MASTER AND SERVANT—Do the special rules of contributory negligence and assumption of the risk, applicable to agricultural employer-employee relationships, modify the duty of care owed by the employer to his employee or are they defenses to the question of liability once breach of the duty has been established?

Plaintiff, while attempting to dislodge a stuck silo unloader by rocking and lifting the machine with the power on and the various parts moving, was seriously injured when he apparently slipped, his feet becoming entangled in the exposed, unguarded, rotating augers. The silo unloader had a history of getting stuck and this fact was known by both the employer and the employee. Plaintiff sued his employer, alleging negligence in failing to provide a safe place to work and safe machinery with which to perform the work. Plaintiff joined as co-defendants the distributor of the silo unloader and the successor in interest to the manufacturer on the theories of negligence and breach of implied warranty. The jury returned a verdict against all the defendants. *Held,* reversed to the employer. There was no evidence of negligence on the part of the employer to support the judgment against him. *Wagner v. Larson,* ..... Iowa ....., 136 N.W.2d 312 (1965).

Generally at common law[1] it may be said that when a master and servant relationship exists, the master will be liable for those injuries sustained by the servant while in the course of his employment, due to the master's negligence, except as modified in the appropriate case by the doctrines of contributory negligence, assumption of the risk, and of fellow servant.[2] It is elemental that in every case there can be no liability unless the master has been negligent, *i.e.* has breached some duty owed by him to his servant.[3] This duty arises out of the relationship of master and servant by the operation of law and not out of any contractual relationship between the parties.[4]

The duty of the master is the general duty of due care to protect his servant from injury. While the Iowa court seems to prefer the use of the term reasonable care,[5] ordinary care is also a term widely used to describe that degree of diligence required of the master in carrying out his duty. The general rules of negligence govern the question of what is reasonable care. There should be regard for the circumstances of the employment and, of

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[1] IOWA CODE § 85.1 (1966), now permits the voluntary election of previously exempt farm employers to come under the Workmen's Compensation Act. However, it is expected that many farmers will not elect to purchase workmen's compensation insurance leaving the injured employee with his common law action in negligence for recovery against his employer.

[2] Ring v. Kruse, 158 Neb. 1, 62 N.W.2d 279 (1954); see generally 56 C.J.S. *Master and Servant* § 171 (1948).

[3] Gordon v. Clotsworthy, 127 Colo. 377, 257 P.2d 410 (1953); see generally 35 AM. JUR. *Master and Servant* § 121 (1941); 56 C.J.S. *Master and Servant* § 171 (1948).

[4] Lakube v. Cohen, 304 Mass. 156, 23 N.E.2d 144 (1939); see generally 56 C.J.S. *Master and Servant* § 171 (1948).

[5] Wagner v. Larson, 136 N.W.2d 312 (Iowa 1965); Calkins v. Sandven, 256 Iowa 682, 129 N.W.2d 1 (1964); Mooney v. Nagal, 251 Iowa 1052, 103 N.W.2d 76 (1960); Von Tersch v. Ahrendsen, 251 Iowa 115, 99 N.W.2d 287 (1959); *In re* Estate of Howorth, 250 Iowa 752, 94 N.W.2d 779 (1959); Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959); Nickolas v. Kirner, 247 Iowa 231, 73 N.W.2d 7 (1955); O'Reagan v. Daniels, 241 Iowa 1199, 44 N.W.2d 666 (1950).

course, the standard is that of what the reasonable prudent man would have done under like circumstances.[6]

The duty the master owes to his servant which applies to farmer-farmhand relationships as well as any other master-servant relationship is a duty to furnish and maintain a reasonably safe place to work,[7] and to furnish and maintain reasonably safe machinery, tools, and appliances with which to perform the work.[8] However, it must be kept in mind that the master is not an insurer of the servant's safety; the duty is that of reasonable care in furnishing the place and the instrumentalities, not of furnishing absolutely safe places and instrumentalities for work.[9] The Iowa court has stated that this duty of the master is established both by statute[10] and by judicial pronouncement.[11] The statute has been expressly held to apply to farming and agricultural pursuits.[12]

