whether a company has profits available for distribution must be answered according to the circumstances of each particular case, the nature of the company and the evidence of competent witnesses,[17] and in considering whether there has been a loss of capital it is immaterial whether that loss is an actual, ascertained and realised loss of capital, or a loss by estimated and valued depreciation.[18]

The clearest illustration of the principle of distribution of casual profit is *Cross* v. *Imperial Continental Gas Association*[19] where it was held that compensation payable to the defendant association for the compulsory acquisition of its gas undertakings in various German towns, resulting in the realization by the Association of a very considerable profit upon the book value of these undertakings, could be distributed as realisable profit in its capital assets by way of dividend.

Although the basic principle that dividends cannot be paid out of capital seems simple, its application may raise questions of the utmost difficulty. Every transaction which may infringe the principle must be judged on its special facts. Halsbury, L.C., said in *Dovey* v. *Corey* that courts move cautiously among concrete cases because "many matters will have to be considered by men of business which are not altogether familiar to a court of law".[20] And he quoted Lindley, L.J.'s observation that Parliament had left to men of business "what is to be put into a capital account, what into an income account".[21] These are questions for the shareholder and directors to decide subject to any restrictions or directions contained in the articles or by-laws of the company. In the *A.O.E. Case* the court examined the true effect of the agreement in dispute and found it *ultra vires*, despite its finding that the intended effect of the agreement was quite a businesslike and honourable one.

There have been many conflicting views as to what constitutes capital, and as to the correct distinction between "fixed" and "circulating" capital for the purposes of determining whether a dividend has been declared so as not to offend s.158 of the Companies Act.[22] The A.O.E. case has illustrated that, while the court will give due regard to the opinions of men of business as to the correct method of keeping accounts and as to what shall constitute profit for distribution, it will always be ready to attack a distribution if, in the court's opinion, the moneys distributed cannot fairly be classed as distributable profit.

Modern accountancy and company administration are so complicated that any attempt by the courts to define in a narrow way the terms "profit", "capital" and "dividend" for the purpose of this rule could easily cause widespread confusion. The interests of creditors and debenture holders of a limited company are to a substantial degree protected, it is submitted, by the power of the court to go behind company balance sheets and statements, despite the evidence of company officers as to how the company has treated the moneys or assets in dispute. The court will always give due consideration to the views of business men but will not necessarily accept them as final and conclusive.

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THE ACTION *PER QUOD SERVITIUM AMISIT* *COMMISSIONER FOR RAILWAYS (N.S.W.)* v. *SCOTT*

In the development of the tort of negligence our law seems to have set

[17] *Bond* v. *Barrow Haematite Steel Co.* (1902) 1 Ch. 253.
[18] *Dovey* v. *Corey* (1901) A.C. 471.
[19] (1923) 2 Ch. 553. See also Byrne, J., in *Foster* v. *New Trinidad Lake Asphalt Co.* (1901) 1 Ch. 208.
[20] (1901) A.C. 477 at 486-87.
[21] *Lee* v. *Neuchatel Lake Asphalt Co.* (1889) 41 Ch. D. 1, 21.
[22] (1936), No. 33 of 1936.

its face against the vindication of purely economic interests.[1] But the action *per quod servitium amisit*, lying outside the scope of the devices, such as the concepts of "remoteness" and "duty", which limit the scope of the tort of negligence, has escaped the impact of this policy. The result is that the interest of the master in a master and servant relationship is given a measure of protection denied to most other relational interests.[2] The action has not, however, escaped modern censure by English judges. Thus in *Admiralty Commissioners* v. *S.S. Amerika*[3] Lord Sumner, in the House of Lords, said:

> Indeed what is anomalous about the action *per quod servitium amisit* is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status.[4]

Viscount Simonds expressed the same thought in the Privy Council in *Attorney-General for New South Wales* v. *Perpetual Trustee Co. Ltd. and Ors.* :

> It would not, in their Lordships' view, be in accordance with modern notions or with the realities of human relationships today to extend the action to the loss of service of one who, if he can be called a servant at all, is the holder of an office which has for centuries been regarded as a public office.[5]

The person referred to as "the holder of an office" was a policeman and the quotation forms part of a joint judgment upholding the High Court's decision[6] that the action does not lie at the suit of the Crown for recovery in respect of the loss of the services of a policeman.

