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THE PROBLEM OF INDEMNITY UNDER THE SAFE PLACE STATUTE

ROBERT F. BODEN*

I. INTRODUCTORY

A great number of cases which have arisen under the Wisconsin Safe Place Statute have concerned not only the rights as between the injured party and a single defendant, but the conflicting rights and duties of several persons charged with liability under the Statute. In many of the cases involving injuries sustained under circumstances such that the Safe Place Statute is applicable, it is necessary not only to resolve the question of whether or not the plaintiff may recover, but further the oftentimes most difficult question of who shall ultimately bear the loss.

The Safe Place Statute was drafted in such way that more than one person may bear the necessary relationship to the injured plaintiff entitling plaintiff to recover from him. Indeed, there may be cases where the plaintiff has a cause of action against numerous parties as a result of his injuries.

Subcontractors, general contractors, owners, lessees, architects, employers—all are persons who may or may not sustain liability under the Safe Place Statute, depending upon the facts of each case. It is the purpose of this article to explore and attempt to resolve the legal problems concerned with the relationship between these various classes of persons with the objective in view of trying to determine who shall ultimately be responsible for the injuries to a given plaintiff.

II. NATURE OF THE SAFE PLACE STATUTE AND LIABILITY THEREUNDER

A. IN GENERAL

The Wisconsin Safe Place Statute is a most unusual piece of legislation. It has been on the statute books since 1911,¹ and has been the subject of extended litigation over the years.

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¹ WIS. LAWS, (1911), Ch. 485.

The duty imposed by the Statute is set forth in Section 101.06 of the WISCONSIN STATUTES providing as follows:

"Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employes and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair or maintain such place of employment or public building, and every architect shall so prepare the plans for the construction of such place of employment or public building, as to render the same safe."

Section 101.01, quoted in its entirety in the footnotes,² defines the various terms used in establishing the duty prescribed by Section 101.06.

² "101.01 Definitions of terms used. The following terms as used in Sections 101.01 to 101.29 of the statutes, shall be construed as follows:

(1) The phrase 'place of employment' shall mean and include every place, whether indoors or out or underground and the premise appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in (a) private domestic service which does not involve the use of mechanical power or (b) farm labor when the employer is the farmer operating the farm and the labor is such as is customarily performed as a part of farming, and including the transportation of farm products immediately and directly from the farm, and of materials, supplies or equipment directly to the farm for use thereon.

(2) The term 'employment' shall mean and include any trade, occupation or process of manufacture or any method of carrying on such trade, occupation or process of manufacture in which any person may be engaged, except in such private domestic service as does not include the use of mechanical power and in farm labor as used in subsection (1).

(3) The term 'employer' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or custody of any employment, place of employment or of any employe.

(4) The term 'employe' shall mean and include every person who may be required or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, or to go or work or be at any time in any place of employment.

(5) The term 'frequenter' shall mean and include every person, other than an employe, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser.

(6) The term 'deputy' shall mean and include any person employed by the industrial commission designated as such deputy by the commission, who shall possess special, technical, scientific, managerial or personal abilities or qualities in matters within the jurisdiction of the industrial commission, and who may be engaged in the performance of duties under the direction of the commission, calling for the exercise of such abilities or qualities.

(7) The term 'order' shall mean and include any decision, rule, regulation,

In construing the Statute, the Wisconsin Supreme Court has held that it creates no new causes of action in favor of anyone or against anyone but that it only affects the duty and defines the standard of care owed by owners and employers toward frequenters and employees in public buildings and places of employment.³

In *Rosholt v. Worden-Allen Co.*,⁴ the Court held that the Safe Place Statute, requiring every employer to furnish a place of employment which shall be as free from danger "as the nature of the employment will reasonably permit" effected a radical change from the common law rule which required only that the place should be reasonably safe. The Court held that the duty imposed by the Statute is an absolute one and is a greater duty than the duty merely to operate the place in a non-negligent manner.⁵

direction, requirement or standard of the commission, or any other determination arrived at or decision made by such commission.

(8) The term 'general order' shall mean and include such order as applies generally throughout the state to all persons, employment, places of employment or public buildings, or all persons, employments, or places of employment or public buildings of a class under the jurisdiction of the commission. All other orders of the commission shall be considered special orders.

(9) The term 'local order' shall mean and include any ordinance, order, rule or determination of any common council, board of aldermen, board of trustees, or the village board, or any village or city, or the board of health of any municipality, or an order or direction of any official of such municipality, upon any matter over which the industrial commission has jurisdiction.

(10) The term 'welfare' shall mean and include comfort, decency and moral well-being.

(11) The term 'safe' or 'safety' as applied to an employment or a place of employment or a public building, shall mean such freedom from danger to the life, health, safety or welfare of employes or frequenters, or the public, or tenants, or firemen, and such reasonable means of notification, egress and escape in case of fire, and such freedom from danger to adjacent buildings or other property, as the nature of the employment, place of employment, or public building, will reasonably permit.

(12) The term 'public building' as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants.

(13) The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any manager, representative, officer, or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

³ *Mullen v. Larson-Morgan Co.*, 212 Wis. 52, 249 N.W. 67 (1933); *Holzworth v. State*, 238 Wis. 63, 298 N.W. 163 (1941).

⁴ 155 Wis. 168, 144 N.W. 650 (1913); see also *Sparrow v. Menasha Paper Co.*, 154 Wis. 459, 143 N.W. 317 (1913); *Hollenbeck v. Chippewa Sugar Co.*, 156 Wis. 317, 144 N.W. 1104 (1914); *Peschel v. Klug*, 170 Wis. 519, 75 N.W. 806 (1920); *Mullen v. Larson-Morgan Co.*, *supra*, note 3.

⁵ While it is generally conceded that the Safe Place Statute increased the duty of an owner or employer beyond that prescribed by common law, at least one author has pointed out that "While our Court has frequently stated that the duty imposed by the Safe Place Statutes is more stringent, it would take a metaphysician to describe any relative difference between 'reasonably safe'

While the Safe Place Statute may not have technically created any causes of action, nevertheless the construction placed upon it by the Court over the years has had that practical effect in many instances. For instance, in *Wilson v. Evangelical Lutheran Church*,⁶ the Court held that the Safe Place Statute makes no exceptions of religious and charitable corporations and that therefore, in enacting it, the legislature abolished, insofar as safe place cases were concerned, the immunity from suit theretofore enjoyed by religious and charitable corporations.⁷

In *Heiden v. Milwaukee*,⁸ it was held that the inclusion of cities within the term "owner" as defined in the Statute indicated legislative intent that municipal corporations be subject to it, whether acting in a proprietary or in a governmental capacity, and that their immunity from suit in safe place cases arising out of governmental activities was removed by the Statute.

The Court refused to extend this principle to the state itself in *Holzworth v. State*,⁹ despite the fact that the state was included in the definition of "owner" in the Statute. The ground for the Court's refusal to hold that the Safe Place Statute abolished, as to cases within its purview, the state's immunity from suit was that the Statute created no causes of action but only set up a standard of care.

Likewise, the Court has held that the Safe Place Statute has abolished the defense of assumption of risk theretofore available in negligence cases.¹⁰

Thus it is seen that the general statement that the Safe Place Statute only lays down a standard of care must be qualified to the extent that it abolishes certain defenses historically available at common law. In that sense, it has created causes of action which did not exist before its passage.

For purposes of this article, exploring the question of indemnity under the Statute, it is probably sufficient to classify the Safe Place Statute as one defining standard of care rather than as one creating causes of action, bearing in mind these general exceptions to the rule.

It is also to be noted in connection with the Safe Place Statute that its application is confined, at least under present interpretation, to cases of defects in the premises involved and not to acts of active negli-

and 'as safe as the (premises') nature reasonably permits.'" Reuss, *Thirty Years of the Safe Place Statute*, 1940 Wis. L. Rev. 333, 334.

⁶ 202 Wis. 111, 230 N.W. 708 (1930).

⁷ See also *Wright v. St. Mary's Hospital*, 265 Wis. 502, 61 N.W.2d 900 (1953).

⁸ 226 Wis. 92, 275 N.W. 922 (1937).

⁹ *Supra*, note 3.

¹⁰ *Washburn v. Skogg*, 204 Wis. 29, 233 N.W. 764; 235 N.W. 437 (1931); *Bent v. Jonet*, 213 Wis. 635, 252 N.W. 290 (1934); *Sweitzer v. Fox*, 226 Wis. 26, 275 N.W. 546 (1937); but see *Klein v. Montgomery Ward & Co.*, 263 Wis. 317, 57 N.W.2d 188 (1953).

gence by persons on those premises.¹¹ In other words, the Safe Place Statute is not concerned with negligent acts by employees on otherwise safe premises, charged under the doctrine of *respondent superior* to the employer or owner, but is concerned with the condition of the premises. Thus no liability attaches under the Statute where the plaintiff has been injured because of the negligence of some co-employee, but does attach if he is injured because of the defective condition of the premises.¹²

B. DUTIES OF OWNERS AND EMPLOYERS UNDER THE STATUTE

The duties imposed by the Safe Place Statute are imposed upon a definite class of persons. Persons upon whom safe place duties are imposed are either "owners" or "employers" depending upon the nature of the premises involved. There may be owners of public buildings and owners of places of employment. There can be employers in charge of places of employment and there can be employers in charge of public buildings, which are also places of employment. In each case, however, a person must qualify as an owner or employer before he may be subjected to liability, and his liability may differ depending upon whether he is owner or employer.

The Statute defines "employer" as follows:¹³

"The term 'employer' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any agent, manager, representative or other person having control or custody of any employment, place of employment or of any employe."

The Statute defines "owner" as follows:¹⁴

"The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any manager, representative, officer, or other person having ownership, control or custody, of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

It is not the purpose of this article to explore the many legal problems concerned with who are "owners" and who are "employers" except as those problems bear upon the question at hand. The im-

¹¹ Pfeifer v. Standard Gateway Theater, Inc., 259 Wis. 333, 48 N.W.2d 505 (1951).

¹² *Ibid.*

¹³ WIS. STATS. (1955), §101.01(3).