No discussion of the Iowa law of master and servant as it applies to farm accidents can be complete without a consideration of the special rules which apply to the two common law defenses, those of contributory negligence and assumption of the risk. In a common law action for negligence, contributory negligence is considered a complete defense; however, this defense as it applies to the master-servant relationship is restricted by statute in Iowa.[13] As stated in *Frederick v. Goff*[14] "Since this is an action by an

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[6] Lownes v. Furman, 161 Neb. 57, 71 N.W.2d 661 (1955); see generally FLEMING, TORTS 117-20 (2d ed. 1960).

[7] Calkins v. Sandven, 256 Iowa 682, 129 N.W.2d 1 (1964); Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959); O'Reagan v. Daniels, 241 Iowa 1199, 44 N.W.2d 666 (1950); Rehard v. Miles, 227 Iowa 1290, 290 N.W. 702 (1940).

[8] Calkins v. Sandven, *supra* note 7; O'Reagan v. Daniels, *supra* note 7; Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942); Lang v. Hedrick, 229 Iowa 766, 295 N.W. 107 (1940); Bell v. Brown, 214 Iowa 370, 239 N.W. 785 (1931); Oestereich v. Leslie, 212 Iowa 105, 234 N.W. 229 (1931). Other particular acts or omissions of the employer on which liability has been predicated include: (1) failure to have guards, shields, and other safety devices, (2) failure to inspect and repair, (3) failure to warn or instruct, (4) master ordering a particular act leading to injury, (5) failure to start or stop a machine or excessive speed, and (6) failure to provide competent and adequate assistance. See also Annot., 67 A.L.R.2d 1120 (1959) for extensive discussion of this problem.

[9] Calkins v. Sandven, *supra* note 8; Johnson v. Kinney, *supra* note 8; Anderson v. Sheuerman, 232 Iowa 705, 6 N.W.2d 125 (1942).

[10] IOWA CODE § 88.14 (1966) provides:

> In all cases where the property, works, machinery, or appliances of an employer are defective or out of repair, and where it is the duty of the employer from the character of the place, work, machinery, or appliances to furnish reasonably safe machinery, appliances, or place to work, the *employee shall not be deemed to have assumed the risk*, by continuing in the prosecution of the work, growing out of any defect as aforesaid, of which the employee may have had knowledge when the employer had knowledge of such defect, *except when in the usual and ordinary course of his employment it is the duty of such employee to make the repairs, or remedy the defects.* Nor shall the employee under such conditions be deemed to have waived the negligence, if any, *unless the danger be imminent and to such extent that a reasonable prudent person would not have continued in the prosecution of the work;* but this statute shall not be construed so as to include such risks as are incident to the employment; and no contract which restricts liability hereunder shall be legal or binding. (Emphasis added.)

[11] Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959).

[12] Lang v. Hedrick, 229 Iowa 766, 295 N.W. 107 (1940).

[13] IOWA R. CIV. P. 97 (1966) provides: "In an action by an employee against an employer, or by a passenger against a common carrier to recover for negligence, plaintiff need not plead or prove his freedom from contributory negligence, but defendant may plead and prove contributory negligence in mitigation of damages."

[14] 251 Iowa 290, 100 N.W.2d 624 (1960).

employee against an employer to recover for negligence plaintiff was not required to plead and prove his freedom from contributory negligence but defendant might plead and prove contributory negligence in mitigation of damages."[15] Assumption of the risk, considered a complete defense at common law, also is restricted by statute in Iowa as it applies to the master-servant relationship.[16] The Iowa court in applying this statute in the case of *Johnson v. Kinney*,[17] stated the following:

> If appellants were negligent in the respect charged, appellee did not assume the risk therefrom by continuing in the work unless in the usual course of his employment it was his duty to remedy the defect, and even if such were his duty, he assumed no risk therefrom unless the danger was imminent so that a reasonable prudent person would not continue in the work.[18]

With the two main common law defenses of contributory negligence and assumption of the risk clearly restricted, the issue in most agriculture employer-employee negligence cases is whether the fact of the employer's negligence can be established. This is determined by looking to the employer's conduct to find evidence of a breach of duty owed to the employee. Although these principles are familiar and well settled, the difficulties, as the Iowa court has recognized,[19] arise in the application of these principles to a particular set of facts.

