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valid causes of action now in jeopardy because of the arbitrary pleading requirements, but also of freeing the courts from an illogical adherence to a rule founded most probably in the concept of privity in the negligence law.

INDEMNITY AMONG JOINT TORT-FEASORS IN NEW YORK: ACTIVE AND PASSIVE NEGLIGENCE AND IMPLEADER

The principle of indemnity rests on the theory that "one liable only by reason of a duty imposed by law for consequences flowing from the negligent conduct of another, and not an actual participant in that conduct, may recover over against the active perpetrator of the wrong."[1] Thus, indemnity is awarded to one legally liable but morally innocent as against the actual wrongdoer whose conduct has caused liability to be imposed on him.[2]

Indemnity is often confused with contribution, though the two are distinguishable. Indemnity shifts the entire economic loss from the party who has been compelled to pay to the tort-feasor chiefly responsible for that loss;[3] contribution distributes the loss proportionately among the tort-feasors.[4] At common law a joint tort-feasor who had discharged the claim of the injured plaintiff had no right of contribution from the other wrongdoer.[5] The common law rule has taken frequent and vigorous criticism, and has been ameliorated by statute in many jurisdictions. In New York section 211-a of the Civil Practice Act[6] allows contribution if there is a joint money judgment against the tort-feasors, and one has paid more than his pro rata share. A right to indemnity, however, could be enforced at common law by a separate action of

1. 4 Shearman & Redfield, A Treatise on the Law of Negligence § 894 (rev. ed. 1941).

2. Bohlen, Studies in the Law of Torts 512 (1926). It should be noted that the principle of indemnity is not restricted to negligence actions, though it is primarily that aspect which will be considered herein.

3. Meriam & Thornton, Indemnity Between Tort-feasors: An Evolving Doctrine in the New York Court of Appeals, 25 N.Y.U.L. Rev. 845 (1950).

4. See Prosser, Torts § 46 (2d ed. 1955) [hereinafter cited as Prosser].

5. See Note, Indemnity among Tort-feasors in New York, 39 Cornell L.Q. 484 (1954). The rule that there is no contribution between those who are regarded as joint tort-feasors when one has discharged the claim of the injured plaintiff had its origin in Merryweather v. Nixan, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799). The early American courts, however, applied the rule against contribution to situations of wilful misconduct, refusing to extend it to negligence or mistake. Soon the courts lost sight of the origin and reason for the rule and applied it generally, refusing even to permit contribution where independent though concurrent or even successive negligence caused a single result. Prosser § 46. Its adoption by the early New York courts was justified on the ground of public policy. See, e.g., Peck v. Ellis, 2 Johns Ch. R. 131 (N.Y. 1816).

6. N.Y. Civ. Prac. Act § 211-a provides: "Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over. . . ." For a good analysis of this provision see Gregory, Tort Contribution Practice in New York, 20 Cornell L.Q. 269 (1935).

the indemnitee against the claimed indemnitor after damages had been paid.[7] Today, in New York, statutes also permit the indemnitee to assert his right by means of impleader and cross-claim.[8]

What is this right and how is it to be enforced? These are the questions, among others, which this comment will explore.

ORIGINS OF THE RULE

Municipalities

As far back as the 1870's a municipality which, by reason of its common law duty to keep streets in a safe condition, had been subjected to and had paid a judgment, was held to be entitled to indemnification from the active tort-feasor, usually a trolley-car company or some other person who possessed a license to use the streets for his own advantage, and who was directly responsible for the resulting injury.[9] Initially the municipality's right to indemnification was found in covenants to repair which, by bond, the tort-feasor had executed in favor of the municipality.[10]

The court in *City of Rochester v. Montgomery*[11] went further and reasoned that when the city is held "primarily liable" to an injured pedestrian, it is entitled to a recovery due to the contractor's "unlawful or negligent" act. This test was more definitively enunciated in *Village of Port Jervis v. First Nat'l Bank*,[12] where the court pointed out that "this liability grows out of the affirmative act of the defendant and renders him liable not only to the party injured, but also mediately liable to any party who has been damnified by his neglect. Liability in such a case is predicated upon the negligent character of the act which caused the injury and the general principle of law which makes a party responsible for the consequences of his own wrongful conduct."[13] However, the court also subscribed to the theory that

7. Although it would seem the argument that one tort-feasor should not recover for his own wrong would apply also to indemnity, the courts have been more liberal in this area. Prosser § 46.

8. N.Y. Civ. Prac. Act § 193-a provides that a defendant may bring in any person not a party to the action who "is or may be liable to him" for all or part of the plaintiff's claim against him provided such claim is related to the main action by a common question of law or fact. N.Y. Civ. Prac. Act § 264 provides that where the judgment may determine the ultimate rights of a party who claims that another party to the action "is or may be liable to him for all or part of a claim asserted against him" such party must demand such determination in his pleading. The controversy shall not delay the judgment in the main controversy, unless the court directs otherwise.

9. Note, 39 Cornell L.Q. 484, 485 (1954).

10. City of Brooklyn v. Brooklyn City R.R., 47 N.Y. 475 (1872). See also City of Rochester v. Campbell, 123 N.Y. 405, 441, 25 N.E. 937, 938 (1890), where the court asserted that "if the municipality has provided by contract with third persons for keeping its street in repair, and has been, through a neglect by such party to perform his contract, subjected to damages at the suit of an injured party, it may recover from such party the sum which it has thus been compelled to pay."

11. 72 N.Y. 65 (1878).

12. 96 N.Y. 550 (1884).

13. Id. at 555.

the contractor, by receiving a license from the city, impliedly agreed to perform the work "in such a manner as to save the public from danger and the municipality from liability."[14]

The reasoning of *Village of Port Jervis* persisted in cases[15] that followed, and in *Toth v. Kennedy & Smith*[16] it was held that where the contractor has obtained a building license from the city, the city could recover *either* on a theory of an implied agreement to indemnify or on a theory of active-passive negligence.[17]

Expansion of the Rule Beyond Municipalities

The right of indemnification which originated in favor of municipalities was shortly thereafter extended to landlords who, having been held liable for dangerous conditions on their premises, sought to recover against third-party lessees who created the conditions. Thus, the court in *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*[18] reasoned that the party who had been held legally liable for another's personal neglect and had paid damages which "ought to" have been paid by the wrongdoer was entitled to indemnity whether contractual relations existed between them or not. The court held there was a cause of action over against the sublessee who had been in complete control of the premises when the accident happened.

The *Oceanic* decision made it clear enough that indemnification was not limited to cases involving street defects, nor was it necessarily founded on express contractual grounds.[19] Shortly thereafter, contractors who had been held liable to property owners were permitted to recover over against their subcontractors who had created the dangerous conditions on the premises. In *Dunn v. Uvalde Asphalt Paving Co.*[20] the court, noting that the contract between the subcontractor and the contractor contained no express stipulation that the contractor was to be indemnified against liability or loss arising from the subcontractor's negligence, nevertheless felt that the wrongdoer stood in the relation of indemnitor to the contractor who had been held liable for

14. Id. at 556.

15. See, e.g., Doyle v. Union Ry., 276 N.Y. 453, 12 N.E.2d 541 (1938); Branch v. Town of Eastchester, 258 App. Div. 727, 14 N.Y.S.2d 863 (2d Dep't 1939); Fortune v. City of Syracuse, 191 Misc. 738, 78 N.Y.S.2d 775 (Sup. Ct. 1948). A different principle, however, was applied where the city was sued for injuries due to the unsafe condition of a sidewalk, with the city being able to recover from the abutting owner only where he caused the condition leading to the accident or failed to maintain in safe condition an installation placed there for the "special benefit" of the property. For cases illustrating this and for the distinction made where the city has undertaken to repair the defect and has done so negligently, see Note, 39 Cornell L.Q. 484, 487-88 (1954).