¹⁴ WIS. STATS. (1955), §101.01(13).

portant phraseology to keep in mind in connection with the definition of "owner" is that the owner must be a person "having ownership, control or custody of any place of employment or public building or of the construction, repair or maintenance of any place of employment or public building. . . ."

It becomes obvious, therefore, that the term "owner" in the Safe Place Statute is far broader than the concept of ownership as understood in the law of property.

C. DUTIES OF OWNERS AND EMPLOYERS; NON-DELEGABLE DUTIES

The basis of the entire problem of indemnity under the Safe Place Statute is the proposition that the duties imposed by the Statute are non-delegable.¹⁵ The leading case on this point is *Criswell v. Seaman Body Corp.*¹⁶ In that case, Seaman engaged the Permanent Construction Co. as general contractor to erect a building. Permanent subcontracted the erection of structural steel to Worden-Allen Co. The plaintiff was an employee of Worden-Allen. He was injured in the course of his employment for Worden when a metal cable extending from a derrick used by Worden's crew came in contact with an uninsulated wire of a power line owned by the Electric Co. but located on Seaman's premises.

It appeared that Seaman not only had the right to direct the location and height of the power company's poles, but also had several employees who had charge of inspecting the work being done by Worden and Permanent, and who did in fact discuss safety matters with the subcontractor Worden.

After receiving Workmen's Compensation from Worden's compensation carrier, the plaintiff commenced a third party action under the provisions of WIS. STATS., Sec. 102.29, against Seaman and the Electric Co. to recover damages for injuries sustained as a result of violations of the Safe Place Statute by the defendants.¹⁷ A verdict

¹⁵ The proposition that "safe place duties" are non-delegable was recognized early in the course of the judicial construction of the act. *Sparrow v. Menasha Paper Co.*, *supra*, note 4; *Waskow v. Robert L. Reisinger Co.*, 180 Wis. 537, 193 N.W. 358 (1923). In *Neitzke v. Kraft-Phenix Dairies, Inc.*, 214 Wis. 441, 253 N.W. 579 (1934) the Court said: "The fact, if such be the case, that respondent's (Plaintiff's) immediate employer was derelict in his duty does not affect the validity of respondent's claim against appellant (defendant owner), on whom rested the duty to provide a safe place to work." See also *Saxhaug v. Forsyth Leather Co.*, 252 Wis. 376, 31 N.W.2d 589 (1947).

¹⁶ 233 Wis. 606, 290 N.W. 177 (1940).

¹⁷ It should be noted that, under the Safe Place Statute, the employee of a contractor working on premises is within the definition of "frequenter" in WIS. STATS. (1955), §101.01(5) as to other contractors and employers in and owners of the premises. *Neitzke v. Kraft-Phenix Dairies*, *supra*, note 15; *Criswell v. Seaman Body Corp.*, *supra*, note 16; *Morrison v. Steinfort*, 254 Wis. 89, 35 N.W.2d 335 (1948); *Johannsen v. Peter P. Woboril, Inc.*, 260 Wis. 341, 50 N.W.2d 53 (1952). Such injured employee, then, enjoys the status of "frequenter" when commencing a third party action against one allegedly liable under the Safe Place Statute, and as to him, as "frequenter," another "em-

was directed in favor of the Electric Co. but the issue of Seaman's violation was given to the jury. From judgment on an adverse verdict, Seaman appealed.

On appeal, Seaman contended that it did not own, maintain or control the power line, which was owned and cared for by the Electric Co.; that it was neither engaged in nor equipped for the construction trade, and let the contract for the erection of the building to Permanent; that it did not own, control or select the equipment or methods of Permanent or its subcontractors and could not control the details of the work.

The Court held that the evidence established conclusively that Seaman was the owner and had custody, control and possession of the premises upon which the power line and building were located. Said the Court:

"Although the Electric Company continued to be the owner of the power line, that fact did not prevent Seaman from exercising its rights and powers of controlling and having necessary changes made by the Electric Company in the location and height of its poles and wires, and the clearance of the latter for safety purposes. In these respects and for that purpose, Seaman had sufficient control over the power line upon its premises. . . ." ¹⁸

The Court went on to say:

". . . when Seaman let the general contract to Permanent and it in turn engaged Worden as the subcontractor to erect the structural steel, Seaman neither relinquished its rights of possession and control of the premises *nor could it while continuing in possession and control thereof delegate to either Permanent or Worden, so as to absolve itself therefrom, its duty and obligation under Sec. 101.06, Stats., to furnish for employees and frequenters the safe place of employment, safety devices, safeguards and methods and every other thing required by that statute. . . .* Consequently it was Seaman's duty under the safe-place statute either to have the wires relocated so as to remove the danger of a contact or the formation of an electric arc between the wire and the cable, or to have the current shut off while the boom had to be operated so close to where the wires were placed with Seaman's knowledge and consent. *Having knowledge of the dangerous condition and having the right and power to remedy it Seaman became liable for injuries caused by its failure to furnish and maintain a safe place of employment in compliance with Sec. 101.01, Stats.*" (Emphasis added) ¹⁹

The Court also pointed out: "Negligence on the part of Worden

ployer" on the premises owes the same duties as he does to his own employees. *Sandeem v. Willow River Powder Co.*, 214 Wis. 166, 252 N.W. 706 (1934).

¹⁸ *Supra*, note 16, at p. 617 of 233 Wis.

¹⁹ *Supra*, note 16, at pp. 617-618 of 233 Wis.

does not defeat Seaman's liability to Criswell as a frequenter by reason of its failure to comply with the Safe Place Statute."²⁰

Thus, under the *Criswell* decision, when it is established that a given party was an "owner" of the premises, liability attaches, and the obligations incurred under the Statute cannot be delegated. The duty owed is directly owed to "employees" and "frequenters" and cannot be avoided as to such persons.

Several important rules of law helping to define "owner" are developed in the *Criswell* case, bearing, of course, upon the question of non-delegable duties. They are:

1. The "ownership, control or custody" of a place of employment or public building need not be exclusive in order to charge one as "owner."

2. Control and custody may be enough to impose the duties of an "owner," though ownership is not present in the property sense of that term.

3. Though a construction job be let to an independent contractor, who controls the details thereof, the title-holder may retain sufficient "ownership, control or custody" if he retains a right to inspect the work, to look after the condition of the premises, and to conduct other activities on the premises.

4. In order to charge the owner, the defect need not exist before the work began.

In addition, the *Criswell* case establishes the important doctrine that, because an owner's duties are non-delegable, he may sustain liability under the Statute without actual fault or for his passive negligence, even though a cause of the injuries to the plaintiff is the active negligence of some other "owner," as, in the *Criswell* case, a subcontractor.²¹

An important exception to the *Criswell* rule, if it can properly be called an exception, remained dicta only for twenty years, until, in 1955, it was recognized in *Potter v. City of Kenosha*.²² In *Neitzke v. Kraft-Phenix Dairies, Inc.*,²³ the Court said in dicta:

"Situations may arise where the premises are so changed by the independent contractor as to excuse the owner from liability. If, for instance, the dangerous instrumentality is erected by the independent contractor himself, or a defective scaffolding is installed, the owner may not be liable for the injuries resulting. Or if the independent contractor conducts his work, unknown

²⁰ *Supra*, note 16, at p. 619 of 233 Wis.

²¹ See also, in connection with non-delegable duties and the conditions requisite to their imposition, *Waskow v. Robert L. Reisinger Co.*, *supra*, note 15; *Bunce v. Grand & Sixth Bldg., Inc.*, 206 Wis. 100, 238 N.W. 867 (1931); *Neitzke v. Kraft-Phenix Dairies, Inc.*, *supra*, note 15; *Mickelson v. Cities Service Oil Co.*, 250 Wis. 1, 26 N.W.2d 264 (1946).

²² 268 Wis. 361, 68 N.W.2d 4 (1955).

²³ *Supra*, note 15.

to the owner, in a manner so unusual and at variance with the customary methods of doing that work that because of it an existing instrumentality becomes dangerous and renders the premises unsafe, the owner may be free from liability."

The recent *Potter* case clearly recognized this principle and said:

"We are constrained to hold that when an owner turns over to an independent contractor the complete control and custody of a safe place, whereon or whereunder the contractor creates a place of employment for the purpose of fulfilling the terms of the contract, the owner reserving no right of supervision or control of the work excepting that of inspection or to change the plan with reference to the construction to be furnished, if thereafter in the performance of the work under the contract the premises are changed by the contractor and as a result a hazardous condition is created, the owner does not become liable to the contractor's employee injured as a consequence of such hazardous condition while acting in the scope of his employment."²⁴

An analysis of the rule indicates that it is but an amplification of the doctrine of the *Criswell* case relative to "ownership, custody or control" and well within the framework of that case.

No attempt will be made to exhaust the many legal problems raised in considering the different duties owed under the Statute by "owners" and "employers" for such would serve no useful purpose. Notice must be taken, at least in general, however, of the distinction between the statutory duties of "owners" and "employers," since the conflicting interests of defendants in a safe place case are necessarily affected thereby.

In *Jaeger v. Evangelical Lutheran Holy Ghost Congregation*,²⁵ the Court pointed out:

"The employer's duty to furnish safe employment includes the furnishing of a safe place of employment, and the employer has a broad duty not only with respect to the structure, which constitutes the place of employment, but with reference to the devices and other property installed or placed in such place. The employer's duty is carefully and specifically set forth in the first half of the section (Sec. 101.06). The last portion of the section defines the duty of employers and owners with respect to the structure of the building. The duty in this respect is to construct, repair and maintain such place of employment or such building in such a manner as to render the same safe. The obligation of the owner as such plainly relates to the building and not to temporary conditions which may negligently be permitted to exist within the building. . . .

"The permitting of temporary conditions wholly dissociated from the structure does not constitute a violation of the safe

²⁴ *Potter v. City of Kenosha*, *supra*, note 22, at p. 372 of 268 Wis.

²⁵ 219 Wis. 209, 262 N.W. 585 (1935).

place statute by the owner of a building, although, and it obviously does, constitute a violation if permitted by an employer."