The majority of Iowa's numerous farm accident cases involve circumstances whereby the employee sues the farmer-employer for damages for his personal injuries, allegedly caused by the farmer's negligence. Throughout these cases where the Iowa court has found the existence of a jury question as to the farmer's negligence, certain fact patterns seem to be repetitious. These fact patterns relate to (1) shields not covering the part of the instrumentality causing the injury,[20] (2) component parts of the instrumentality which were broken or defective and not repaired,[21] and (3) homemade repairs which changed a previously existing structural characteristic of the instrumentality.[22] With the exception of one case,[23] there seem to be no Iowa cases sustaining a verdict where the instrumentality was in the same condition as it was when purchased new. While a manufacturer might be held liable on theories of negligent manufacturing, negligent design, or breach of implied warranty,[24] the Iowa court until 1964 when it decided *Calkins v. Sandven*[25] had been unwilling to place the same responsibility upon the farmer as it had previously placed upon the manufacturer. It might have been said that the farmer's duty of care did not extend to the duty of a

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15 *Id.* at 297-98, 100 N.W.2d at 629.
16 IOWA CODE § 88.14 (1966), for full text, *supra* note 10.
17 232 Iowa 1016, 7 N.W.2d 188 (1942).
18 *Id.* at 1020, 7 N.W.2d at 191.
19 Degner v. Anderson, 213 Iowa 588, 239 N.W. 790 (1931).
20 Mooney v. Nagel, 251 Iowa 1052, 103 N.W.2d 76 (1960); Von Tersch v. Ahrendsen, 251 Iowa 115, 99 N.W.2d 287 (1959); Johnson v. Kinney, 232 Iowa 1016, 7 N.W.2d 188 (1942); Lang v. Hedrick, 229 Iowa 766, 295 N.W. 107 (1940).
21 Frederick v. Goff, 251 Iowa 290, 100 N.W.2d 624 (1960); Bell v. Brown, 214 Iowa 370, 239 N.W. 785 (1931); Oestereich v. Leslie, 212 Iowa 105, 234 N.W. 229 (1931).
22 Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959); Price v. McNeill, 237 Iowa 1120, 24 N.W.2d 464 (1946); Bell v. Brown, *supra* note 21.
23 Calkins v. Sandven, 256 Iowa 682, 129 N.W.2d 1 (1964), discussed *infra*.
24 See generally PROSSER, TORTS §§ 96-99 (3d ed. 1964).
25 256 Iowa 682, 129 N.W.2d 1 (1964).

mechanical engineer in designing and manufacturing a safe machine and his standard of care was measured by that of a reasonable prudent farmer.

In *Calkins v. Sandven*,[26] Calkins, the employee, was checking a self-unloading wagon for the purpose of making sure it was in running order for the next day's work. He started the power take off on the tractor which the wagon was attached to and walked to the rear of the wagon to inspect it. Upon reaching the rear of the wagon he tripped and fell, his arm getting caught in a small opening in the rear of the wagon where he was injured by moving cross bars. The employee sued his employer Sandven, joining the manufacturer as co-defendant.[27] The unloading wagon was in the same mechanical condition as when it was purchased new, *i.e.* no broken, substituted, or defective parts.[28] The trial court had denied the defendant's motion for a directed verdict and for judgment notwithstanding the jury's failure to return a verdict. The Iowa court held on appeal that the question of whether the farmer-employer had been negligent in failing to provide safe machinery and in failing to warn of the danger of the machine was for the jury.[29]