16. 259 App. Div. 855, 19 N.Y.S.2d 517 (2d Dep't 1940), aff'd mem., 285 N.Y. 579, 33 N.E.2d 249 (1941).

17. That this is still the criterion for upholding the municipality's right of recovery over, see Burke v. City of New York, 2 N.Y.2d 90, 138 N.E.2d 332, 157 N.Y.S.2d 1 (1956).

18. 134 N.Y. 461, 31 N.E. 987 (1892).

19. For a good evaluation of this expansion see Comment, 25 N.Y.U.L. Rev. 845 (1950).

20. 175 N.Y. 214, 67 N.E. 439 (1903).

the property damage. The contractor could recover, however, only if he had actually paid some of the sums for which he had been held liable.[21]

The application of the rule to the contractor-subcontractor situation was more explicit in *Phoenix Bridge Co. v. Creem*.[22] The court, again noting that the right of indemnity did not depend upon the presence of an indemnity bond when an agreement to indemnify could be implied from the circumstances, distinguished the liability imposed by mere omission of a legal duty from that imposed by personal participation in an affirmative act of negligence or from knowledge of or acquiescence in an act or omission. Although both the contractor and subcontractors were equally liable to third-parties for the neglect of duty which resulted in the injury, as between the two, the contractor by virtue of the contractual relationship was entitled to rely upon the subcontractors' discharge of that duty. The contractor could be deprived of his right of indemnity only by proof that he in fact participated in the negligence beyond a mere omission to perform the duty imposed on both by law. The rule was further extended to include property owners who sought indemnification from other persons, such as deliverymen, who created dangerous conditions on the premises which had cast the owner in damages.[23]

Although it was demonstrated the indemnity rule was not to be limited to a particular factual situation or to specified relationships between the parties, the rule governing liability at this point was merely a statement that one party "ought" to pay damages as between himself and another.[24] The courts were attempting to do justice by placing the loss on the party ultimately responsible but had formulated no clear standards for shifting damages. The decisions were full of "verbal formulae" which described the result reached but offered no explanation of why indemnity was allowed or refused.[25]

The cases had thus far made it clear that recovery could be had either on the basis of a consensual agreement or on a quasi-contractual theory.[26] An express indemnity contract or consensual agreement could be of two kinds: "sweeping," *i.e.*, where the indemnitor agreed to save the indemnitee harmless from any loss or liability regardless of indemnitee's own negligence and even if the indemnitee's negligence were the sole cause of injury; or "limited," *i.e.*, where the indemnitor agreed to protect the indemnitee from liability for in-

21. The court made the interesting observation that the contractor did not have to await judgment before paying the property owners, but could have done so voluntarily and still have obtained indemnity against the subcontractor if he were the primary wrongdoer. Id. at 218, 67 N.E. at 440. This is not true under existing procedure since recovery of judgment against the defendant is a condition of recovery against a third-party. See, e.g., Verder v. Schack, 90 N.Y.S.2d 801 (Sup. Ct. 1949).

22. 102 App. Div. 354, 92 N.Y. Supp. 855 (2d Dep't 1905), aff'd mem., 185 N.Y. 580, 78 N.E. 1110 (1906).

23. See Scott v. Curtis, 195 N.Y. 424, 88 N.E. 794 (1909).

24. For cases illustrating this and for the distinction made where the injury occurred months after the job was finished or after the work was accepted by the owner, see Note, 39 Cornell L.Q. 484, 489 (1954).

25. For a good discussion of this point see Comment, 25 N.Y.U.L. Rev. 845, 848-49 (1950).

26. See 42 C.J.S. Indemnity §§ 4, 20 (1944).

demnitor's own negligence.[27] *Thompson-Starrett Co. v. Otis Elevator Co.*[28] held that the sweeping indemnity contract had to show an intention to indemnify a party against his own negligence expressed "in unequivocal terms," for here was an instance where recovery could be had by the active wrongdoer. Where there was no such sweeping agreement, recovery had to be made under common law principles. The limited indemnity contract, in effect, merely expressed contractually the same liability which the law would impose anyway where the indemnitee was merely passively negligent and the indemnitor actively negligent.[29] As the active-passive negligence rule was to govern recovery except when there was a sweeping agreement, which was rather uncommon, further clarification of the standard was necessary.

The Rule—Tests and Standards

An attempt to explain more fully the active-passive rule that was taking shape in the courts was made in *Tipaldi v. Riverside Memorial Chapel.*[30] There the court said that it made no difference, as regards indemnity, whether the fault of the primary wrongdoer was an act of commission or omission. *Adler v. Tully & Di Napoli, Inc.,*[31] raised the next logical question; what effect does the defendant's knowledge of a defect have on his right to indemnity? The court had previously, in *Schwartz v. Merola Bros. Constr. Corp.,*[32] drawn a distinction between actual and constructive knowledge and equated actual knowledge with the active negligence which bars recovery over.[33] *Dolnick v. Donner Lumber Corp.*[34] indicated that even constructive knowledge could be equated with active negligence if a party had a duty to acquire actual knowledge and failed to do so. A dictum in the later case of *Falk v. Crystal Hall*[35] stated that there was no difference between actual and

27. Comment, 25 Fordham L. Rev. 714, 715 (1957).

28. 271 N.Y. 36, 2 N.E.2d 35 (1936).

29. Comment, 25 Fordham L. Rev. 714, 715 (1957). For a good illustration how the absence or presence of an express contract of indemnity can affect the scope of liability, see Dudar v. Milef Realty Corp., 258 N.Y. 415, 180 N.E. 102 (1932), where the owner was claiming indemnity from the subcontractor who had negligently injured a third-party by operation of a hod hoist. The court there stated: "In the absence of a contractual obligation by the operator of the hod hoist, assuming sole responsibility for the results of its own negligence, the question of ultimate liability as between the two defendants might be debatable. . . . Here the contractor did by express agreement assume such responsibility." Id. at 422, 180 N.E. at 105. Cf. John Wanamaker, Inc. v. Otis Elevator Co., 228 N.Y. 192, 126 N.E. 718 (1920).

30. 273 App. Div. 414, 78 N.Y.S.2d 12 (1st Dep't), aff'd mem., 298 N.Y. 686, 82 N.E.2d 585 (1948).

31. 274 App. Div. 1001, 84 N.Y.S.2d 305 (2d Dep't 1948), aff'd mem., 300 N.Y. 662, 91 N.E.2d 323 (1950).

32. 290 N.Y. 145, 48 N.E.2d 299 (1943).

33. See Comment, 25 N.Y.U.L. Rev. 845, 854 (1950).

34. 275 App. Div. 954, 89 N.Y.S.2d 783 (2d Dep't 1949), aff'd mem., 300 N.Y. 660, 91 N.E.2d 322 (1950).