Nevertheless, as *Commissioner for Railways (N.S.W.)* v. *Scott*[6a] further shows, the High Court has shown some readiness to preserve the action. In the *Policeman's Case*[7] of the majority (Dixon, J., as he then was, McTiernan, Webb, Fullagar, and Kitto, JJ.) of the High Court, all but Fullagar, J. based their judgments on the consideration that they were bound by the decision in *The Commonwealth* v. *Quince*,[8] and not on the broad ground of the anomalous nature of the action. *Quince's Case* involved a majority decision to the effect that the action *per quod servitium amisit* does not lie at the suit of the Crown in respect of the loss of services of a member of the armed forces since its scope is limited to "persons serving under a contract of service or in fact rendering services such as would be given under such a contract",[9] and the relationship of a member of the armed forces to the Crown is not defined by such a contract. Latham, C.J. and Williams, J. delivered dissenting judgments in *Quince's Case*. Williams, J. delivered the sole dissenting judgment in the *Policeman's Case*. Dixon, J., however, would also have decided in favour of the plaintiff had he not considered himself bound to apply *Quince's Case*.

Only Fullagar, J., took the view that even apart from *Quince's Case* the defendant should have gained the verdict. After stating the general rule that the mere fact that an injury to A prevents B from gaining a benefit from A does not invest B with a right of action against the wrongdoer, he said:

> Because the proprietary idea on which the exception to the general rule was founded has long since ceased to have any life or reality, and because the exception is intrinsically illogical and unreasonable, my own opinion is that claims such as that made in the present case ought not to be recognised at all today.

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[1] See e.g. *Revesz* v. *The Commonwealth* (1951) 51 S.R. (N.S.W.) 63; *Candler* v. *Crane, Christmas & Co.* (1951) 2 K.B. 164.

[2] Apart from those which a husband has in the *consortium* of his wife and a parent in the services of his child.

[3] (1917) A.C. 38.

[4] *Id.* at 60.

[5] (1955) A.C. 457; 92 C.L.R. 113, (P.C.), (hereinafter referred to as the *Policeman's Case*).

[6] (1951) 85 C.L.R. 237.

[6a] (1959) 33 A.L.J.R. 126.

[7] *Ibid.*

[8] (1944) 68 C.L.R. 227.

[9] *Id.* at 241, *per* Rich, J.

His Honour would have been prepared to abolish the action altogether unless he could have been persuaded that such a view was "too iconoclastic".[10] Up to and including the decision in the *Policeman's Case*, therefore, the trend of the Australian cases was toward a restriction of the scope of the action within the bounds of a strict common law master and servant relationship, no extension to relationships analogous thereto being permitted. But apart from the strong stand taken by Fullagar, J., more drastic limitations do not seem to have been contemplated by the High Court.

In 1956 the case of *Inland Revenue Commissioners* v. *Hambrook*[11] came before the Court of Appeal (Denning, Birkett, and Parker, L.JJ.). The Commissioners, on behalf of the Crown, had brought an action *per quod servitium amisit* for the recovery of the payment of sick pay made to a permanent public servant while he was off work as a result of injuries negligently inflicted by the defendant. In the Divisional Court[12] Lord Goddard, C.J. found for the defendant on grounds similar to those underlying the decisions in the *Policeman's Case* and *Quince's Case*. His decision was unanimously upheld by the Court of Appeal but on different grounds. It was agreed that the position of a permanent public servant could not be distinguished from that of a member of the armed forces nor of a policeman and the plaintiff would fail on that ground alone. Denning, L.J., however, in a judgment substantially concurred in by the other two members of the Court, sought to reduce the scope of the action to the point of extinction in its application to present day conditions. Expressing his opinion that such an action "treats a servant as a chattel belonging to his master",[13] and pointing out that it is anomalous since it is based on a rule which provides protection not afforded in respect of negligent interference with other types of relational interests, he went on to hold that the action *per quod servitium amisit* is limited to recovery for the loss of services of a "menial" (i.e. one who "lives in" as a member of the family) servant. The Crown could not recover, therefore, for the loss of the services of a permanent public servant. His Lordship[14] saw historical ground for so holding in the view of Blackstone that in the eighteenth century the scope of the action was limited to the field of its origin, i.e. the family and members of the household of the plaintiff, by the *dictum* of Eyre, C.J. in *Taylor* v. *Nerri*[15] that the holdings had not "gone further than a menial servant", and also by a seduction case[16] in which the plaintiff's daughter was described in the declaration as a "menial servant".[17]