Both the manufacturer's and the employer's first ground relied on for reversal was that the employee failed to show that either defendant breached any duty owing to him.[30] The Iowa court in considering the manufacturer's duty to the employee cited with approval Section 395 of the *Restatement of Torts*,[31] which states the standard of care in manufacturing a machine. The court concluded that a jury question existed as to the manufacturer's negligence. The court then considered the employer's duty to the employee. It stated the common law duties of safe place and safe machinery and then held that if the employer in the exercise of reasonable care should have shielded the open space, it was his duty to do so,[32] although there was no shield manufactured for this opening in the wagon. This duty to shield, therefore, was actually a duty placed upon the farmer to determine which of the component parts were dangerous and then design, build, and implement a shield to protect the employee against such dangers. This duty more closely resembled the duty of a reasonable prudent mechanical engineer rather than a reasonable prudent farmer. The Iowa court in essence held that the

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[26] *Ibid.*

[27] *Id.* at 685, 129 N.W.2d at 2.

[28] *Id.* at 686-88, 129 N.W.2d at 3-4, conclusion based on the general statement of facts.

[29] Although the court gives two grounds for its holding, *i.e.* failure to provide safe machinery and failure to warn, it is believed that the failure to provide safe machinery was the more substantial ground for the basis of the opinion and that ground is also the relevant basis for this note.

[30] 256 Iowa at 689, 129 N.W.2d at 5.

[31] RESTATEMENT, TORTS § 395 (1934) provides:

> A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.

[32] "If in the exercise of reasonable care under the circumstances defendant Sandven should have covered the open space at the rear of the wagon or should have warned plaintiff of the danger, if any, from using it in its then condition, it was his duty to do so. Of course, neither Sandven nor his co-defendant was an insurer of plaintiff's safety." Calkins v. Sandven, 256 Iowa 682, 694-95, 129 N.W.2d 1, 8 (1964).

duty the farmer-employer owed to his employee was the same duty which the manufacturer owes to one using the machine which he manufactured and designed.[33]

In *Wagner v. Larson*,[34] the Iowa court without overruling the *Calkins* case seems to limit it by redefining the farmer-employer's duty owed to his employee. The question the court raises by not overruling *Calkins* is in the reasoning used to distinguish the two cases. Wagner's first of five allegations of negligence was to the effect that the employer was negligent in requiring the employee to operate a silo unloader which was defective for want of safety devices by reason of unsafe design.[35] The Iowa court interpreted this allegation as alleging that the farmer owed a duty to provide his employee with machinery of safe design. The court concluded that no such duty existed and stated that:

> The claim against defendant Larson is based on negligence and not warranty. It is not a case of absolute liability with the limitations of Workmen's Compensation. Plaintiff seeks to hold his employer negligent in failing to exercise the judgment that might be expected of a mechanical or safety engineer. This would go far beyond anything we have said or are willing to hold.[36]

Instead of overruling *Calkins v. Sandven* at this point the court distinguishes it in the following paragraph:

> We have recently had farm accident cases before us. Our most recent pronouncements appear in Calkins v. Sandven, Iowa, 129 N.W.2d 1; Frederick v. Goff, 251 Iowa 1052, 103 N.W.2d 624; and Mooney v. Nagel, 251 Iowa 290, 100 N.W.2d 76. An analysis of these cases indicates entirely different situations than we have in the case at bar. In Sandven the injured plaintiff employee was operating the machine on the wagon for the first time. He had never used it before nor had he paid any attention to its operation. In the case before us the plaintiff was thoroughly experienced in the operation of the machine. In the case before us the plaintiff was pulling the machine toward himself when he slipped. In Sandven the plaintiff did not fall as a result of any contact with the machine. He slipped from outside causes and fell into the unguarded machine. In Sandven the defendant was more familiar with the machine than was the plaintiff who was without experience. Such is not the case here. In Sandven we held that a false impression of safety was created by the partial shielding and that it would have been feasible and relatively simple to shield that part of the machinery into which the plaintiff fell. In the case at bar there was no false impression and no showing that it would have been relatively simple for the defendant Larson to have shielded that part of the machine into which plaintiff fell. In Sandven the moving parts causing plaintiff's injury were not readily observable. There was a latent danger with a duty to warn. Such is not the case here. In Sandven we suggested that the machine was more dangerous because of partial shielding than it would have been without shields.[37]