35. 200 Misc. 979, 105 N.Y.S.2d 66 (Sup. Ct. 1951), aff'd mem., 279 App. Div. 1071, 113 N.Y.S.2d 277 (1st Dep't), appeal denied, 304 N.Y. 987, 108 N.E.2d 410 (1952).

constructive knowledge, as constructive knowledge of a dangerous condition could impose an affirmative duty. This dictum was apparently rejected by the appellate division in *Raping v. Great Atl. & Pac. Tea Co.*[36]

The cases had all spoken of active and passive negligence, but what these terms meant was still far from clear. The court in *McFall v. Compagnie Maritime Belge*[37] attempted to resolve this confusion in terminology. There was stated what was to become a criterion in later cases: The question whether negligence is active or passive is generally one of fact for the jury and, in effect, the terms "active" and "passive" are simply guides for a jury in deciding which of the several wrongdoers is more responsible for the injury.[38] Though this principle and practice were generally accepted, it soon became obvious that confusion was by no means dissipated. *Meltzer v. Temple Estates*[39] again clouded the picture by stating that only where there was room for a reasonable difference of opinion as to the "comparative culpability" of the joint tort-feasors would the question of "liability over" be given to the jury. Otherwise it would be disposed of as a point of law. Thus, it would seem that if the confusion that has arisen by attempting to fit cases into bare cubicles of easy nomenclature is to be alleviated, it can be done only by realizing that no rule really governs in the field of indemnity.

Obviously, no hard and fast rules can be laid down. Nevertheless, a few general observations may be of value. The decisions turn on a disparity in culpability between the parties, with the more negligent party being held liable over to the less negligent.[40] This disparity would seem to be a mixed question of law and fact. The jury must ultimately determine whether the difference in

36. 283 App. Div. 204, 126 N.Y.S.2d 687 (3d Dep't 1953). Plaintiff, having been injured by an exploding bottle, sued the storekeeper who tried to implead both the bottle manufacturer and bottler. The lower court had denied impleader, reasoning that the storekeeper was actively negligent in not discovering the defect. The appellate division reversed, and granted impleader as it felt that the storekeeper might have been only passively negligent in not detecting the flaw in the bottle, thus determining that despite Falk v. Crystal Hall, supra note 35, there was a difference between actual and constructive knowledge. For a suggestion that the Falk dictum may not be inconsistent with the facts of this case see Note, 39 Cornell L.Q. 484, 499 (1954).

37. 304 N.Y. 314, 107 N.E.2d 463 (1952).

38. See Note, 39 Cornell L.Q. 484, 499 (1954).

39. 203 Misc. 602, 116 N.Y.S.2d 546 (N.Y. City Ct. 1952).

40. A good illustration of what constitutes such a disparity is Harrington v. 615 West Corp., 2 N.Y.2d 476, 141 N.E.2d 602, 161 N.Y.S.2d 106 (1957), wherein a tenant tripped over a rope securing the scaffold of a painting contractor engaged by the landlord and brought suit against the contractor and the landlord, who in turn cross-claimed against the contractor. The court, pointing out that both the landlord and contractor should have recognized that a tenant might trip over the rope, determined that each was under an equal duty to warn the tenant of the danger, and as the negligence of one was not primary in comparison with that of the other, neither being actively negligent, dismissed the cross-claim. The court did state, however, that if the contractor had been negligent in the manner in which he rigged the rope, indemnification of the owner might then have been possible, the theory being that improperly rigging a scaffold involves a different kind of negligence than merely failing to warn a tenant of a possible danger.

culpability is such as to merit recovery, but it is the responsibility of the judge to determine whether the nature of the parties' actions justifies turning the matter over to the jury. It is the latter consideration which raises the problem. Probably the most significant observation is that almost universally the party allowed recovery over has been held liable only by virtue of an omission of duty, and it seems that had the party's liability been grounded upon an affirmative act the result would be different. In fact, the New York Court of Appeals recently said: "[I]t seems . . . that one cannot be guilty of passive negligence merely, if he has been guilty of a fault of commission."[41]

In many of the cases where indemnity has been allowed there was a contractual relationship between the parties. Thus, the question is raised whether this feature may have influenced the courts in reaching their decisions. Indeed, it might be argued that insistence on the existence of a contractual relationship would provide a simple and certainly clearer guide, and making a contractual relationship the exclusive test, as was eventually done in maritime cases,[42] would do away with some of the uncertainty surrounding indemnity. It has, however, been repeatedly said that indemnity would be granted if the facts so warranted, whether or not a contractual relationship was found, on the equities involved, this being clearly in accord with the theory that indemnity is essentially an equitable doctrine.[43] Thus, the rules of law surrounding indemnity inevitably have to be elastic and lacking in definiteness. The basic policy inquiry in all cases is who in fairness and equity is at fault here? Any requirement devised by the courts is only a means by which this basic test of fairness is sought to be applied.[44]

Statutory Liability

Motor Vehicle and Traffic Law

Section 59 of the New York Motor Vehicle and Traffic Law[45] as well as *respondeat superior*[46] make an employer liable to a third-party for the negligent

41. Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 456, 158 N.E.2d 691, 696, 186 N.Y.S.2d 15, 22 (1959). The court went on to say: "It is the omission or failure to perform a nondelegable type of duty (e.g., the duty of an owner of realty or a shipowner to furnish the injured party with a safe place to work), as distinguished from the failure to observe for the protection of the interests of another person that degree of care and vigilance which the circumstances justly demand, which constitutes passive negligence entitling one to indemnity." Ibid.

42. See, e.g., Weyerhauser S.S. Co. v. Nacirema Co., 355 U.S. 563 (1958).

43. Note, 42 Va. L. Rev. 959, 975 (1956).

44. Comment, 25 N.Y.U.L. Rev. 845, 861-62 (1950). It has been said that indemnity is based altogether upon the law's notion, influenced by an equitable background of what is fair and proper between the parties. Leflar, Contribution and Indemnity between Tort-feasors, 81 U. Pa. L. Rev. 130, 147 (1932).

45. N.Y. Vehicle & Traffic Law § 59 provides: "Every owner of a motor vehicle . . . operated upon a public highway shall be liable . . . for . . . injuries to person or property resulting from negligence in the operation of such motor vehicle . . . by any person . . . using or operating the same with the permission . . . of such owner."

46. See, e.g., Traub v. Dinzler, 309 N.Y. 395, 131 N.E.2d 564 (1955); Smart v. Morard, 124 N.Y.S.2d 634 (Sup. Ct. 1953). While strong public policy requires injured parties in

conduct of his employee in the operation of the employer's motor vehicle. Such an employer, being only passively negligent at best, has a right of indemnification against his employee. The question, however, is really academic. Not only are such suits often barred by union contracts, but consideration of employee morale and the betterment of personnel relations discourage the employer from enforcing his remedies against his own employees. Moreover, the typical insurance policy covers not only the owner but anyone who is operating the vehicle with his consent.

The Labor Law

Section 241 of the New York Labor Law provides that contractors and property owners, when constructing or demolishing buildings or doing excavation work, must comply with certain requirements for the safety of workmen. When a subcontractor signs an express indemnity agreement, is the agreement actually available to contractors and owners or is it in effect nullified because of the statutory duty imposed on the landowner or contractor by section 241?

In *Walters v. Rao Elec. Equip. Co.*[47] and *Semanchuck v. Fifth Ave. & Thirty-Seventh St. Corp.*,[48] the New York Court of Appeals reasoned that for purposes of indemnity the legislature in enacting section 241 had discarded the common law distinction between active and passive negligence and that, as the duty imposed was nondelegable, the statute's violation per se constituted the tort-feasor actively negligent. From these cases the so-called *Walters* rule evolved. In essence it provided that indemnity will be given a party held liable to an injured workman for failure to furnish protection in accordance with section 241 as against an actively negligent joint tort-feasor only where there is an express agreement which "unequivocally expressed" an intention to indemnify the tort-feasor for his own violation of the statutory duties of section 241. In other words, where a violation of section 241 is involved, the matter becomes one of strict contract construction.