However, where the "owner" of a "public building" is also an "employer" and the building also qualifies as a "place of employment," the owner sustains the larger liability of an "employer" not only to employees but to "frequenters" in the building.²⁶

The measure of duty, of course, becomes important in an indemnity case involving an "owner," inasmuch as it is the determination of his duty as co-extensive with the duty of another, coupled with its non-delegability and the fact that the duty should be discharged by the other, which confers the cause of action for indemnity.

III. NATURE OF INDEMNITY

As it was necessary to examine the nature of the Safe Place Statute and the theory of liability thereunder, particularly the concept of non-delegable duties, so also is it necessary to consider the principles of the law of indemnity.

In the *RESTATEMENT OF THE LAW OF RESTITUTION*, it is said:

"A person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful nature of his conduct."²⁷

In commenting upon this rule the *RESTATEMENT* says:

". . . it applies where the duty to be performed is contractual or quasi-contractual where it is a duty owed to the public, as in the payment of a tax, and where the duty to pay is based upon a tort, as where a servant innocently commits conversion in obeying orders of his master and has been required to pay damages therefor. It applies irrespective of the existence of a contract or agreement between the payor and the primary obligor, although it is subject to the terms of any contract which the parties may make."²⁸

Thus it appears that a contract of indemnity may be an express contract or a contract implied in fact or implied in law depending upon the circumstances of the case.²⁹

A contract implied in fact, as distinguished from a contract implied in law, or a "quasi-contract," "requires the same as an express con-

²⁶ *Prehn v. C. Niss & Sons, Inc.*, 233 Wis. 155, 288 N.W. 736 (1939).

²⁷ *RESTATEMENT OF THE LAW OF RESTITUTION*, §76.

²⁸ *RESTATEMENT OF THE LAW OF RESTITUTION*, §76, Comment B.

²⁹ "It has been generally stated that a contract of indemnity need not be express, but that indemnity may be recovered if the evidence establishes an implied contract. And although a right of indemnity generally arises by contract, express or implied, it has been said to exist whenever the relation between the parties is such that either in law or in equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful act of another in which he does not join." 27 AM. JUR., INDEMNITY, §16.

tract, the element of mutual meeting of minds and intention to contract."³⁰ Our Court has said:

"The two species (express and implied-in-fact contracts) differ only in methods of proof. One is established by proof of intention, the other by proof of circumstances from which the intention is implied as a matter of fact."³¹

Contracts are implied in fact, then, when services are performed by one at the request of another; it being from the request that the intention to contract may be implied.³² On the other hand, where one merely accepts services rendered by another, and valuable to him, not having requested them, no such intention may be implied, and the remedy must be in the field of quasi or implied-in-law contracts.³³

A contract implied in law arises because the law, to prevent unjust enrichment, imposes upon another the obligation to pay a debt which he, in equity and good conscience, should have paid.³⁴ Such "contracts" are not really contracts at all for the liability arises by operation of law without regard to the assent of the parties. As pointed out in the *Wojahn* case:

"They (contracts implied in law) arise where there is a legal duty to respond in money which by a legal fiction may be enforced as upon an implied promise. In such case there is no element of contract strictly so called. There is only the duty to which the law fixes a legal obligation of performance as in the case of a promise *inter partes*. So it is called in the books a quasi-contract."³⁵

The Wisconsin Supreme Court has recently said in *Nelson v. Preston*:³⁶

" . . . quasi contracts are 'a class of obligations which are imposed or created by law without regard to the assent of the party bound, on the ground that they are dictated by reason and justice, . . . and the obligation arises not from consent, . . . but from the law or natural equity. Such contracts rest on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, . . . In order that a contract may be implied in law from the wrong of a party, it must have been committed with the intention of benefiting his own estate.' 17 C.J.S. CONTRACTS, p. 323, Sec. 6. As stated in *Dunnebacke Co. v. Pittman*, 216 Wis. 305, 257 N.W. 30, the essential elements of quasi contract entitling one to judgment for unjust enrichment are:

³⁰ *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N.W. 1068 (1911).

³¹ *Ibid.*

³² *Ibid.*

³³ *Wojahn v. National Union Bank*, *supra*, note 30; *Dunnebacke Co. v. Pittman*, 216 Wis. 305, 257 N.W. 30 (1934).

³⁴ *Supra*, notes 27 and 28.

³⁵ *Wojahn v. National Union Bank*, *supra*, note 30.

³⁶ 262 Wis. 547, 55 N.W.2d 918 (1952).

1. A benefit conferred upon the defendant by the plaintiff;
2. Appreciation by the defendant of the fact of such benefit;
3. Acceptance and retention by the defendant of such benefit, under circumstances such that it would be inequitable to retain the benefit without payment of the value thereof."

A right to indemnity, then, may possibly arise in three ways: by express contract; by contract implied in fact; or by quasi-contract. For all practical purposes we may disregard contracts implied in fact, insofar as indemnity under the Safe Place Statute is concerned, since it is hardly to be anticipated that one's liability would be discharged by another at his request, except under the most unusual circumstances. We shall turn our attention, then, to express and quasi-contracts.

IV. THE PROBLEM OF INDEMNITY

A. EXPRESS CONTRACTS

The only Wisconsin case discussing the issues arising out of express indemnity contracts is *Hartford Accident and Indemnity Co. v. Worden-Allen Co.*,³⁷ a sequel to *Criswell v. Seaman Body Corp.*,³⁸ discussed *supra*. Hartford Accident and Indemnity Co. was the liability insurer of the Seaman Company, and, of course, paid the judgment rendered against Seaman and affirmed by the Supreme Court in the *Criswell case*. After paying the judgment, Hartford, subrogated to the rights of Seaman, commenced an action against Worden-Allen, the subcontractor whose boom had come into contact with the electric wires causing Criswell's injuries, to recover the amount paid Criswell together with the cost of defending the action. The action was commenced upon an express contract of indemnity executed between Worden and Permanent, the general contractor, for the benefit of Seaman.³⁹ Thus the stage was set for the first, and unfortunately the last, case to come before the Court on the indemnity problem under the Safe Place Statute.

The Court held that Hartford (standing in the shoes of Seaman) could recover indemnity under the contract from Worden-Allen. The contract provision was as follows:

"In accepting this order you (Worden) agree to indemnify, reimburse and save harmless the owner (Seaman) and us (Permanent) of and from all loss and damage to person or property and all claims, suits or demands arising from damages or injuries to you and your employees, ourselves and our employees, the owner and his employees, other contractors and

³⁷ 238 Wis. 124, 297 N.W. 436 (1941).

³⁸ *Supra*, note 16.

³⁹ It should be noted that, at the time that Criswell originally commenced his action, Seaman tendered the defense of the action to Worden-Allen, which declined the tender. The importance of this procedural device in an indemnity case is discussed *infra*, in connection with other procedural problems.

their employees, and the general public, due to, arising from, or connected with your operations on this job."⁴⁰

Worden made the following contentions in defense of the action:

1. Seaman (and Hartford) is not entitled to be indemnified under the contract "for any injuries to which Seaman's actual default proximately contributed;"⁴¹

2. It would be contrary to public policy to give effect to the agreement in that it would encourage Seaman to neglect its safe place duties;

3. Hartford (Seaman's liability insurer) and Worden were at most co-sureties and contribution, not indemnity, is the rule to be applied.⁴²

The Court rejected all of these arguments. Respecting the first, it said:

"It is now claimed that plaintiff, which stands in the shoes of Seaman, is not entitled to be indemnified under this contract for any injuries to which Seaman's actual default proximately contributed. We do not consider the contention to be sound. If the indemnity (contract) is to mean anything, it must include situations in which Seaman has sustained a liability by reason of the building operations. It may very well be that if the injuries had arisen solely out of Seaman's default in some respect, and were not in any way attributable to Worden, there would be no liability under the indemnity agreement. Here, however, the active negligence was that of Worden. Liability of Seaman was predicated upon a failure to furnish a safe place of employment, and there was a default in this respect only because of Worden's operations on the premises. In point of fact, the premises were only unsafe as to Worden's employees."⁴³

The Court went on to say:

"Upon the former appeal liability of Seaman was grounded by this court on the fact that Seaman remained in possession of the premises, and under these circumstances it could not delegate either to Permanent or Worden its duties under the safe-place statute. It appears to us that the liability of Seaman here is precisely the sort that was contemplated under the indemnity contract, and that to hold that it is not is to render the indemnity meaningless. The indemnity contract presupposes a liability by Seaman to employees, frequenters, and others."⁴⁴

Further, the Court pointed out:

"We have been able to discover no situation in which the indemnity contract would have any meaning or purpose if it

⁴⁰ *Supra*, note 37, at p. 127 of 238 Wis.

⁴¹ *Ibid.*, at p. 129.

⁴² Other contentions of Worden, not material here, will not be reviewed in this article.

⁴³ *Supra*, note 37, at p. 129 of 238 Wis.

⁴⁴ *Ibid.*

were not to cover such a default by Seaman as is here involved. As we have heretofore suggested, it may be that the contract does not cover cases in which the sole proximate cause of the injuries resulting in Seaman's liability were defaults on the part of Seaman wholly uncontributed to by Worden. A strong argument can be made to the effect that such a case is not covered by the indemnity, but we need not decide this question because it is not here under the facts of this case."⁴⁵

After quickly disposing of the public policy argument,⁴⁶ the Court held that, even if Hartford and Worden were, prior to Criswell's injury, co-sureties (a point which it did not decide) still Worden became principal surety as to the particular facts of the case and was obliged to respond in indemnity.⁴⁷

The Court's decision was founded upon the distinction between active and passive negligence. Seaman was only passively negligent in failing to take additional precautions against the type of injury which Criswell sustained, such passive negligence being founded upon the non-delegable character of its duties under the Statute. Worden, on the other hand, was actively negligent in the manner in which it operated the boom. Under these circumstances, the contract of indemnity may be applied. It is not limited to situations where the owner is completely without actual fault, nor is it limited only to situ-

⁴⁵ *Ibid.*, at p. 130 of 238 Wis.