If the view be accepted that the action *per quod servitium amisit* is anomalous, both in the intrinsic sense as an exception to the general denial of protection to relational interests against negligent interference and in the extrinsic sense of incongruity with modern notions of the nature of the relationship of master and servant,[18] then this would be a most effective method of curtailing the action short of legislative action. If the action is thus limited

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[10] (1951) 85 C.L.R. 237, 275-76, 288.
[11] (1956) 2 Q.B. 641.
[12] *Ibid.*
[13] *Id.* at 660.
[14] *Id.* at 663.
[15] (1795) 1 Esp. 386.
[16] *Bennett* v. *Allcott* (1787) 2 T.R. 166.
[17] Denning, L.J. went on to dispose of the cases of *A.-G.* v. *Valle-Jones* (1935) 2 K.B. 209, in which the Crown succeeded in a claim for the loss of services of an airman, and of *Mankin* v. *Scala Theodrome Co.* (1947) K.B. 257, in which a successful action was maintained for the loss of services of a music hall artist. The former (he thought), must be regarded as having been wrongly decided in view of the decision in the *Policeman's Case*, and the latter could scarcely stand against the views expressed in the House of Lords in *The Amerika*. In *Martinez* v. *Gerber* (1841) 3 Man. & G. 88, the plaintiff recovered for loss arising out of injury to his "servant and traveller". This case was described by their Lordships in the Privy Council in the *Policeman's Case* as probably representing "some advance on the limit suggested by Eyre, C.J." Denning, L.J., however, preferred to regard the case as involving a servant who "lived in" with his master. The report of the case is, it is submitted, too scanty to be relied upon with any conviction one way or the other.
[18] The action for loss of *consortium* is amenable to similar argument in this regard and the House of Lords has recently refused to extend that action to give a wife a right reciprocal with that of her husband: *Best* v. *Samuel Fox & Co. Ltd.* (1951) A.C. 716.

to claims for the loss of the services of "menial" servants "it does not therefore lie at the instance of governments, limited companies or other employers who keep no household."[19]

Yet as sometimes happens when a judgment proceeds on arguments of expediency or policy, arguments pointing in the opposite direction may also become persuasive.[20] The decision of the Court of Appeal, resting as it does on slender and, with respect, dubious authority, proved to be particularly vulnerable at the hands of a court not bound by it and the majority of whom refused to accept its basic assumption. Provisions for sick pay and the payment of medical expenses by the employer where an employee is injured in the course of his employment are commonly made in statutes governing employer-employee relations, and are contained in most awards. Apart from the action *per quod servitium amisit* the employer has no general law means of recovering the sums paid in pursuance of his obligation under the relevant statute or award and the action has therefore assumed an importance from an economic point of view, which it perhaps did not have in some earlier periods of its history.[21] In the case of the *Commissioner for Railways* v. *Scott* the High Court has recognised the employer's claim and refused to adopt the course taken by the Court of Appeal. It is submitted with respect that the historical analysis of the action undertaken by Dixon, C.J. (who, however, finally preferred to follow the Court of Appeal) and Windeyer, J., effectively destroys the argument that the scope of the action *per quod servitium amisit* was restricted during the eighteenth century to "menial" or domestic servants. The passage from Blackstone quoted by Denning, L.J. in *Hambrook's Case* appears to have been misinterpreted by his Lordship. Furthermore the *dictum* of Eyre, C.J. in *Taylor* v. *Nerri* is reported by one whose accuracy appears to be open to doubt[22] while the declaration in *Bennett* v. *Allcott*[23] "seems to be unique in using the words menial servant".[24]