Rufo v. Orlando[49] extended the *Walters* rule to the Rules of the Board of Standards and Appeals promulgated pursuant to section 241.[50] The court

automobile accidents to be furnished with a responsible defendant, any distortion of a fault concept should be limited to making the injured party whole. Although the moral innocence of the employer or owner is ignored so that the injured third-party has a defendant who can pay judgment, he should not be penalized by denial of recovery from the one actually at fault. 2 Larson, The Law of Workmen's Compensation § 71.10 (1952) [hereinafter cited as Larson]; Restatement, Restitution § 96 (1937); 42 C.J.S. Indemnity § 21 (1944).

47. 289 N.Y. 57, 43 N.E.2d 810 (1942) (suit by employee of contractor against contractor and subcontractor under N.Y. Lab. Law § 241(4)).

48. 290 N.Y. 412, 49 N.E.2d 507 (1943) (suit by employee of contractor against contractor and subcontractor under N.Y. Lab. Law § 241(5)).

49. 309 N.Y. 345, 130 N.E.2d 887 (1955).

50. N.Y. Lab. Law § 241 provides: "All contractors and owners, when constructing or demolishing buildings . . . shall comply with the following requirements. . . . The board of standards and appeals may make rules to provide for the protection of workmen in connection with the excavation work for the construction of buildings, the work of constructing or demolishing buildings and structures, and the guarding of dangerous machinery

reasoned that since the legislature had abolished, in section 241, the distinction between active and passive tort-feasors, the rules and regulations which were to implement that section could not be construed to alter such an intent.[51] Although *Wischnie v. Dorsch*[52] recognized and *Semanchuck* indicated by dicta[53] that only in section 241 of the Labor Law did the legislature make the old common law distinction between active and passive negligence inapplicable, some lower courts extended and continue to extend the *Walters* rule to other sections of the Labor Law,[54] and even to provisions of the Administrative Code of the City of New York.[55]

Criticism

There may be merit to the argument that the *Walters* rule is an expression of sound public policy insofar as it seeks to impose a high standard of care on all parties concerned and to insure the plaintiff an existing and responsible defendant.[56] However, once the injured party has been made whole there is no sound reason to change the rules regarding the allocation of financial liability among the tort-feasors.[57]

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used in connection therewith, and the owners and contractors for such work shall comply therewith."

51. It is interesting to note that recovery in Rufo v. Orlando, 309 N.Y. 345, 130 N.E.2d 887 (1955), could have been denied on common law principles for, as the court pointed out, the verdict in favor of the laborer necessarily implied a finding that the trench was not reasonably safe for the purposes for which it was to be used, and the contractor who was to excavate was affirmatively negligent in creating a dangerous condition at the excavation site. Any negligence of the general contractor would merely have established both as active joint tort-feasors.

52. 296 N.Y. 257, 72 N.E.2d 700 (1947) (N.Y. Lab. Law §§ 255, 316, do not impose the same active, primary, nondelegable duty on an owner as does N.Y. Lab. Law § 241).

53. The court stated it felt that the Walters rule should not be extended into a field where indemnity was claimed for liability imposed by failure to perform a nondelegable duty in construction and demolition work not arising under the New York Labor Law. Semanchuck v. Fifth Ave. & Thirty-Seventh St. Corp., 290 N.Y. 412, 419-22, 49 N.E.2d 507, 509-10 (1943).

54. Chideckel v. Dime Sav. Bank, 103 N.Y.S.2d 616 (Sup. Ct. 1951) (failure to furnish safe tools as required by N.Y. Lab. Law § 240); Morris v. Attula, 74 N.Y.S.2d 386 (Sup. Ct. 1947) (failure to furnish anchors for window cleaners). Although there is no case extending the rule to N.Y. Lab. Law § 241-a, it would appear that a contractor violating this section is also to be considered an active tort-feasor. See, e.g., Duncan v. Twin Leasing Corp., 283 App. Div. 1080, 131 N.Y.S.2d 423 (2d Dep't 1954); Reilly v. Charles Herman Contracting Co., 89 N.Y.S.2d 632 (Sup. Ct. 1949).

55. See, e.g., Klein v. Bargray Constr. Corp., 140 N.Y.S.2d 734 (N.Y. City Ct. 1955), rev'd per curiam, 1 App. Div. 2d 883, 149 N.Y.S.2d 926 (1st Dep't 1956). See also Good Neighbor Fed'n v. Pathe Indus., 202 Misc. 951, 114 N.Y.S.2d 365 (Sup. Ct. 1952), aff'd mem., 281 App. Div. 968, 120 N.Y.S.2d 925 (1st Dep't 1953); Storoz v. International Business Mach. Corp., 91 N.Y.S.2d 573 (Sup. Ct. 1949), aff'd mem., 276 App. Div. 1079, 97 N.Y.S.2d 367 (1st Dep't 1950).

56. See Wischnie v. Dorsch, 296 N.Y. 257, 72 N.E.2d 700 (1947).

57. 2 Larson § 71.10. It might seem that sections of the New York Labor Law other than § 241 could require such an interpretation, such as the duty to put anchors on building exteriors for the protection of window cleaners, but even here such a rule dispensing with common law principles does not seem warranted. For a good development of this point see Note, 39 Cornell L.Q. 484, 492 (1954).

The Compensation Statutes

Employers often insure their employees against industrial accidents with some form of workmen's compensation. The question naturally arises whether a third-party, sued by an employee, may get contribution or indemnity from the employer whose negligence has caused or contributed to the injury. This, of course, will vary with the provisions of the various state statutes.

Section 11 of the New York Workmen's Compensation Law, which is typical of many statutory provisions, provides: "The liability of an employer . . . shall be exclusive and in place of any other liability whatsoever, to such employee, his personal representatives, husband, parents, dependents, or next of kin, or anyone otherwise entitled to recover damages, at common law or otherwise on account of such injury or death. . . ." The Longshoremen's and Harbor Workers' Compensation Act[58] has substantially the same exclusive remedy provision.

Would allowing contribution or indemnity to a third-party cast upon the employer a burden against which, theoretically, he is protected by the compensation system which abolished the employee's common law remedies against the employer in return for statutory benefits?[59]

Federal Law

The federal courts are divided on the question of recovery over but have agreed on the distinction between contribution and indemnity; the right of contribution is recognized as founded on contribution-between-tort-feasor statutes or on common law or admiralty rules, while the right of indemnity is based on an independent duty or employer's obligation to the third-party, either by express contract or implication of law.[60]

Contribution

Two rules have evolved regarding contribution. A minority of circuits, applying admiralty rules, permit limited contribution on the part of the employer.[61] However, the majority hold that an employer whose concurring

58. 44 Stat. 1424 (1927), 33 U.S.C. §§ 901-50 (1958). Section 5 provides that "the liability of an employer . . . shall be exclusive and in place of all other liability of such employer to the employee . . . and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury. . . ." 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).

59. At common law an employee could sue his employer for injury due to his negligence, but an employer could plead the defenses of contributory negligence, assumption of risk and the fellow-servant rule. Today, as a result of compensation legislation, the employer is absolutely liable whether at fault or not, with the employee receiving only a limited amount which is, however, certain. Note, 42 Va. L. Rev. 959, 961 (1956). For persons who are included within the term "third-party" see 2 Larson § 72.00.

60. 2 Larson § 76.10.