⁴⁶ The Court said, at p. 131 of 238 Wis.: "It is also suggested that it would be contrary to public policy to extend the clause of this type to include indemnity for violation of the safe-place statute because it would tend to discourage the discharge of Seaman's duties in that respect. It may well be that Seaman could not contract with members of the general public and employees of Worden that it would not be liable for its own failure to maintain a safe place for frequenters and employees. That is not what it did, however. It simply purchased insurance from plaintiff and exacted an indemnity contract from defendant, the latter to cover cases where defendant's default contributed actively to Seaman's liability. If there were anything to defendant's contention, automobile and public-liability insurance policies would be void."

⁴⁷ *Ibid.*, at p. 132 of 238 Wis.: "It is next contended that plaintiff and defendant are at most coinsurers or cosureties, and that plaintiff's right is to contribution and not to indemnity. Cosuretyship is the relation between two or more sureties who are bound to answer for the same duty of the principal and who as between themselves should share the loss caused by the default of the principal. Restatement, Security, Proposed Final Draft, ch. 6, §141. The relation of coinsurers is upon about the same basis. The rule of contribution is an equitable rule and is based on the fact that those who insure or become sureties for the same duty ought to share the results of the default. Where, however, by reason of the agreement between the sureties or by reason of the general equities of the situation one surety or insurer ought, as against other sureties or insurers, to bear the whole loss, he becomes the principal surety, and all the other insurers or sureties become subinsurers or subsureties. Restatement, Security, Proposed Final Draft, ch. 6, §141A. That is the situation here. Plaintiff merely insured Seaman against its liabilities under the safe-place statute. Worden insured Seaman against all liabilities sustained by it and contributed to by a breach of duty on the part of Worden. As between Worden and plaintiff, waiving all questions whether they were otherwise cosureties or coinsurers, Worden clearly ought to respond in indemnity rather than contribution."

ations where the owner's liability is sustained on an agency theory, or as owner under an uninsured contractor.⁴⁸

Thus the Court has held that indemnity may be had in a situation where the indemnitee is not wholly without fault, if there is an express contract of indemnity and if the indemnitee's negligence is merely passive, or consists in omissions, while the indemnitor's conduct, on the other hand, is actively negligent.

The *Hartford* case has far from settled the problem arising under express contracts of indemnity. This is true because the Court founded its decision upon the difference between active and passive negligence, and between liability imposed as a result of actual fault and liability imposed under the Safe Place Statute without regard to fault and arising out of non-delegable duties.

Since the *Hartford* case has suggested that perhaps an indemnity contract can not be applied under certain circumstances, it is necessary to examine all of the possible fact situations which may be the subject of actions upon express indemnity contracts. These fact situations, using the classification set up by the Court in the *Hartford* case, are as follows:

1. The person from whom indemnity is sought may be actively negligent and the person seeking indemnity may be wholly without actual fault but may sustain his liability under the Safe Place Statute as a result of non-delegable duties.

2. The person from whom indemnity is sought may be actively negligent, and the person seeking indemnity may be passively negligent.

3. The person from whom indemnity is sought may be actively negligent, and the person seeking indemnity may also be actively negligent.

4. The person from whom indemnity is sought may be only passively negligent, and the person seeking indemnity may be actively negligent.

5. The person from whom indemnity is sought may sustain liability without actual fault, and the person seeking indemnity may be actively negligent.

We need not be concerned with the first of these possible fact situations because they were disposed of by the *Hartford* decision. The second is precisely the fact situation of the *Hartford* case, and in the first the indemnitee's degree of culpability is even less than non-feasance, so that we may safely assume that the *Hartford* decision would apply also to a situation where the indemnitee's only liability

⁴⁸ *Ibid.*, at p. 129 *et seq.* of 238 Wis. Other courts have reached the same result on similar facts. See *Griffiths & Son Co. v. National Fireproofing Co.*, 210 Ill. 331, 141 N.E. 739, 38 A.L.R. 559 (1923); *Dundar v. Milef Realty Corp.*, 258 N.Y. 415, 180 N.E. 102 (1932); *Baltimore & O. R. Co. v. Youngstown Boiler & Tank Co.*, 64 F.2d 638 (6th Cir., 1933).

to the plaintiff was as a result of non-delegable duties. In fact, dicta in the *Hartford* decision so indicates.

The third, fourth and fifth situations all present the same problem. Where the degree of negligence of the indemnitee is as great or greater than the degree of negligence of the indemnitor, may the indemnitee recover on an express contract of indemnity despite his own guilt? Is it against public policy to give effect to an agreement which will relieve one party of liability for his own negligent acts?

Indemnity agreements are not per se invalid as against public policy.⁴⁹ This principle appears to be recognized in all jurisdictions.⁵⁰ Thus, every case must be examined to ascertain whether the facts permit an application of the agreement to determine the rights of the parties.

In the Washington case of *Griffiths v. Broderick*,⁵¹ the plaintiff commenced an action to recover indemnity from the defendant corporation. It appeared that the plaintiff engaged the defendant to manage his apartment building, executing a written contract which, among other things, provided that the plaintiff would "save and hold Henry Broderick, Inc., harmless of and from any and all loss, damage or injury to any person or persons whatsoever, or property, arising from any cause or for any reason whatsoever in or upon said premises." A tenant was injured in the building as a result of the defendant Broderick allowing a stairway to become out of repair. The tenant commenced an action against and recovered a judgment against the plaintiff owner, who then sought indemnity from Broderick, Inc. Broderick defended on the ground that the plaintiff, under the contract, had agreed to hold harmless from all liability, and that this included liability arising from Broderick's own negligence and that, consequently, the plaintiff could not recover. The plaintiff contended that the indemnity agreement was void as against public policy when applied to a situation where the indemnitee sought to recover on the contract for loss incurred on account of its own negligence. The argument raised against the proposition of indemnity against one's own negligence was that such agreements would tend to encourage negligent conduct inasmuch as a person would not be ultimately responsible for the consequences of his negligent acts, although his liability to the principal party remained.

The Court agreed with the defendant, and held that there was no rule of public policy which forbade a person from contracting against liability for his own negligence. To so hold, the Court pointed out, would render invalid all contracts of indemnity insurance.

⁴⁹ *Hartford Accident & Indemnity Co. v. Worden-Allen Co.*, *supra*, note 37.

⁵⁰ Annotation, 175 A.L.R. 8, 25 (1948).

⁵¹ 27 Wash.2d 901, 182 P.2d 18, 175 A.L.R. 1 (1947).

The facts respecting the cause of the tenant's injuries are not completely stated in the opinion and it is, therefore, difficult to classify this case in terms of active and passive negligence. However, even if we assume that the negligent conduct of Broderick was merely passive, it would appear that the case is authority for the proposition that an indemnity agreement is effective, even where the degree of culpability of the indemnitee is greater than that of the indemnitor. This is true because it appears that the indemnitor sustained purely a constructive liability, as owner, to the injured party.

A case squarely holding that a person may agree to indemnify another against all active negligence is *Northern Pacific R. Co. v. Thornton Brothers Co.*⁵² In that case a sanitary district procured an easement across a railway right of way to construct a sewer. In letting the contract to the defendant, Thornton Brothers Co., it procured an indemnity agreement whereby the defendant agreed to indemnify the railway company against all loss or damage "arising in any manner out of or in any manner connected with" the work. Subsequently, a pile driver owned by a sub-contractor under the defendant, Thornton, was damaged through the negligence of the railway company in the operation of a train. The railway paid damages to the sub-contractor and sued the defendant contractor for indemnity. The Minnesota court held that the railway company could recover indemnity from the contractor under the agreement.

Most courts which have considered the problem have held that a person may properly contract to indemnify himself against his own active negligence.⁵³ Cases holding such agreements valid generally base their conclusion on reasoning such as that of the Missouri court in *Terminal Railroad Assn. v. Ralston-Purina Co.*,⁵⁴ where the following is said:

"As to whether an indemnitee can recover for losses caused by his own negligence depends on the language of the indemnity contract and what may be termed the subject matter thereof. A contract which undertakes to indemnify against the consequences of an act which is illegal, because against positive law or public policy, is void, . . . but it is not contrary to any positive law or public policy for an indemnitee to contract with

⁵² 206 Minn. 193, 288 N.W. 226 (1939).

⁵³ *Westinghouse, C.K. & Co. v. Long Island R. Co.*, 160 App.Div. 200, 145 N.Y.Supp. 201 (1914), aff'd 216 N.Y. 697, 100 N.E. 1051 (1915); *Ford v. Stevens Motor Car Co.*, 203 Mo.App. 669, 220 S.W. 980 (1920); *Payne v. National Transit Co.*, 300 Fed. 411 (D.C.Pa., 1924), aff'd 6 F.2d 729 (3rd Cir., 1925), cert.den., 269 U.S. 579 (1925); *J. W. Grady Co. v. Herrick*, 288 Mass. 304, 192 N.E. 738 (1934); *Clark v. Ames*, 267 Mass. 44, 165 N.E. 696 (1929); *Northern Pacific R. Co. v. Thornton Bros. Co.*, *supra*, note 52; *Griffiths v. Broderick*, *supra*, note 51; *Terminal Railroad Assn. v. Ralston-Purina Co.*, 352 Mo. 1013, 180 S.W.2d 693 (1944).

⁵⁴ *Supra*, note 53.

an indemnitor to save him harmless as to third persons, even though the loss sustained was the result of his own negligence."

The distinction, of course, is between mere negligence, though in the field of malfeasance, and wilful tortious conduct. It is also pointed out in the cases that it is not an objection to the validity of such agreements that they insure against a wrongful act, because they do not contemplate the commission of such act, they merely provide against the contingency of such an act happening through negligence and not by design.⁵⁵

Those courts adopting a contrary view do so on the theory that it is against public policy for one to secure an agreement whereby he is indemnified against the results of his own negligence. In *Johnson v. Richmond & D. R. Co.*,⁵⁶ where the facts were identical to those in the *Northern Pacific* case, the court reached an opposite conclusion and denied indemnity to the railway company. The court said:

"It would be strange indeed if such a doctrine (of indemnity for one's own active negligence) could be maintained. To uphold the stipulation in question would be to hold that it was competent for one party to put the other parties to the contract at the mercy of its own misconduct, which can never be lawfully done where an enlightened system of jurisprudence prevails. Public policy forbids it, and contracts against public policy are void."