Scott's Case arose out of injury to an engine-driver in the employment of the New South Wales Government Railways. In attempting to avoid collision with the defendant, who had by his negligence given rise to the risk situation, the engine driver had sustained injury which resulted in his being off work for a period during which he was entitled, under s.100B of the Government Railways Act, 1912-1955, to payment in accordance with his classification of employment and length of service. Section 100B also makes it obligatory on the Commissioner to pay for the cost of medical treatment. The Commissioner now sought to recover the money paid under this section in an action *per quod servitium amisit*. The Supreme Court of New South Wales (Street, C.J. and Herron, J.; Owen, J. *dissentiente*) rejected the claim of the Commissioner.[25] Street, C.J.[26] relied upon a passage from the judgment of the Privy Council in the *Policeman's Case*:[27]

> Their Lordships can now express their final opinion upon the case. They repeat that in their view there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve.

His Honour found support in *Hambrook's Case* for his contention that the words "domestic relation" define the limits of the right to recovery in an action *per quod servitium amisit*. It is submitted with great respect that this view

[19] (1956) 2 Q.B. 641, 666, *per* Denning, L.J.
[20] *Cf.* e.g. the judgments of Denning, L.J. in *Hambrook's Case* and Fullagar, J. in the *Policeman's Case* with those of Dixon, C.J. and Windeyer, J. in *Scott's Case*.
[21] See (1959) 33 A.L.J.R. 126, 128-29, *per* Dixon, C.J.
[22] *Id.* at 133, *per* Kitto, J.
[23] (1787) 2 T.R. 166.
[24] (1959) 33 A.L.J.R. 126, 146, *per* Windeyer, J.
[25] (1958) 76 W.N. (N.S.W.) 242.
[26] *Id.* at 244.
[27] (1955) A.C. 457, 489.

does not accord with the tenor of the judgment delivered by the Privy Council, and that the phrase "domestic relation" was used broadly to contrast the "public relation" of a policeman to the Crown or State with the relation in general of a servant to his master. Owen, J., dissenting, so interpreted the Privy Council judgment. The High Court, on appeal, by a majority reversed the decision of the Supreme Court. The majority adopted Owen, J.'s interpretation of the Privy Council's judgment in the *Policeman's Case*. Dixon, C.J., who dissented, also said that he would have decided with the majority had he not thought it better, in the interests of uniformity, to follow the precedent set by the Court of Appeal. The result of *Scott's Case* is that an employee of a statutory public utility is in a position different from that of a policeman, a member of the armed forces or a public servant employed in a department of State (assuming *Hambrook's Case* is to be accepted as an authority for this as it appears to have been by Kitto, J.[28] and Menzies, J.[29]). He is not a "public officer" in the sense of that term used by their Lordships in the Privy Council.[30]

Of the judgments of the minority (Dixon, C.J., McTiernan, and Fullagar, JJ.) those of Dixon, C.J. and Fullagar, J. bear a close resemblance to their respective judgments in the *Policeman's Case*. The considerations which would have moved the Chief Justice to prefer (had he felt free to do so) his own view as to the scope of the action *per quod servitium amisit* to that of the Court of Appeal, are apparent from his previous comment on *Quince's Case* made in the course of his judgment in the *Policeman's Case*.[31] "It cannot be said that any compelling consideration or important authority was overlooked or that the decision conflicts with well-established principle or fails to go with a definite stream of authority." Fullagar, J. also adhered to the view he expressed in the *Policeman's Case*, and he was prepared to regard the law as settled by *Hambrook's Case* as an alternative to complete rejection of the action.

It now appears that, subject only to the disability imposed on the Crown by *Quince's Case*, the *Policeman's Case* and *Hambrook's Case*, the action *per quod servitium amisit* will lie in Australia wherever the plaintiff can show that he stands in the relationship of master and servant to a person who has suffered personal injuries at the hands of the defendant.