61. See, e.g., Portel v. United States, 85 F. Supp. 458 (S.D.N.Y. 1949); The Samovar, 72 F. Supp. 574 (N.D. Cal. 1947); The Tampico, 45 F. Supp. 174 (W.D.N.Y. 1942). Contra, American Mut. Liab. Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); Lo Bue v. United States, 91 F. Supp. 298 (E.D.N.Y. 1950). Admiralty, unlike the common law,

negligence contributes to employee's injuries cannot be sued or joined by the third-party as a joint tort-feasor at common law or under statutes allowing contribution.[62] These courts reason that employee's claim against the employer is solely for statutory benefits, the liability resting upon the employer being absolute and irrespective of negligence, while employee's claim against the third-party is for negligence and thus, being different in kind, cannot result in common liability for the employer and the third-party.[63] This was illustrated by *American Mut. Liab. Ins. Co. v. Matthews*,[64] where the court determined that a shipowner and a stevedoring firm, not incurring the same type of liability to an injured stevedore, could not be joint wrongdoers and denied contribution to the shipowner from whom the employee recovered. This holding was reinforced by *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*,[65] which conclusively established that the "moiety rule" of admiralty whereby mutual wrongdoers share equally the damages sustained by each, as well as any personal injury and property damage inflicted on innocent third-parties, did not apply to noncollision cases.

Indemnity

As to whether the employer is immune to a cause of action founded on indemnity, two views have also been taken. Some courts construe the exclusive liability provision in the compensation statute to prohibit a claim of recovery over against the employer by a third-party, reasoning that such a clause was intended to limit employer's "over-all liability" in the same degree that it limits employee's rights against the employer.[66] The majority of courts have adopted a narrower construction and allow indemnity, reasoning that immunity is provided only against actions for damages on account of employee's injury and that the third-party's action for indemnity is not for damages "on account of" employee's injury but for reimbursement "on account of" the breach of an *independent duty* owed by the employer to the third-party.[67]

These latter courts have used this "independent duty" idea as a device for aiding the third-party in circumventing the employer's immunity from suit, and have found that this independent obligation to indemnify the third-party, which thus constitutes an exception to the exclusive liability clause, can arise from: (1) an express contract of indemnity whereby the employer agrees to indemnify the third-party for the kind of loss the third-party has been compelled to pay to the employee (here problems of interpretation have arisen such as found in *American Stevedores, Inc. v. Porello)*;[68] and (2) an implied

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does not embrace the idea that the rights between joint tort-feasors arise only common liability. 2 Larson § 76.22.

62. 2 Larson § 76.21.

63. Ibid.

64. 182 F.2d 322 (2d Cir. 1950).

65. 342 U.S. 282 (1952).

66. See 2 Larson § 76.30.

67. Ibid.

68. 330 U.S. 446 (1947). In this case the Supreme Court construed an indemnity provision in a contract between the United States and a stevedoring concern, saying that the

obligation to perform the work with due care as where the employer is a contractor performing work for the third-party (as found in *Read v. United States*).[69]

In other cases[70] where a contractual relationship between the parties existed, the courts also applied a test of active or primary negligence. Whether there exists a third category in which, even in the absence of a contractual relationship, an independent implied duty to indemnify the third-party will arise out of the sole relationship of two joint tort-feasors, is something upon which the courts have not yet agreed. *Slattery v. Marra Bros.*,[71] held that there can be no indemnity where the only independent duty is that of primary to secondary wrongdoer; but the court in *United States v. Rothchild Int'l Stevedoring Co.*,[72] speaking of the Longshoremen's and Harbor Workers' Compensation Act, held that although the third-party had created the dangerous condition, employer's subsequent negligence in permitting his employees to work under such known conditions was an intervening cause, and allowed the third-party full indemnity from the employer.

It would seem that the courts were attempting to evolve a quasi-contractual theory of indemnity involving the active-passive negligence distinction. Starting with *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*,[73] however, a definite trend away from the primary-secondary test is noticeable, at least in the Supreme Court decisions relating to maritime torts. Rejecting the argument that payments to the stevedore by his employer under the Longshoremen's and Harbor Workers' Compensation Act barred recovery over by the shipowner, the Supreme Court in that case, four Justices dissenting, determined that the third-party complaint was actually for *breach of contract*, employer stevedoring com-

liability assuming clause was ambiguous and capable of being interpreted so as to make the contractor indemnify the United States should the latter be held liable for damages caused solely by the contractor's negligence or that the contractor reimburse the United States for all damages caused in any part by the contractor's negligence or that, if the parties were jointly negligent, the contractor would be responsible for that portion of the damages which his fault bore to the total fault. Thus, the Court said the intent of the clause was a question of fact calling for the production of evidence.

69. 201 F.2d 758 (3d Cir. 1953). See generally 2 Larson § 76.43.

70. See, e.g., Berti v. Compagnie De Navigation Cyprien Fabre, 213 F.2d 397 (2d Cir. 1954); Polozzola v. Pan-Atlantic S.S. Corp., 211 F.2d 277 (2d Cir. 1954).

71. 186 F.2d 134 (2d Cir.), cert. denied, 341 U.S. 915 (1951). Judge Hand stated: "[W]e shall assume that, when the indemnitor and indemnitee are both liable to the injured person, it is the law of New Jersey that, regardless of any other relation between them, the difference in gravity of their faults may be great enough to throw the whole loss upon one. We cannot, however, agree that that result is rationally possible except upon the assumption that both parties are liable to the same person for the joint wrong. If so, when one of the two is not so liable, the right of the other to indemnity must be found in rights and liabilities arising out of some other legal transaction between the two." 186 F.2d at 139. As there was no contract or legal relationship between the employer and the third-party, indemnity accordingly was denied.

72. 183 F.2d 181 (9th Cir. 1950). Contra, Brown v. American Hawaiian S.S. Co., 211 F.2d 16 (3d Cir. 1954).

73. 350 U.S. 124, 133-34 (1955).

pany having breached its obligation to the shipowner to perform the work in a reasonably safe manner. Later cases[74] indicate the lengths to which the Supreme Court has gone to find a contractual relationship between the parties, thereby apparently ruling out the alternative quasi-contractual theory of recovery in maritime indemnity. These cases reason that a contractual assumption of indemnity by the employer is a voluntary waiver of the limited liability afforded employees under the Longshoremen's Act while indemnity under a quasi-contractual theory is recovery over "on account of injury," and hence precluded by statute.[75]

New York

The right to contribution among joint tort-feasors in admiralty has in the past been enforced in New York. However, no such right is enforced against the employer joint tort-feasor today where the injury is to one of his employees entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act.[76] As for indemnity in maritime torts, the decisions of the federal courts control in New York, and the federal trends are reflected in the state courts' decisions. Thus, although the *McFall* case permitted a recovery over by a shipowner against an injured stevedore's employer on the theory of common law indemnity, the New York Court of Appeals in the subsequent case of *Merriweather v. Boland & Cornelius*[77] was careful to point out that a

74. See, e.g., Crumady v. The J. H. Fisser, 358 U.S. 423 (1959); Weyerhaeuser S.S. Co. v. Nacirema Co., 355 U.S. 563 (1958).

75. For a good analysis of the result of holding that the exclusive liability clause does not bar an action for indemnity when the parties are in a contractual relationship, see Weinstock, Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers, 103 U. Pa. L. Rev. 321 (1954). Actually it appears that this whole problem could be solved by new legislation covering both contribution and indemnity and apportioning damages awarded to comparative fault. Comment, 25 Fordham L. Rev. 174 (1956). Larson believes that by inclusion of third-parties within the compensation system injustice would be alleviated in many cases. 2 Larson § 76.53. For the practicality of this approach in reference to stevedores and shipowners see Note, 66 Yale L.J. 581, 589-90 (1957).

