ibid, 445

52. (1840) 11 Ad. 8 El. 301

53. [1956] 2 Q.B. 641, at 644, "the apprentice lived in as one of the family, as many did in those days. Perhaps he slept under the counter."

54. (1841) 3 Man & E.88; 133 E.R. 1069.

55. Supra

56. At 426; see also per Kitto J at 415, Menzies J at 436

57. Ante., n.30

58. [1955] A.C. 457, 486

59. Supra

60. (1944) 68 C.L.R. 227

61. Ibid, per Latham C.J., Rich, Starke, McTiernan JJ; Williams J. dissenting.

62. (1952) 85 C.L.R. 237

63. But Dixon J, had the matter been res integra would have held the action to be available to the Crown.

64. See Turner P. in Attorney-General v Wilson and Horton supra.

65. [1955] A.C. 457, 484

66. Ibid, 489

67. Ibid, 490

68. Dixon J. in Attorney-General for New South Wales v Perpetual Trustee Co. Ltd. (1952) 85 C.L.R. 237,249 is referred to in support.

69. Vol., Book 1 Ch.14

70. Ibid, 410

71. Supra

72. [1955] A.C. 457, 489

73. (1959) 102 C.L.R. 392, 464

74. Ibid., 429

75. [1956] 1 Q.B. 192, 195-196.

76. In Hambrook's case, Lord Goddard C.J. at first instance reached the same conclusion as the Court of Appeal, but on the same ground upon which the Privy Council decided the Perpetual Trustee case

77. As did Menzies J. in Scott's case, at p.437

78. [1973] 2 N.Z.L.R. 238

79. Ibid. per Turner P., at 248

80 Comprising Turner P., Richmond and Speight J.J.

81. See esp. Speight J ante, at 261

82. E.g. Cattle v Stockton Waterworks (1875) L.R. 10 Q.B. 453

83. [1944] 68 C.L.R. 227

84. Ibid., 244

85. Lord Denning M.R., Lawton J, (Edmund-Davies L.J. dissenting).

86. Spartan Steel and Alloys v Martin & Co. (Contractors) Ltd. [1973] 1 Q.B. 27; [1972] 3 All E.R. 557

87. S.C.M. (United Kingdom) Ltd. v W.J. Whittal & Son Ltd. [1970] 3 All E.R. 245

88. Ibid.

89. Ibid, 561

90. [1970] 3 All E.R. 245, at 250

91. [1973] 3 All E.R. 557, at 561

92. Based on the decision in Donoghue v Stevenson [1932] A.C. 562

93. Enunciated in Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co.Ltd. (The Wagon Mound)(No. 1) [1961] 3 All E.R. 404

94. See also per Lawton J in Spartan Steel, supra at p.573

95. [1970] 3 All E.R. 345

96. Ibid, 251

97. Idem.

98. See ante Part II, B

99. [1956] 2 Q.B. 641, 667

1. See post, Part III, D,3. "The correct approach."

2. [1973] 2 N.Z.L.R. 238, at 261

2a. Ante, note 1.

3. Which Denning L.J. alleged (wrongly) the Court in Hambrook's case had done; see ante.

4. [1956] 2 Q.B. 641, 660-661

5. Ante, Part II, A

6. Ibid.

7. [1917] A.C. 38 (A.L.), at 60

8. One of the grounds on which the claim failed in the case was held to be the principle of Baker v Bolton (1808) 1 Camp. 493, thatin a civil court the death of a human being cannot be complained of as a civil injury. For a criticism of the decision see the article cited post note 43 by Campbell.

9. Which it did, in the Accident Compensation Amendment Act, 1973 No. 112. s.5.

10. Supra, 248

11. See ante, note 7.

12. [1973] 2 N.Z.L.R. 238, 249

13. Scott's case, ante, 439

14. Idem.

15. Supra

16. E.g. in Scott's case per Windeyer J at pp. 461-462

17. [1971] A.C. 38

18. Ibid, 61

19. (1944) 68 C.L.R. 227, 239

20. In Attorney-General v Valle-Jones [1935] 2 K.B. 209. This case has not been regarded by the courts as authority for the limit of the scope of the action per quod, because it did not expressly consider the question; it was assumed by both parties that the action lay at the suit of the Crown.

21. [1973] 2 N.Z.L.R. 238, 254 ll. 46 - 51 per Richmond J.

22. [1956] 2 Q.B. 641, 672-673; also per Denning L.J. at 667

23. [1973] 2 N.Z.L.R. 238, 255 and also Scott's case ante at pp 408-409

24. [1932] N.Z.L.R. 802

25. Ibid, 811

26. [1973] 2 N.Z.L.R. 238, 256.

27. Ibid., 256

28. Idem

29. But this is doubtful. While in contract damages for inconvenience may be recovered, in tort it is not the case. Under the action per quod there appears to be no authority for recovery of such damages.

30. Richmond J. seems to leave this possibility open. In his judgment he does not expressly disapprove of this type of approach, and implicitly appears to agree with it; see post, note. 34

31. Ibid, 258-259

32. Ibid., 258

33. Ibid., 254 17 et seq., "Indeed, I have been unable to find support for the proposition that the voluntary payment of wages to an injured employee can enable the recovery of those wages as a separate head of damage." ibid, 259, 1134-49.

34. Ibid., 259 1150-52.

35. See the third approach, ante

36. Ibid., 260

37. Ibid., 250

38. Idem.

39. But note that Richmond J. at 258 1132-34 considered that the Crown could not recover under this head because it was not a natural person and therefore incapable of suffering inconvenience; see also ante, note 29.

40. Idem.

41. Richmond J. only, adverts to this as a possible ground, and then by implication, see ante, notes 30, 34.

42. Per Lord Sumner in Admiralty Commissioners v. S.S.Amerika [1917] A.C. 38, 55

43. (1968) U.Q.L.J. 1

44. Ibid., 19

45. [1959] 102 C.L.R. 392, 440; see also comments of Dixon C.J. at 403

46. But, Fullagar J. at 408, ibid, explains that recovery of such payments does not depend on the relation of master and servant and the action per quod. See also Richmond J. [1973] 2 N.Z.L.R. 238, 257

47. Working Paper No. 19 (1968)

48. See ante, Part III, D, "2. The four approaches" and "3. The correct approach"

49. 1963, Cmnd 2017

50. Supra

51. Ibid., Appendix, para 3.

52. As did the Law Reform Committee.

53. Working Paper No. 19, para 6.

54. I.e. "judicial surgery" (per Speight J. [1973] 2 N.Z.L.R. 238, 260

55. Ante

56. Working Paper No. 19, para 6.

57. See British Transport Commission v Gourley [1956] A.C. 185 (H.L.)

58. Browning v War Office [1963] 1 Q.B. 75 (C.A.); Parry v Cleaver [1968] 1 Q.B. 195 (C.A.)

59. Ante

60. Working Paper No. 19, para . 11

61. Idem., quoting from Fleming, "The Law of Torts"

62. [1956] 2 Q.B. 641, per Denning L.J. at 667, and Parker L.J. at 672.

63. In Admiralty Commissioners v S.S. Amerika, supra

64. Working Paper No. 19, para 13.

65. Ibid. para 47

66. Multiplicity of actions and detriment to employer/ employee relations

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