The immediate objection which comes to mind upon a reading of this Virginia decision is that such a view would render invalid all contracts of indemnity insurance. In fact, it would seem that if indemnity insurance contracts are to be given validity, then other indemnity agreements whereby the indemnitee secures protection against his own active negligence must be given effect.

The Wisconsin Court has never had occasion to rule on this question. It has, however, ruled that indemnity insurance contracts are not void as against public policy on the theory that they encourage negligent conduct by relieving the actor of personal liability.⁵⁷ Our Court has inferred, however, in the *Hartford* case,⁵⁸ that perhaps an indemnity agreement could not be given effect where the negligence of the indemnitee was active and that of the indemnitor merely passive. As has been pointed out, that statement of the Court was dicta only, but it should be borne in mind in any attempt to determine what the Court might do should a case come before it.

Despite this dicta, it is felt by this writer that if a case comes to the Court, it will be inclined to adopt the majority rule and give validity

⁵⁵ *John Griffiths & Son v. National Fireproofing Co.*, *supra*, note 48.

⁵⁶ 86 Va. 975, 11 S.E. 829 (1890).

⁵⁷ *Hartford Accident & Indemnity Co. v. Worden-Allen Co.*, *supra*, note 37.

⁵⁸ *Ibid.*

to the contract. Any other result, it is submitted, necessarily is based upon the proposition that it is against public policy to insure against one's own negligence. Such a proposition is today untenable, although it may have had some validity prior to the advent of indemnity and casualty insurance.

If indemnity agreements of this kind are to be given effect on this ground, then one further question arises, to wit: Are such contracts not in fact insurance contracts entered into with an indemnitor not licensed in that business, and therefore void?

Insurance carriers must, of course, be licensed.⁵⁹ The Wisconsin Court has said:

"An insurance contract is a contract whereby one party agrees to wholly or partially indemnify the other for loss or damage which he may suffer from a specified peril."⁶⁰

This is the general definition of an insurance contract accepted and recognized everywhere.⁶¹ Manifestly, that which is a contract of insurance cannot be changed into something else by merely giving it another name.⁶²

No case has been found anywhere discussing whether an indemnity agreement between, for instance an owner and a contractor, whereby the indemnitor agreed to indemnify the indemnitee against the latter's own active negligence, was in fact an insurance contract, and void because the indemnitor was not licensed.

The Wisconsin Court's definition of an insurance contract does not include a proviso that the indemnitor must be one who holds himself out and engages in the business of writing indemnity agreements. Under it anyone who undertook to indemnify another against some specified loss would be engaged in the insurance business. However, it should be remembered that in the *Shakman* case⁶³ wherein the definition was set forth, the Court was not faced with this problem, and further that, while the WISCONSIN STATUTES regulate insurance, they do not define it.⁶⁴ Likewise the basis of the regulation is that the general public has an interest in the proper control of the *business* of writing insurance policies,⁶⁵ as a matter of the police power. The

⁵⁹ WIS. STATS. (1955), Ch. 201-207.

⁶⁰ *Shakman v. United States Credit System Co.*, 92 Wis. 366, 66 N.W. 528, 32 L.R.A. 383, 53 Am.St.Rep. 920 (1896).

⁶¹ 29 AM. JUR., INSURANCE, §3.

⁶² State ex rel. Martin v. Dane County Mutual Benefit Assn., 247 Wis. 220, 19 N.W.2d 303 (1944).

⁶³ *Supra*, note 60.

⁶⁴ State ex rel. Martin v. Dane County Mutual Benefit Assn., *supra*, note 62.

⁶⁵ State ex rel. United States F. & G. Co. v. Smith, 184 Wis. 309, 199 N.W. 954 (1924); State ex rel. Time Insurance Co. v. Smith, 184 Wis. 455, 200 N.W. 65 (1924); *Hobbins v. Hannah*, 186 Wis. 283, 202 N.W. 800 (1925); State ex rel. Aetna Insurance Co. v. Fowler, 196 Wis. 451, 220 N.W. 534 (1928).

public interest is not in the incidental execution of an indemnity agreement as part of a general business contract.

Thus appears the distinction which it seems must be made in these cases. It appears only proper that if *A*, having no relation to the activities of *B*, agrees to indemnify *B* against his own negligent acts, and further enters into similar agreements with others, he should procure a license so to do, for he is engaged in the business of writing insurance. If *A*, however, is a building contractor and *B* engages him to build a house, exacting, as part of the contract for the erection of the house, an indemnity agreement an entirely different situation is presented. Indeed, it is to be doubted if the police power of the state could extend to such a contractual arrangement.⁶⁶

Before leaving the subject of express indemnity agreements, it is well to note that all of the above proceeds on the assumption that the terms of the indemnity agreement are sufficient to include such things as the indemnitee's own negligence, or his own active negligence. Without a sufficiently specific agreement, of course, there is no basis for recovery against the indemnitor.⁶⁷

B. IMPLIED IN LAW OR QUASI-CONTRACTS

In General. The quasi-contractual phase of the problem under consideration is perhaps the more difficult. It is equally important because the number of cases where the parties fail to spell out their rights and duties by means of express indemnity agreements are numerous.

In the law of express indemnity agreements, a party who agrees to indemnify another against a certain loss will, in most jurisdictions, be held to the bargain he has made, even if it results in his having to indemnify the other against his own active negligence. The fundamental difference between these and indemnity contracts implied in law is that in the latter situation the obligation of the indemnitor, as has been seen, is imposed by the law to prevent unjust enrichment.⁶⁸ Assent to be bound is not the test; rather the question is whether the indemnitee has conferred a benefit upon the indemnitor, which has been appreciated, accepted and retained by the latter under such circumstances that he would be unjustly enriched if he did not respond in damages to the indemnitee to the extent of the benefit conferred.⁶⁹

Insofar as the subject under consideration is concerned, the classic

⁶⁶ It is, of course, not within the scope of this article to discuss the limits of the police power. It should suffice to point out the axiom that the police power extends to those matters affecting *public* health, safety, morals or welfare.

⁶⁷ See *Finkelstein v. Brant*, 198 Wis. 527, 224 N.W. 743 (1929). Also, see the text of the indemnity agreement in the *Hartford* case, quoted *supra*, note 40, and the indemnity agreement in *Northern Pacific R. Co. v. Thornton Bros. Co.*, *supra*, note 52.

⁶⁸ *Supra*, notes 30 through 36.

⁶⁹ *Supra*, note 36.

situation of quasi-contractual indemnity is the case where an owner of premises is liable to a frequenter because his duties under the Safe Place Statute are non-delegable, but where the injuries sustained by the frequenter were in fact caused by the negligence of a contractor working on the premises, from whom the owner failed to secure a written indemnity agreement.

Availability of Quasi-Contractual Relief. As indicated above, the only Wisconsin case pertaining to the entire problem of indemnity under the Safe Place Statute is *Hartford Accident & Indemnity Co. v. Worden-Allen Co.*,⁷⁰ involving an express contract. Dicta in that case, however, sheds some light on the disposition of the Court toward quasi-contractual indemnity cases. In discussing the express contract the Court said:

“ . . . the first (contention) is that it (the indemnity agreement) may have been intended to cover liability arising out of non-delegable duties, where in fact the fault was wholly that of Worden, but because of the non-delegable character of the duty Seaman would sustain a liability without actual fault. *In such a situation, however, there would be no need for an indemnity contract because Seaman would be entitled without it to complete indemnity from Worden.* *Zulkee v. Wing*, 20 Wis. *408.”
(emphasis added)

Thus the Court points out that where the indemnitee has sustained a liability without actual fault the express contract is unnecessary and indemnity may be had purely as a matter of quasi-contract. Cited in support of that proposition is *Zulkee v. Wing*,⁷¹ an 1866 case holding that a master may have indemnity from his servant on account of damages paid by the master as a result of the servant's negligence. The only other Wisconsin case discussing the question is *City of Milwaukee v. Boynton Cab Co.*,⁷² where the Court in dicta said that quasi-contractual indemnity might be had by one who sustained liability without any fault against the actual tortfeasor.

While these statements of the Court are dicta, there is no reason to suppose that they would not be held to be the law should a case be brought before the Court. In every case where one completely innocent is required to respond for the tort of another, all of the conditions

⁷⁰ *Supra*, note 37.

⁷¹ 20 Wis. *408 (1866).

⁷² 201 Wis. 581, 229 N.W. 28 (1930). In this case, an employee of the plaintiff city was killed as a result of the negligence of the defendant in the operation of a motor vehicle. The city was in no respect negligent, but was obliged to pay workmen's compensation benefits. Thus subrogated under the provisions of Wis. STATS., §102.29, the city sued the defendant. While recovery was allowed because of the statutory grant of a cause of action to the city under Sec. 102.29, the Court pointed out in dicta that the city would have enjoyed a common law right of indemnity, as a matter of quasi-contract had the statutory right not been conferred.

of quasi-contractual recovery as set forth above are met.⁷³ Perhaps the only clearer case is where the alleged indemnitee is guilty of active negligence and the alleged indemnitor sustains liability without actual fault. While most jurisdictions would give effect to a written agreement under these circumstances, it is obvious that no quasi-contractual relief is available for the simple reason that there is no unjust enrichment.

The real problem arises in cases where the indemnitee has been guilty of some omission, some passive negligence, and the indemnitor was actively negligent. Under these circumstances, is there any quasi-contractual relief?