76. See 2 Carmody & Wait, Cyclopedia of New York Practice § 65 (1952) [hereinafter cited as Carmody & Wait].

77. 6 N.Y.2d 417, 160 N.E.2d 717, 190 N.Y.S.2d 65 (1959) (negligence action by stevedore against the operator of the ship upon which he was working when injured). The courts have found that while the remedy of workmen's compensation is exclusive as against the employer, it does not bar the employee from pursuing his common law tort remedy as against the third-party. See, e.g., Parchefsky v. Kroll Bros., 267 N.Y. 410, 196 N.E. 308 (1935); Milone v. Bono, 8 Misc. 2d 826, 162 N.Y.S.2d 1002 (Sup. Ct. 1957). See also 2 Carmody & Wait § 69. An interesting problem arises as to who is a third-party in states which have statutes providing that the general contractor will be liable for compensation to employees of the uninsured subcontractor engaged in work for the principal contractor. Since he is thus made the employer for the purpose of the statute, the majority of cases have allowed him immunity from common law suit when he has been held liable for compensation payments. However, where the subcontractor is insured most courts hold the general contractor a third-party subject to common law suit. 2 Larson § 72.31. New York has been extreme in this regard. In Sweezey v. Arc. Elec. Constr. Co., 295 N.Y. 306, 67 N.E.2d 369 (1946), the court found the general contractor such a third-party

third-party plaintiff was entitled to trial of his claim of indemnity, not upon the theory of active-passive negligence but upon the existence of a contract with and a warranty by a third-party defendant to perform his duty in a safe and seamanlike manner.

State Workmen's Compensation Law

In construing the New York Workmen's Compensation Law the New York courts have followed the rationale of the federal courts to the extent of refusing a third-party recovery over against an employer where contribution is sought,[78] but sometimes permitting it in the case of indemnification.[79]

There is no difficulty in finding a right to indemnity where the employer's obligation springs from an express indemnity agreement. The right is not so limited. In *Westchester Lighting Co. v. Westchester County Small Estates Corp.*[80] the court found an implied agreement to indemnify. There a contractor while building new homes had broken plaintiff utility company's gas main which ran under a public highway. The escaping gas asphyxiated the contractor's employee in a nearby house. Although the gas company as occupier of the land had failed to discover the dangerous condition and had not given warning to the employee at work on the premises, the employer, said the court, while working near the gas pipes impliedly assumed a duty to the gas company to use reasonable care in the performance of the work, and having by his own active negligence caused the break in the line he thereby became obligated to indemnify the gas company for its damages.[81] Thus, a contractual relationship

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even though he was also liable for compensation to the subcontractor's employee. It reasoned that the contractor was conditionally liable as a guarantor, for while not bound to secure compensation he was liable for payment if the subcontractor failed to do so. The court further pointed out that the basis of the contractor's liability was his relation to the subcontractor, and that any recovery of compensation by the subcontractor's employee from the general contractor constituted a lien against the money due the subcontractor. For a criticism of this holding and a general evaluation of the whole problem of "contractor-under" statutes, see 2 Larson § 72.31.

78. Although contribution is denied mainly due to the absence of a joint tort-feasor statute, the court in Edwards v. Sophkirsh Holding Corp., 280 App. Div. 168, 112 N.Y.S.2d 219 (1st Dep't), aff'd mem., 304 N.Y. 850, 109 N.E.2d 717 (1952), pointed out that contribution would be barred by the Workmen's Compensation Law even if there were joint tort-feasors.

79. See, e.g., Clements v. Rockefeller, 189 Misc. 885, 70 N.Y.S.2d 146 (Sup. Ct. 1947), which involved an action against a landlord for the death of a tenant's employee. The landlord was permitted to implead the tenant, to whom he had leased the premises, even though the tenant had complied with the Workmen's Compensation Law. See Western Union Tel. Co. v. Cochran, 302 N.Y. 545, 99 N.E.2d 882 (1951); Mirsky v. Seaich Realty Co., 256 App. Div. 658, 11 N.Y.S.2d 191 (1st Dep't 1939).

80. 278 N.Y. 175, 15 N.E.2d 567 (1938).

81. Further clarification of this obligation was given in American Mut. Liab. Ins. Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950), where the court, denying contribution to the third-party against the employer for a claim arising out of a defective rope, pointed out that the employer owed no duty to inspect the rope to the third-party who had furnished the item, such a duty running only to his employee, and concluded that to hold the em-

between the gas company and the employer, which the federal courts would deem to be essential, is not required in New York.

INSURANCE POLICIES: INDEMNITY FOR CONTRACTUAL LIABILITY

Does a clause in an insurance policy excluding coverage for contractual liability[82] embrace the situation where insured enters into a contract of indemnity with a third-party thereby assuming any loss or liability which may be incurred by that party? Such a clause was found operative to exclude coverage in *Union Paving Co. v. Thomas*,[83] but inoperative in *United States Fid. & Guar. Co. v. Virginia Eng'r Co.*[84] In the latter case the court pointed out that the indemnity clause in the construction contract did not assume liability for which the contractor was not himself liable at law, but merely expressly protected the owner against liability for which the contractor would have been responsible anyway, and declared that:

> To construe the exclusion clause to relieve the . . . [insurer] of liability for such claim would be to write into the policy a reservation which it does not contain, and which . . . could not have been within the contemplation of the parties. It is not reasonable to suppose that, when the insured was taking insurance to protect against liability imposed by law, it was intended to exclude coverage of claims for which the law imposed liability on the insured, merely because insured had agreed to protect another against secondary liability on account of such claims.[85]

The two holdings are not necessarily irreconcilable. The court in *Virginia Eng'r Co.* recognized the distinction between limited and express indemnity agreements, but nevertheless felt that insurer and insured had not intended to exclude coverage where there was an implied in law indemnity obligation. No such implied in law obligation was before the court in *Union Paving Co.* No claim was made that the owner was only passively negligent, and the decision was solely concerned with the indemnity agreement before the court.[86]

The court of appeals had an opportunity to consider the problem in *O'Dowd v. American Sur. Co.*,[87] where the insured sought damages against the insurer

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ployer had such a duty to the supplier would imply an agreement on the part of the employer to indemnify the supplier for his own negligence in furnishing such a rope.

82. Typical of these clauses is the one found in United States Fid. & Guar. Co. v. Virginia Eng'r Co., 213 F.2d 109, 111 (4th Cir. 1954), which provided: "This policy does not apply: (a) to liability assumed by the insured under any contract or agreement not defined herein."

83. 186 F.2d 172 (3d Cir. 1951).

84. 213 F.2d 109 (4th Cir. 1954).

85. Id. at 112.

86. The court in United States Fid. & Guar. Co. v. Virginia Eng'r Co., 213 F.2d 109 (4th Cir. 1954), even drew notice to the fact that Union Paving Co. v. Thomas, 186 F.2d 172 (3d Cir. 1951), "seemed to have proceeded on the theory that the only liability of the insured for the injury . . . arose out of the indemnity agreement which it had executed. Here . . . there was liability on the insured for the injury without reference to the indemnity agreement." 213 F.2d at 115. For a good analysis of these cases see Comment, 25 Fordham L. Rev. 714 (1957).