So far as the report discloses, the plaintiff in *Scott's Case* claimed only in respect of sick pay and medical expenses incurred in healing the servant, and since his right to make such a claim in an action *per quod servitium amisit* (if that action lay at all) was not disputed, the question of what further damages are recoverable in the action did not arise for actual decision. One of the reasons given by Fullagar, J. in both the *Policeman's Case*[32] and in *Scott's Case*[33] for seeking to confine the action as far as possible, was the difficulty in finding a yardstick against which to measure the loss to the plaintiff. In both cases he rejected the contention that the pecuniary loss suffered by the plaintiff can be measured by the amount paid in wages to the injured servant during incapacity. Taylor, J. would have been inclined to agree with Fullagar, J. had a decision on the question been necessary.[34] Windeyer, J., however, took the broad view[35] that the master is entitled to recover any moneys which he becomes legally obliged to pay as a result of the injury to his servant. Whatever the true measure of damages may prove to be it seems certain that sick pay will be recoverable. The "surplus value" accruing to the master from the services of his servant after payment of wages is the real benefit he receives from those services. If he is obliged to pay

[28] (1959) 33 A.L.J.R. 126, 135-36.
[29] *Id.* at 143.
[30] (1955) A.C. 457.
[31] (1951) 85 C.L.R. 237, 244.
[32] *Id.* at 290.
[33] (1959) 33 A.L.J.R. 126, 131.
[34] *Id.* at 139.
[35] *Id.* at 154.

wages and receives no benefit at all it would seem unreasonable to deny him recovery of the wages paid on the ground that they represent less than the true measure of his loss.

The practical problem, of ensuring that the resuscitation of the action does not give rise to a position where the wrongdoer will have to meet liability twice over for a part of the loss arising in personal injury situations, remains for the consideration of the courts. If wages and medical expenses paid by the employer to or on behalf of his injured employee are properly to be taken into consideration, in mitigation of the damages payable by the wrongdoer to the servant in the servant's action, the problem will not arise. But the law in this area is still unsettled.[36] So far as the action makes possible recovery for loss which would otherwise go uncompensated, it is limited in respects favourable to the wrongdoer. The plaintiff must be a "master" in the strict common law sense of that term. No recovery may be had by the Crown where the injured party is a "public officer". Fiscal policy would appear to demand a restoration of the Crown to a position of equality with private employers. There is room, moreover, for an action more broadly based. Where a person other than a master has become obliged to pay wages or medical expenses to or on behalf of the injured employee there appears to be no reason on the assumed principle why the defendant should escape liability.

No doubt the preoccupation of the High Court with the history of the action *per quod servitium amisit* was essential in order to restore the action to its full potency. But it is in the very alive and contemporary issue concerning who is entitled to what damages in personal injury situations that the practical significance of the decision in *Scott's Case* will emerge.

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INVESTMENT TRUST MANAGERS AND MANAGEMENT OF CORPORATIONS

AUSTRALIAN FIXED TRUSTS PTY. LTD. AND OTHERS v. *CLYDE INDUSTRIES LTD. AND OTHERS*
UNION INSURANCE SOCIETY OF CANTON LTD. v. *CLYDE INDUSTRIES LTD. AND OTHERS*

The defendant in both these cases,[1] which were heard together, was Clyde Industries Ltd., a public company carrying on a large engineering business. The plaintiff companies were involved in the cases by virtue of their positions as "managers" under certain investment schemes whereby shares in the defendant company were held by "custodian trustees" in trust for their respective managers. The issue between the parties arose from an attempt by the directors to alter the Articles of Association of the defendant company in such a way as to restrict the voting rights attached to shares held by custodian trustees under this type of scheme, and the question before the court was whether or not a special resolution incorporating the alteration was a valid resolution of the company.

The investment schemes which were involved in this case were of the type known as unit trusts. Under such a scheme a "manager" purchases blocks of shares in a number of different concerns and vests them in "custodian

[36] In the recent case of *Paff* v. *Speed* (as yet unreported) before the N.S.W. Supreme Court, Dovey, J. ruled that evidence was admissible that the plaintiff was entitled to a total disability pension as a result of injuries inflicted by the defendant. The ruling was not specifically appealed against, and the Full Court, while it accepted the ruling for the purpose of the appeal, confined itself to the question whether a new trial should have been granted on all the evidence. The High Court has granted special leave to appeal against the decision of the Full Court and it may be that the High Court will review the whole position of mitigation of damages by collateral payment.

[1] (1959) S.R. (N.S.W.) 33.