Whatever may be the rule in other jurisdictions, it is the purpose of this paper to explore the problem under the Wisconsin Safe Place Statute, and it is the opinion of this writer that, to a large extent, this question is answered by the Wisconsin doctrine of contribution among joint tortfeasors. Most jurisdictions embrace the old common law rule that contribution will not lie between joint tortfeasors.⁷⁴ In Wisconsin, since the 1918 decision in *Ellis v. Chicago and North Western Ry. Co.*,⁷⁵ we have established a rule of contribution among joint tortfeasors. In that case, the plaintiff's injuries were caused in a collision between a railway train and an interurban car, the negligence of the railway company and the traction company concurring to produce the result. The Court held that the rule against contribution between joint wrongdoers did not apply to a case where there was no wilful or conscious wrong, and that contribution would lie as between joint tortfeasors guilty of ordinary negligence.

In the leading case of *Wait v. Pierce*⁷⁶ the Court set forth the basis of the right to contribution, and stated:

"The right of contribution is founded upon principles of equity and natural justice and does not spring from contract. Whether the common obligation be imposed by contract or grow out of tort, the thing that gives rise to the right of contribution is that one of the common obligors has discharged more than his fair and equitable share of the common liability."

Since these decisions, the doctrine of contribution has become firmly fixed in our jurisprudence. Contribution is available to a joint tortfeasor who sustains a common liability for negligence with another joint tortfeasor and who has discharged more than his fair

⁷³ *Travelers' Insurance Co. v. Northwest Airlines*, 94 F.Supp. 620 (D.C.Wis., 1950).

⁷⁴ The leading case adopting this rule is *Union Stockyards Co. v. Chicago, B. & Q. R. Co.*, 196 U.S. 217 (1905).

⁷⁵ 167 Wis. 392, 167 N.W. 1048 (1918).

⁷⁶ 191 Wis. 202, 210 N.W. 822, 48 A.L.R. 276 (1926).

share of the obligation.⁷⁷ In the case of two such tortfeasors, 50% of the total liability to the plaintiff is a fair and equitable share, regardless of the comparative negligence of the parties.⁷⁸ The right to contribution is inchoate until one of two joint tortfeasors pays more than his fair share, at which time the right vests.⁷⁹ Wilful misconduct includes gross negligence, and a grossly negligent tortfeasor may not have contribution.⁸⁰

In almost forty years of litigation since the *Ellis* case⁸¹ no Wisconsin decision has ever intimated that the rules of contribution were in any wise affected by the character of the *ordinary* negligence of the parties. In other words, whether the negligence of the joint tortfeasors be active or passive, contribution will lie. That the Wisconsin Supreme Court would alter this firmly established doctrine is most improbable.

It therefore appears that indemnity, as a matter of quasi-contract, will not lie in favor of a passively negligent joint tortfeasor against an actively negligent joint tortfeasor, for to allow such recovery would destroy the doctrine of contribution which obtains in this state.

What happens, however, if one or more of the conditions of contribution liability are not present? As we have seen, the doctrine of contribution depends upon the existence of the relationship of joint tortfeasors, which in turn depends upon "concurring negligence" and common liability to the plaintiff.⁸² Further the element of wilful wrongdoing must be absent.⁸³

At the outset, let us eliminate the proposition of a case where the negligence of the parties did not "concur" to produce plaintiff's injuries. It is difficult to imagine a safe place case involving passive and active negligence where such a problem would be presented. This is true because the passive omission of one party would be a continuing negligent act which would combine with the other's active negligence to cause the injury. This proposition has been recognized by our Court in *Pennell v. Rumely Products Co.*⁸⁴ It was pointed out in that case that in order for the continuing omission not to concur with the active negligence to create the joint and several liability of joint tortfeasors,

⁷⁷ *Ellis v. Chicago & N.W. R. Co.*, *supra*, note 75; *Wait v. Pierce*, *supra*, note 76; *Walker v. Kroger Grocery & Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934); *Ainsworth v. Berg*, 253 Wis. 438, 34 N.W.2d 75, 35 N.W.2d 911 (1948).

⁷⁸ *Zurn v. Whatley*, 213 Wis. 365, 251 N.W. 435 (1933); *Homerding v. Pospyschalla*, 228 Wis. 606, 280 N.W. 409 (1938).

⁷⁹ *Michel v. McKenna*, 199 Wis. 608, 227 N.W. 396 (1929); *De Brue v. Frank*, 213 Wis. 280, 251 N.W. 494 (1933); *Ainsworth v. Berg*, *supra*, note 77.

⁸⁰ *Zurn v. Whatley*, *supra*, note 78.

⁸¹ *Supra*, note 75.

⁸² See cases cited *supra*, notes 75 through 80. Also see *Noll v. Nugent*, 214 Wis. 204, 252 N.W. 574 (1934).

⁸³ *Supra*, note 80.

⁸⁴ 159 Wis. 195, 149 N.W. 769 (1914).

the active negligence would have to constitute a superseding cause, destroying proximate causation between the omission and the injury. Thus this problem is really a problem in the field of proximate cause, and the passively negligent party, if successful, prevails against the plaintiff, and no indemnity question arises.

Turning to gross negligence, there is likewise no case in Wisconsin on the question of whether an ordinarily negligent tortfeasor may have indemnity from a grossly negligent one. The question is one of frequent speculation among lawyers, and does pose a serious question. As set forth above,⁸⁵ the right to quasi-contractual indemnity is generally stated to be conditioned upon the freedom of the indemnitee from wrongful conduct.⁸⁶ On the other hand, Wisconsin has rejected the concept that the wrongful conduct of a joint tortfeasor should bar his recovery of contribution if he is guilty of no wilful misconduct.⁸⁷ Could this policy not be extended to the field of indemnity? The answer, of course, lies with our Court, and, because of the infrequency of gross negligence cases under the Safe Place Statute, we will merely pose the question and pass to the real problem which is often encountered when, as between two persons liable under the Statute, the relationship of joint tortfeasors does not exist.

That problem is the problem arising when there is no common liability between the two. It arises where the alleged indemnitor is the employer of the plaintiff who has sued the indemnitee.

Problem where Plaintiff is Employee of Indemnitor. Let us suppose that *A* is the employee of *B*, an independent contractor engaged by *C* to work on *C*'s premises. *A* is injured as a result of the negligence of *B*, his employer, under such circumstances that *B* becomes liable to *A* for the payment of workmen's compensation benefits. *C* has retained the necessary custody and control of his premises to become chargeable with the non-delegable duties of the Safe Place Statute. *B*, through his compensation carrier, pays benefits to *A*. *A* then joins with *B*'s carrier in a "third party action" under the Workmen's Compensation Act⁸⁸ against *C*, alleging that the injuries of *A* were caused by *C*'s violation of the Safe Place Statute. No express

⁸⁵ See discussion, *supra*, on the nature of indemnity.

⁸⁶ RESTATEMENT OF THE LAW OF RESTITUTION, §76.

⁸⁷ See cases cited *supra*, notes 75 through 80.

⁸⁸ WIS. STATS. (1955), §102.29 provides as follows: "The making of a claim for compensation against an employer or compensation insurer for the injury or death of an employee shall not affect the right of the employee, his personal representative or other person entitled to bring action, to make claim or maintain an action in tort against any other party for such injury or death. . . . The employer or compensation insurer who shall have paid or is obligated to pay a lawful claim under this chapter shall likewise have the right to make claim or maintain an action in tort against any other party for such injury or death. . . ."

indemnity agreement exists between *B* and *C*. *C* impleads *B* in the action and files a cross-complaint for indemnity against *B*.

This is not at all an infrequent situation and it raises what is perhaps one of the most difficult problems of indemnity under the Safe Place Statute. The issue is whether or not *C*, the owner, may have indemnity on a quasi-contract theory against *B*, the contractor and employer of *A*, despite the following provision in the Wisconsin Workmen's Compensation Act:

"When such conditions (of liability for compensation under the Act) exist, the right to recovery of compensation pursuant to the provisions of this chapter shall be the exclusive remedy against the employer."⁸⁹

In the leading case of *Britt v. Buggs*,⁹⁰ the Wisconsin Supreme Court held that where the plaintiff in a third party action against a third party defendant, who impleaded the plaintiff's employer and cross-complained for contribution, received workmen's compensation under the Act, the third party could not enforce contribution from the employer. The Court pointed out that the right to contribution arises only where there is a common liability to the plaintiff and where the relationship of joint tortfeasors exists between the parties. The court said:

"It will be seen that Buggs having been subjected to the liability of the compensation act, such liability was in lieu of any other liability whatsoever. Hence Buggs completely relieved himself from liability to Britt on account of the collision when he paid compensation pursuant to the compensation act. That being so, there was no common liability to Britt for such accident by Buggs and Wolff (the third party). . . ."⁹¹

It is, therefore, clear that no contribution may be had from the plaintiff's employer in a case where the only liability of the employer arises under the Workmen's Compensation Act. Consequently, an owner may not recover contribution from an independent contractor whose employee has been injured on the job and who has commenced a third party action against the owner under the Safe Place Statute. But, may the owner secure indemnity on a quasi-contractual theory?⁹²

It goes without saying that the employer has not agreed voluntarily and expressly to assume liabilities beyond his compensation liability.

⁸⁹ WIS. STATS. (1955), §102.03(2).

⁹⁰ 201 Wis. 533, 230 N.W. 621 (1930).

⁹¹ *Ibid.*

⁹² Of course, no problem is presented where there is an express indemnity agreement. It must be remembered that in the *Hartford* case, *supra*, note 37, Hartford, standing in the shoes of the owner, was allowed indemnity from Worden, the plaintiff's employer, under an express contract. The right to indemnity arises from the contract, and there is nothing in the Workmen's Compensation Law to prevent an employer from enlarging his liability by express agreement voluntarily entered into.