87. 3 N.Y.2d 347, 144 N.E.2d 359, 165 N.Y.S.2d 458 (1957).

in breach of contract for failure to pay the full amount of a judgment rendered on an indemnity agreement. The court distinguished the situation here from *Virginia Eng'r Co.* because the relative degree of culpability of the insured and the beneficiary of the indemnity agreement had never been litigated, the determinations in the prior negligence action being consistent either with the theory that the insured and the indemnitee were joint tort-feasors or that the insured alone was actively negligent. Finding, in addition, that the insured in his complaint did not contend that he was actively negligent, it determined that insured had not sustained the burden of establishing the claim under the terms of the policy, and found the granting of summary judgment improper. The court did point out that if at the trial it should develop that the indemnitee was in *pari delicto* with the insured, the insurer would be liable only for half the judgment, but that if it were determined that the insured was the active wrongdoer, the insurer would be liable for the balance of the judgment.

The Problem in Relation to Workmen's Compensation

An assumption clause similar to the one found in *American Stevedores, Inc. v. Porello* was involved in *Cardinal v. State*.[88] Suit was brought by the employer against New York State for breach of an insurance policy issued by the State Fund. The policy purported to indemnify an employer against all liability to his employees under the New York Workmen's Compensation Law and the Federal Longshoremen's and Harbor Workers' Compensation Act, against any other liability imposed by law and to defend any suits or proceedings brought against him "on account of such injuries," excepting any liability assumed by the employer under contract. The Fund had refused to undertake employer's defense of certain maritime actions on the sole ground that the petitions alleged a contract by the employer to indemnify the United States, the owner of the ship out of which arose the injuries to employees of the employer which were the subject matter of the actions. The Fund offered, after the *Porello* decision, to defend the impleading petitions on condition that it pay only a minimum amount if judgments were recovered against the United States. Subsequently, agreements were reached and all the libels were settled, the United States paying forty per cent and the employer sixty per cent of the settlement.

The court of appeals said that where an insurer unjustifiedly refuses to defend suit, insured, after making a reasonable settlement or compromise, is entitled to reimbursement from the insurer even though the policy purports to avoid liability if any settlements are made without the insurer's consent. The only question then was whether the employer had made a reasonable settlement of the injured party's claim, which reasonableness was here conceded. The court found that the employer was justified in paying sixty per cent of the settlement because the fault for the accident was at least partly his, since he had notice of a dangerous condition and had failed to remedy it. Had the actions gone to trial, the employer would have been liable for half or even all of the damages.[89] Thus, having answered the grounds advanced by the Fund

88. 304 N.Y. 400, 107 N.E.2d 569 (1952), cert. denied, 345 U.S. 918 (1953).

89. The court determined that had the suits been brought to trial under existing maritime law several results were possible: The employer and the United States could have been held joint tort-feasors, the former being held liable to the United States for half

for escaping liability,[90] the court determined that, on the facts and the law as it then appeared, the claimant was reasonably justified in making the settlement when abandoned by the insurer to his own devices, and was consequently entitled to judgment against the State for the total sum paid by him.

It would seem that the New York courts, which have granted indemnity in the absence of a sweeping indemnity agreement to the passive as against the active wrongdoer, would also find an exclusion clause ineffective to prevent reimbursement or indemnity where there existed a concurrent common law right of indemnification. If it is possible, as was done in *Virginia Eng'r Co.*, to place emphasis on the intention of the parties when the policy is taken out, then the exclusion clause should be operative where the insured is liable for the third-party's negligence solely by an express and sweeping indemnity agreement, but inoperative where insured as an active wrongdoer would on quasi-contractual principles be liable to the party who is passively negligent.

Procedural Problems

As joint tort-feasors are neither indispensible[91] nor conditionally necessary[92] parties, the plaintiff in a negligence action has the option of suing all or only some of them.[93] The question then arises as to whether or not a defendant may seek contribution and indemnity in the same action from other tort-feasors involved as codefendants and from those whom plaintiff did not join initially or, more specifically, whether sections 264[94] and 193-a[95] of the Civil Practice Act have in any way changed the common law and statutory rules governing contribution and indemnity.

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damages. The employer could have been held primarily liable to the United States and wholly required to indemnify it. The employer might have been held liable to indemnify the United States on a question of fact as to the United States' obligation to repair, testimony which the trial court might have rejected. The employer had by contract assumed some liability to indemnify the United States, the meaning of which was unsettled. Cardinal v. State, 304 N.Y. 400, —, 107 N.E.2d 569, 574 (1952).

90. The court felt that the Fund could have taken on the defense of the impleading petitions with reservation of its rights against the insured employer or even have defended against the tort count in the impleading petitions, requiring the employer to defend himself as to any contractual claim by the United States if it thought there was any difference between the tort liability and the contractual obligation, and that in not doing so it had waived every question of coverage except as to the unfounded monetary limitation. Id. at —, 107 N.E.2d at 577.

91. Such parties are those whose absence would prevent an effective determination of the law suit or whose interests not being severable would be adversely affected by a judgment rendered between the parties in the action. See N.Y. Civ. Prac. Act § 193(1). The joinder of such parties is absolutely necessary, for unless they are brought before the court it lacks power to adjudicate the case. Appleton, New York Practice 62 (5th ed. 1957) [hereinafter cited as Appleton].

92. Such parties ought to be joined in order to give complete relief to the parties in the action. N.Y. Civ. Prac. Act § 193(1). Absence of such parties still permits adjudication of the case. Appleton 63.

93. Since the liability of joint tort-feasors is joint and several, they are proper parties and their joinder cannot be compelled. Appleton 72.

94. See note 8 supra.

95. Ibid.

Fox v. Western New York Motor Lines[96] made it clear that section 193-a has not changed the statutory rule governing contribution among joint tort-feasors.[97] If the plaintiff does not choose to join all the joint tort-feasors in one action, the defendant has no right of contribution or impleader, nor a right to assert a cross-claim.[98] However, where the question is one of indemnity either on an express agreement or on the principles of active-passive negligence, impleader or allowance of a cross-claim if the tort-feasors had been joined by the plaintiff is sometimes permitted.[99] *Brady v. Stanley Weiss & Sons*[100] has shown that a cross-claim will be allowed if on the facts alleged it is possible that the defendant could be liable to the plaintiff on grounds which would entitle him to indemnity from a third-party. Such a situation is illustrated where the complaint charges both active and passive negligence, and a trial is necessary to determine if the plaintiff's recovery will be based on a finding of active or passive negligence or both. *Coffey v. Flower City Carting & Excavating Co.*,[101] however, indicated that where a claim alleges active negligence on the part of the defendant a cross-claim is improper.

A similar rule applies in the case of impleader. In *Middleton v. City of New York*[102] the complaint, alleging that a municipality had been negligent in maintaining a highway, prayed recovery for damages sustained when plaintiff's truck ran into a large accumulation of water and he lost control of the vehicle. The defendant sought to implead the railroad, alleging that by negligently maintaining its right of way it had caused the water to accumulate on the highway. The third-party complaint was dismissed, indicating that the court felt the pleadings were sufficient to establish the municipality as actively negligent or charged with sufficient notice as to be equally liable with the railroad. This case was an exception to the general trend of municipality cases.

Should the court in permitting or refusing a cross-claim or impleader look only to the original complaint, or will it consider matters extraneous to the complaint?[103] This problem was considered recently in *Putvin v. Buffalo Elec.*

96. 257 N.Y. 305, 178 N.E. 289 (1931).

97. The court determined that N.Y. Civ. Prac. Act § 211-a applied only when the plaintiff joined both defendants in the same action and recovered a joint judgment against both of them and one had paid more than his share. Since impleader is available only where the third-party is under a duty to reimburse the defendant for any recovery in the main action, the court felt that when the plaintiff chooses to sue only some of the tort-feasors actively responsible for his injury there is no duty of contribution and consequently no right of impleader.