It can be observed that these distinctions relate to the differences between the employee's conduct in the two different cases. However, the question of

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[33] "The duty Sandven owed plaintiff is very similar to that of North American. There seems to be insufficient logical or sound basis for holding a jury question was presented as to only one of these defendants." *Id.* at 695, 129 N.W.2d at 8.

[34] 136 N.W.2d 312 (Iowa 1965).

[35] *Id.* at 317.

[36] *Id.* at 318.

[37] *Id.* at 319-20.

whether the employer was negligent in that he breached a duty owed to the employee, should not turn on the employee's conduct but should turn on the employer's conduct. Previous to *Wagner v. Larson* the Iowa court had recognized that the issue of the plaintiff's conduct goes to whether the plaintiff was guilty of contributory negligence, not to whether the defendant was negligent.[38]

In the *Wagner* case there is no discussion of the two defenses of contributory negligence or assumption of the risk. This appears to be inconsistent because it is the employee's conduct which is the main means of distinguishing the *Calkins* case from the *Wagner* case and also because of the special rules which restrict both of these defenses which were discussed previously. Assuming that the duty announced in the *Calkins* case has been restricted by the *Wagner* case, the question of why the court did not overrule it remains. If the *Wagner* case actually turned on the employee's conduct, the question of why the court did not discuss the special rules restricting the common law defenses remains.

The effect *Wagner v. Larson* and *Calkins v. Sandven* will have on future farm accident cases is difficult to foresee. The court must have felt it had gone too far in the *Calkins* case in placing identical duties of care on the employer and the manufacturer. The one thing which seems to be certain from the *Wagner* case is that a farmer-employer does not owe the same duty of care to his employee as the duty of care which the manufacturer owes the employee who has been injured due to a defectively manufactured or designed machine. The court in the *Wagner* case started out as though it were going to overrule the *Calkins* case, but after a thorough discussion of the employer's duty to his employee which was contrary to the duty held to be owed in the *Calkins* case, the court distinguished the two cases on facts relating to the differences in the conduct of the two employees, Calkins and Wagner, which pertain to whether the employees were contributorily negligent or whether they assumed the risk. This, as pointed out previously, is contrary to the meaning and intent of the statute[39] which restricts the defense of contributory negligence to the mitigation of damages, and the statute[40] which restricts the defense of assumption of the risk to situations where there is a duty to repair or where there is imminent danger. If the court had considered these statutes it would appear that they could not have distinguished the two cases for the reasons given. Since the court did reverse in the *Wagner* case, the only reason for the reversal appears to be that the duty the farmer-employer owes to his employee has been restricted from that announced in the *Calkins* case and in essence *Wagner v. Larson* overrules *Calkins v. Sandven* on this question of the duty of care which the farmer-employer owes to his employee.

WILLIAM S. GIBB — June 1968

[38] Erickson v. Erickson, 250 Iowa 491, 94 N.W.2d 728 (1959). In this case the defendant-employer contended that the plaintiff-employee had used the tractor and wagon unloader arrangement for ten years and had such a thorough knowledge of the instrumentality which caused plaintiff's injury that defendant could not be held negligent. The Iowa court dismissed this contention stating it to be more in the nature of an allegation of contributory negligence rather than one of absence of negligence.

[39] IOWA R. CIV. P. 97 (1966), for full text, *supra* note 13.

[40] IOWA CODE § 88.14 (1966), for full text, *supra* note 10.