It should also be kept in mind that the doctrine of *Britt v. Buggs*⁹³ cannot be applied as the complete solution to the indemnity problem, because that case decided only that contribution could not be had; this for the reason that no common liability existed between the parties. As we have seen, the law of quasi-contractual indemnity contains no such condition of relief. The question, of course, is whether the owner has conferred a benefit upon the indemnitor-employer which has been accepted and retained by him, to his unjust enrichment.⁹⁴

It is not enough to point to the general doctrine discussed above⁹⁵ that one who, without fault, has discharged the tort liability of another is entitled to indemnity. In the first place, compensation liability is not a tort liability, nor is it a contract liability; it is purely a statutory liability.⁹⁶ In the second place, the employer has paid a limited amount of compensation according to the schedules of the Act, whereas the third party case against the owner is for the recovery, by the compensation carrier, of that amount, plus an unlimited amount by the employee for his pain and suffering.⁹⁷ It may be conceded that, merely on the general principles of indemnity, the owner should be able to recover from the employer indemnification for that portion of the third party claim which represents the subrogated interest of the insurance carrier, because that is a liability which, as between the owner and the employer, should be borne by the latter.⁹⁸ That is a defense, however, which may be asserted by way of affirmative defense against the insurance carrier, which, as subrogated to the rights of the employer,⁹⁹ stands in the employer's shoes. The real problem is with the balance of the claim; the employee's action for pain and suffering.

It is at first difficult to see how the payment by the owner to the employee could confer a benefit upon the employer. This is true because the employer sustains no liability beyond his compensation liability, and is not liable to his employee for pain and suffering.¹⁰⁰ How then does he derive a benefit from the owner's payment to the employee? The situation is manifestly different from a case where an ordinary frequenter, to whom the alleged indemnitor would be liable to an unlimited amount for pain and suffering, sues the owner.

If it is assumed that the indemnitee must discharge an existing legal liability of the indemnitor to the plaintiff, then the conclusion

⁹³ *Supra*, note 90.

⁹⁴ See discussion *supra* as to nature of indemnity.

⁹⁵ *Supra*, notes 70 through 73.

⁹⁶ *Anderson v. Miller Scrap Iron Co.*, 169 Wis. 106, 170 N.W. 275, 171 N.W. 935, 173 N.W. 257 (1919).

⁹⁷ WIS. STATS. (1955), §102.29.

⁹⁸ *Supra*, notes 70 through 73; see also general discussion of nature of indemnity, *supra*.

⁹⁹ WIS. STATS. (1955), §102.29.

¹⁰⁰ WIS. STATS. (1955), Ch. 102; *Britt v. Buggs*, *supra*, note 90.

seems inescapable that there is no cause of action in indemnity in this situation, for lack of a benefit conferred.

Despite this seeming impasse, several courts in other jurisdictions have concluded that, under these circumstances, the "exclusive remedy" provisions of the compensation acts do not bar quasi-contractual indemnity actions.¹⁰¹ None of these cases discuss the problem here raised. Each bases its decision on the proposition that indemnity, unlike contribution, does not depend upon the existence of a joint tort-feasor relationship.¹⁰² The courts faced with the problem seem to think this distinction sufficient to allow the recovery of indemnity.

That there should be no indemnity in a situation of this kind seems indeed unjust. An owner, who is perhaps guilty of no negligence at all, is, because of the non-delegable duties of the Safe Place Statute, subjected to liability far in excess of workmen's compensation benefits, for an injury which is actually caused by the negligence of the contractor, and which should be a matter wholly between the contractor and his employee. Yet it clearly appears that no benefit, in the sense of discharging a legal obligation of the employer to his employee, is conferred.

Must the benefit be in that category, however? It is submitted that a different type of benefit is conferred in these cases which will support quasi-contractual relief. The contractor-employer has, or will, receive from the owner a stipulated sum for performance of the work in question. If the owner is obliged to pay this sum, and at the same time respond in damages to the employees of the contractor injured as a result of the contractor's own negligence, and his consequent failure to perform his work in a workmanlike and non-negligent manner, then the owner has most certainly conferred a benefit upon the contractor though not in the sense of discharging his legal obligations to his employee.

It is settled that a contractor impliedly undertakes, in entering into a contract with an owner, that the work will be done in a workmanlike and non-negligent manner, and with such skill as may ordi-

¹⁰¹ *Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir., 1941); *American District Telephone Co. v. Kittleson*, 179 F.2d 946 (8th Cir., 1950); *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952).

¹⁰² For instance, in the *American District Telephone* case, *supra*, note 101, the court said: "The difficult question in this case arises on the trial court's action in dismissing the third party complaint. It is important to note that the third party complaint did not state an action for contribution, but an action for indemnity, for judgment over against Armour in favor of American, on the allegation that Armour was guilty of primary negligence resulting in the injury of Kittleson and that American's negligence contributing to the injury of Kittleson was secondary." The Court held that the telephone company "had the right to maintain a third party complaint against Armour & Company for indemnity over objections of Armour Company that the right to indemnity was so repugnant to the Compensation Act that survival of the right would prevent realization of the purpose of the Act."

narily be expected from those who undertake such work.¹⁰³ While this covenant is ordinarily applied to the condition of the work performed, and as a defense in an action for the price, there should be no reason why it cannot be applied in these cases. Certainly it is as much a breach of the promise if the contractor performs his work so improperly and negligently as to expose the owner to thousands of dollars of liability for personal injuries as it is a breach if the finished work, because poorly built, is worth a few hundred dollars less.

While no case has been found on this point, it is submitted that the above is a solution to this facet of the problem of indemnity under the Safe Place Statute where the owner's liability is purely based upon the non-delegable duties of the Statute. It is in accord with the rules of quasi-contractual indemnity, and at the same time it does no violence to the concept of non-delegable duties or to the "exclusive remedy" provisions of the Workmen's Compensation Act.¹⁰⁴

However, where the owner is guilty of passive negligence, it is doubtful if this rationale can be applied to the case, for in such a situation the owner's liability is not incurred solely as a result of the breach by the contractor of the implied promise to do the work in a workmanlike and non-negligent manner. Here the same problem arises as arose in the gross negligence matter discussed above, namely, whether the Court will adopt, in indemnity cases, the rule of contribution cases that mere ordinary negligence does not bar quasi-contractual relief. This problem, however, is more difficult in that one is confronted with the finding of a benefit conferred on the employer-contractor guilty of active negligence. But if the Court is to consider the active negligence of the contractor as a breach of the implied covenant, then undoubtedly the owner is entitled to some measure of relief as a matter of defense in an action for the price of the work. However, the rule above proposed should be available in most cases, since the owner does not usually participate even passively in cases where an employee of the contractor is injured through some active negligence of the contractor.

V. COROLLARY PROBLEMS

A. INSURANCE COVERAGE

One of the problems closely related to the matter of indemnity under the Safe Place Statute is the problem of whether insurance coverage is available to a party sued for indemnity under the standard type

¹⁰³ *Butler v. Davis*, 119 Wis. 166, 96 N.W. 561 (1903); *Burmeister v. Wolfgram*, 175 Wis. 506, 185 N.W. 517 (1921); *Geiger v. Ajax Rubber Co.*, 190 N.W. 831 (1922); *Charles v. Umentum*, 261 Wis. 647, 53 N.W.2d 706 (1952).

¹⁰⁴ The contractor's liability is not enlarged beyond that set forth in the Workmen's Compensation Act, Wis. STATS. (1955), §102.03(2), except insofar as he consents thereto by undertaking the work and entering into an agreement with the owner whereby he impliedly agrees to do a workmanlike job. That voluntary enlargement of such obligation is proper is held in *Hartford Accident & Indemnity Co. v. Worden-Allen Co.*, *supra*, note 37.

of public liability insurance policy. This problem arises because practically all public liability policies contain an exclusion to the effect that the policy does not apply "to liability assumed by the insured under any contract or agreement."¹⁰⁵ The question of coverage is immediately apparent and, of course, the issue is whether or not the insured indemnitor has "assumed" his liability "under any contract or agreement."

In the case of express contracts of indemnity it would seem clear that the above quoted exclusion would relieve the public liability insurer from liability voluntarily incurred by the insured under an express indemnity agreement over and above such liability as the law might impose. Thus if, by the terms of an express indemnity agreement, an insured agrees to indemnify another against liability for that other's own negligent acts, it would appear that the exclusion would be effective. While there is no Wisconsin law on the subject, it is obvious that any other result would nullify the specific provision of the insurance contract.¹⁰⁶

However, in a case where an express indemnity agreement exists but where the insured would be liable for indemnity regardless of the existence of the written indemnity agreement, then it is difficult to see how the exclusion could become effective. In this connection the situation proposed by our Court in *Hartford Accident and Indemnity Company v. Worden-Allen Company*¹⁰⁷ is illustrative of a case of this type. The Court said in that case that where the indemnitor was guilty of active negligence and the indemnitee incurred liability without actual fault, as a result of the non-delegable duties of the Safe Place Statute, that the existence of a written indemnity agreement was not essential to permit the recovery of indemnity, because the indemnitor could be required to respond in indemnity as a matter of quasi-contract. That being so, it is difficult to see how an insurer which has agreed to insure against liability imposed by law could escape its obligation under a policy by merely pointing to an express contract which under the circumstances of the case did not enlarge the liability of its insured under the facts of a particular case.¹⁰⁸

¹⁰⁵ The text of the exclusion is taken from the public liability policy of the Continental Casualty Co., but other companies use practically the same, if not identical, language.

¹⁰⁶ In this connection it is to be noted that when the provisions of an insurance policy are clear and unambiguous, the rule of strict construction against insurance companies cannot be resorted to for the purpose of modifying the contract. *Tischendorf v. Lynn Mutual Fire Insurance Co.*, 190 Wis. 33, 208 N.W. 917 (1926); *City Bank of Portage v. Bankers' Ltd. Mutual Cas. Co.*, 206 Wis. 1, 238 N.W. 819 (1931).

¹⁰⁷ *Supra*, note 37.