98. See 2 Carmody & Wait § 65.

99. 2 Carmody & Wait § 65. See also Prosser § 46.

100. 6 App. Div. 2d 241, 175 N.Y.S.2d 850 (4th Dep't 1958).

101. 2 App. Div. 2d 191, 153 N.Y.S.2d 763 (4th Dep't 1956), aff'd mem., 2 N.Y.2d 898, 141 N.E.2d 632, 161 N.Y.S.2d 149 (1957).

102. 276 App. Div. 780, 92 N.Y.S.2d 655 (2d Dep't 1949), aff'd mem., 300 N.Y. 732, 92 N.E.2d 312 (1950). See Note, 39 Cornell L.Q. 484, 486-87 (1954).

103. Early cases ruled out impleader when the plaintiff's complaint alleged active negligence, albeit later causes of action alleged negligence which would only be passive. See, e.g., Nichols v. Clark, MacMullen & Riley, Inc., 261 N.Y. 118, 184 N.E. 729 (1933). It would seem that this whole problem should have been alleviated by enactment of §

Co.[104] In affirming the dismissal of the third-party complaints, the court of appeals pointed out that defendant's right to implead depended upon his ability to demonstrate a right of indemnification. It stated the accepted rule:

> [A] claim over against a third person charging the third person with active negligence will be allowed if *the original complaint* can reasonably be interpreted as including an allegation of passive negligence on the part of a defendant . . . . Conversely, where the defendant is alleged to be guilty only of active, as distinguished from passive negligence, impleader is improper as a matter of law, since an actively negligent tort-feasor is not entitled to indemnity . . . . If the then defendant is alleged to be guilty of both active and passive negligence impleader of the person claimed to be guilty of active negligence is proper . . . .[105]

In a dissent, Judge Van Voorhis, however, pointed out that it was premature to dismiss the third-party complaints before the basis of recovery, if any, which could be awarded at the trial to the original plaintiffs against the third-party plaintiff, was known.[106]

Criticism

Skillful use of the notice to admit[107] and bills of particulars[108] could obviate many difficulties by forcing the plaintiff to amend his complaint to show passive negligence on the part of the defendant. Nevertheless, as allowance of cross-claims and third-party practice was designed to remedy the waste of time and money involved in multiple trials and to avoid the unseemly spectacle of inconsistent verdicts on the same set of facts,[109] it is certainly questionable whether dismissal of the cross-complaint before trial where the original complaint alleges facts which if proven would constitute active negligence does not defeat the purpose of impleader. It might be argued that if the defendant were found liable on the theory of active negligence as alleged in

193-a which dispensed with the previous requirement that the main action and the claim over be the same or based upon the same grounds so long as there was a common question of law or fact, and emphasized that defendant must show that the third-party "is or may be liable over," dismissal of the third-party action being discretionary. The difficulty still remains, the courts relying on the allegations of the plaintiff's complaint. See, e.g., Ruping v. Great Atl. & Pac. Tea Co., 283 App. Div. 204, 126 N.Y.S.2d 687 (3d Dep't 1953); Kennedy v. Bethlehem Steel Co., 282 App. Div. 1001, 125 N.Y.S.2d 552 (4th Dep't 1953), aff'd mem., 307 N.Y. 875, 122 N.E.2d 753 (1954); Valdale Apartments v. Ercito Mazzella Constr., Inc., 115 N.Y.S.2d 59 (Sup. Ct. 1952).

As to how much should be read into the complaint, the courts have taken different views. In Kloppenberg v. Brooklyn Union Gas. Co., 82 N.Y.S.2d 687 (Sup. Ct. 1948), the court pointed out that the plaintiff's complaint should indicate some basis of recovery for passive negligence in order for the defendant's impleader to lie. Cf. Employer's Mut. Liab. Ins. Co. v. Fairchild Press, Inc., 279 App. Div. 895, 111 N.Y.S.2d 604 (1st Dep't 1952), where impleader was allowed.

104. 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

105. Id. at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21. (Emphasis added.)

106. Id. at 460, 158 N.E.2d at 698, 186 N.Y.S.2d at 26.

107. For a discussion of this procedure see Appleton 214-15.

108. See Appleton 152-53.

109. Appleton 67-68.

the complaint no impleader would lie, and if he were not liable impleader would be superfluous. However, if it is true, as the court in *Walkowicz v. Whitney's, Inc.*[110] stated "in many nuisance and negligence actions, the idea that the complaint contains a precise and concise statement of all the material facts must be regarded as partly a fiction," it would seem that a more reasonable approach would be to allow impleader and defer third-party defendant's motion to dismiss, pending a factual presentation at trial, if from defendant's third-party complaint, together with plaintiff's complaint, it appears that there is a possible situation for indemnity.[111] Sections 193-a and 264 of the Civil Practice Act were intended as remedial procedures and only by liberal interpretation will the sections afford full relief, prevent a multiplicity of law suits, avoid a circuity of action and achieve the legislative purpose that led to their enactment. The only exception to allowing a claim over should be where there is a possibility that its interposition will unduly delay the main action and prejudice the plaintiff.

It would also be desirable to lighten the difficulties surrounding the assertion of claims against other tort-feasors by amending section 211-a of the Civil Practice Act to allow impleader and cross-claims for purposes of contribution, that is, create a right of contribution between some tort-feasors without the necessity of joint judgment, thereby perhaps restoring the distinction between negligence and misconduct that was once observed regarding the right of contribution.[112]

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110. 178 Misc. 331, 333, 34 N.Y.S.2d 175, 178 (Sup. Ct. 1942).

111. In Bergman v. George, 202 Misc. 998, 1003, 117 N.Y.S.2d 27, 30 (Sup. Ct. 1952), the court said: "But the allegations of the main complaint are not determinative at this point; it is alleged in the third-party complaint that control was in fact in the impleaded defendant and this allegation too must be taken into consideration in passing upon the issues as a matter of pleading." In Pike v. Balmar Constr. Co., 104 N.Y.S.2d 569, 570-71 (Sup. Ct. 1951), the court said: "It is not the province of the Court on a motion of this kind to speculate upon the possible factual presentations at the trial. It is sufficient that it appears from the pleadings that a jury might return a verdict against the general contractor or on a theory of passive negligence which would permit recovery over against the sub-contractor." See also Johnson v. Endicott-Johnson Corp., 278 App. Div. 626, 101 N.Y.S.2d 922 (3d Dep't 1951); Korycka v. S.A. Healy Co., 5 Misc. 2d 598, 160 N.Y.S. 2d 24 (Sup. Ct. 1957). The right to indemnification must be apparent in the third-party complaint, otherwise it will be dismissed. See, e.g., Wolf v. La Rosa & Sons, Inc., 272 App. Div. 932, 71 N.Y.S.2d 320 (2d Dep't 1947), aff'd mem., 298 N.Y. 597, 81 N.E.2d 329 (1948). For a similar requirement for the cross-claim see, e.g., Shass v. Abgold Realty Corp., 277 App. Div. 346, 100 N.Y.S.2d 121 (2d Dep't 1950). As to how much should be read into the cross-complaint see Note, 39 Cornell L.Q. 484, 495-96 (1954).

112. See note 5 supra. There seems to be no necessity of abolishing the rule against contribution in cases of wilful wrongdoing or flagrant misconduct. Prosser § 46. That this might be the solution is suggested by virtue of the fact that the courts may have in many instances awarded indemnity for inability to grant contribution where plaintiff had failed to join the second tort-feasor in the original action. See Note, 39 Cornell L.Q. 484, 500 (1954).