¹⁰⁸ In a case of this kind, undoubtedly the court would rely upon the well known rule that, in cases of ambiguity in insurance contracts, such policies should be construed most strongly against the insurer. See *Britten v. Eau Claire*, 260 Wis. 382, 51 N.W.2d 31 (1952), and a host of Wisconsin decisions dating

The most perplexing problem in this matter of insurance coverage arises when the alleged indemnitor is guilty of active negligence and the alleged indemnitee is guilty of passive negligence. Under those circumstances, in the absence of an express indemnity agreement, it has been pointed out above that the parties are entitled only to contribution, unless some special factor is present which destroys the relationship of joint tortfeasors. When in such a case the indemnitor enlarges his liability by an express indemnity agreement, what is the limit of his insurer's liability? On the one hand it may be said that the indemnitor has been sued on an express indemnity agreement and not for contribution and that, therefore, the insurance company should be permitted to avoid the entire claim under its exclusion. On the other hand it may be said that the law imposes a contribution liability of 50% upon the indemnitor which could in any event be recovered by the indemnitee and that, therefore, the indemnitor has increased his liability by only 50% of the total claim, and the loss should be pro-rated between the insurer and the insured indemnitor on that basis.¹⁰⁹ The former argument may be criticized on the ground that it determines the substantive rights of the parties solely on the basis of the nature of the indemnitee's action, as upon an express contract, and not upon the ultimate liability of the parties. The latter argument is subject also to criticism on the ground that the insurer's only liability is for contribution, and no contribution action exists against the indemnitor. Whatever conclusion the Court may reach no doubt the rule of strict construction against insurers will play a prominent part.¹¹⁰

It would seem that a problem of insurance coverage does not exist when the indemnity suit is based entirely upon quasi-contract. As pointed out above, contracts implied in law are not really contracts at all because the liability is imposed by the law without regard to the assent of the parties.¹¹¹ They are contracts only by legal fiction. Since the insurance policy exclusion refers to liability "assumed" by contract, it would appear that such exclusion should not cover a liability *imposed* by the law upon a legal fiction of contract. Quite clearly the policy provision contemplates obligations voluntarily incurred by the insured in excess of such obligations as the law imposes upon him regardless of his assent.¹¹²

back to *Hinman v. Hartford Fire Insurance Co.*, 36 Wis. 159 (1874). But note *Bauman v. Midland Union Ins. Co.*, 261 Wis. 449, 53 N.W.2d 529 (1952) where the Court said this rule applies only to the language of the contract and not to the facts of the case.

¹⁰⁹ Clearly the insurer should not be liable for more than the amount which could have been collected as contribution, for the same reasons as discussed above.

¹¹⁰ *Supra*, note 108.

¹¹¹ *Wojahn v. National Union Bank*, *supra*, note 30; *Dunnebacke v. Pittman*, *supra*, note 33; *Nelson v. Preston*, *supra*, note 36.

¹¹² The key to the entire situation is the word "assumed." Words in an insurance

B. PROCEDURAL PROBLEMS

Impleader. The most common practice in cases involving indemnity under the Safe Place Statute is for the indemnitee to implead the indemnitor as a co-defendant in the same action as that brought against the indemnitee, at the same time serving upon the indemnitor a cross-complaint seeking indemnification in the event that the plaintiff recovers against the indemnitee. This practice is most certainly authorized by the WISCONSIN STATUTES. The impleader statute provides:

"A defendant, who if he be held liable in the action, will thereby obtain a right of action against a person not a party may apply for an order making such person a party defendant and the court may so order."¹¹³

While it has always been the practice in Milwaukee County to implead additional defendants by motion or order to show cause served upon the plaintiff and upon the proposed impleaded defendant, and to attach thereto a proposed cross-complaint, which the Court then orders, upon granting the impleader, to stand as and for the cross-complaint in the action, the practice of securing *ex parte* impleader without notice has prevailed in some counties in the State. Thus, it is important to consider the new rule of practice adopted by the Wisconsin Supreme Court, and effective September 1, 1956, which reads as follows:

"Application for an order bringing in an additional party shall be made by motion or order to show cause supported by affidavit together with a proposed cross complaint and served on the plaintiff on or before forty days after the service of the summons and complaint on the applicant. The time limit for the making of such applications may be extended by the court for cause either before or after the expiration of said forty days."¹¹⁴

Therefore, it appears that since the amendment of the Court rules it is imperative that an indemnitee move promptly in seeking to imlead and cross-complain against an indemnitor.

Tender of Defense. Situations may arise where the Court may deny, for reasons peculiar to the case before it, an impleader motion.¹¹⁵ Other situations may arise where counsel for the indemnitee may deem

policy should be given their usual and common meaning, unless such would do violence to the intent of the parties. *Charette v. Prudential Insurance Co.*, 202 Wis. 470, 232 N.W. 848 (1930). Webster defines "assume" as "to take to or upon one's self," or "to undertake." The word refers to action by the person "assuming." One does not "assume" quasi-contractual obligations; they are imposed. *Wojahn v. National Union Bank*, *supra*, note 30.

¹¹³ WIS. STATS. (1955), §260.19(3).

¹¹⁴ WIS. STATS. (1955), §260.19(4).

¹¹⁵ Impleader is in the discretion of the court. WIS. STATS. (1955), §260.19(3); *Wait v. Pierce*, *supra*, note 76.

it inadvisable to implead a second defendant. He may consider it unwise from the standpoint of the effect multiple defendants would have damage-wise on the jury, or he may feel that he can secure a dismissal of the plaintiff's action as a matter of law, or that he may prevail to the jury against the plaintiff. In the latter situations, of course, he does not want to risk the taxation of costs by the impleaded defendant against him, because his cross-complaint, of course, falls if he is not found liable to the plaintiff.

In cases of this kind it is well to consider a tender of defense to the alleged indemnitor. It is not the purpose of this article to discuss at any length the doctrine of tender of defense. An excellent discussion of that practice may be found in a prior article in this Review.¹¹⁶

Basically, the doctrine of tender of defense is to the effect that when one party is liable to indemnify another on account of some matter for which the other has been sued, and he is duly notified of the pendency of the suit and requested to take upon himself its defense, he is bound by the judgment rendered in the action if the notice of a tender of defense to him is duly given, whether or not he actually appears in the action.¹¹⁷

It should be noted that the first requisite of a valid tender of defense is that the tender be timely. It is perhaps well to tender the defense to the indemnitor before the time for answer has expired.¹¹⁸ This, of course, affords him an opportunity to defend the case from the very outset. It is also generally conceded that the tender must include an offer to the indemnitor to give him control of the defense.¹¹⁹

Since the tender of defense is a common law doctrine and because there is very little Wisconsin law on the subject, it is unquestionably wise to make a prompt and complete tender of the defense in a formal fashion, in order to be sure that the rights of the indemnitee are sufficiently protected. The importance of this cannot be too greatly stressed, since a valid tender of defense will bind the indemnitor by the judgment, whereas an invalid tender will not.¹²⁰ The writer has used the form appearing in the footnotes¹²¹ in tendering the de-

¹¹⁶ Luck and Klitsner, *Tender of Defense*, 30 MARQ. L. REV. 1 (1946).

¹¹⁷ *Ibid.*

¹¹⁸ Somers v. Schmidt, 24 Wis. 417 (1869).

¹¹⁹ *Supra*, note 116; Saveland v. Green, 36 Wis. 612 (1875); Adams v. Filer, 7 Wis. 306 (1858); Grafton v. Hinkley, 111 Wis. 46, 86 N.W. 859 (1901).

¹²⁰ *Supra*, note 116; American Candy Co. v. Aetna Life Ins. Co., 164 Wis. 266, 159 N.W. 917 (1916). It is to be noted that under the decision here cited the estoppel of the judgment binds both indemnitor and indemnitee where there has been a valid tender.

¹²¹ Following is a form of tender of defense, to which copies of the pleading are attached:

"Please Take Notice: That the defendant ——— hereby tenders to you the defense of the above entitled action now pending in the court aforesaid, in which ——— is plaintiff and ——— is defendant; that as more particularly

fense of an action, the same together with copies of all pleadings in the action, being served upon the indemnitor to whom the defense was being tendered in the same fashion as a summons. Such a tender of defense, if timely, should result in the indemnitor being bound by the judgment and all the issues of negligence and contributory negligence, so that the only issues to be litigated in a subsequent action against the indemnitor for indemnity are issues strictly between those parties. In the complaint in such an action, the indemnitee must allege that a tender of defense was made and that the tender was proper and timely.¹²²

VI. CONCLUSION

The fact that our Court has had before it but one case involving indemnity under the Safe Place Statute of course prevents any dogmatic conclusions from the above discussion, if such are ever possible when one is considering a question which is fundamentally one of common law.

It is, however, perhaps safe to conclude that, even in view of the dicta in the oft-cited *Hartford* case, any express indemnity agreement sufficient in its terms to cover the case at hand should be given effect, even though such result relieves the indemnitee of the consequences of his own misfeasance.

In the field of quasi-contracts, the conclusion is submitted that indemnity should be available so long as it does not collide with Wisconsin's time honored doctrine of contribution, if the indemnitee is sufficiently without fault of his own which might bar his recovery. This should be particularly true where the indemnitor and the plaintiff are employer and employee, and the indemnitee is left without recourse unless he can secure indemnity.

It is hoped by the author that this article may be of some help to Wisconsin attorneys faced with the prospect of charting a course

appears from the summons and complain of the plaintiff and the answer of the defendant, this action arises out of, etc. (stating nature of action)

"Please Take Further Notice: That the defendant — hereby makes demand upon you to take over the defense of this action and to indemnify and save him harmless against any liability which might ultimately accrue to him in said action; that in the event that you decline to accept the defense of this action, the said defendant shall look to you for indemnification in full on account of any payment which it shall be required to make under any judgment obtained against it and in favor of the plaintiff herein, and for all the costs, expenses and attorney fees incurred by the said defendant in the defense of said action; that you will be bound by the judgment which shall be rendered in this action; that said defendant hereby offers to surrender to you the complete defense and control of this action.

"Please Take Further Notice: That attached hereto are true and correct copies of the summons and complaint of the plaintiff and the answer of the defendant in this action, together with copies of all other papers heretofore served and filed in this action.

"Dated at, etc."

¹²² Saveland v. Green, *supra*, note 119.

across the as yet uncharted sea which is the problem of indemnity under the Wisconsin Safe Place Statute. It cannot contain all the answers, and there are doubtless statements set forth above upon which there is and will be disagreement, but to the end that it may contribute to the solving of these problems it is respectfully submitted.