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R. Keith Strong

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## NOTES

### IMPLEADER IN MONTANA AFTER DUCHESNEAU v. SILVER BOW COUNTY

R. Keith Strong

The 1961 adoption of Rule 14 of the Montana Rules of Civil Procedure<sup>1</sup> created a new procedural right. A defendant<sup>2</sup> may now implead—he may bring into the suit other persons who were not originally parties but who are or may be liable to the defendant for all or part of the plaintiff's claim.<sup>3</sup> The Montana supreme court has seldom interpreted the rule since its adoption.<sup>4</sup> In 1971, *Duchesneau v. Silver Bow County*<sup>5</sup> demanded an interpretation of impleader. The court's response is the subject of this note.

#### THE GREAT NORTH MONTANA STREET WATER TRUCK DISASTER

It was mid-afternoon, August 26, 1968, and Neil Bolton, an employee of Silver Bow County had already flushed Butte's North Montana Street with several loads of water. He finished loading the county's water truck for another run, climbed in, disengaged the clutch and turned the wheels of the truck downhill into the flow of traffic. When the truck started to roll Bolton tried to put it into second gear. It would not go. He tried the brakes. The pedal went to the floor. A worn hose in an air-operated power steering unit had bled the air from the brakes. Meanwhile the truck was rolling down North Montana Street, gathering speed with each foot it traveled. Nine blocks and sixteen damaged automobiles later, after injuring three people and mangling the rear fender of a motorbike being pushed out of harm's way by Officer Tallon of the Butte Police Department, the truck stopped in the showroom of the Wilson Motor Company. The building collapsed.<sup>6</sup>

<sup>1</sup>MONTANA RULES OF CIVIL PROCEDURE, (Hereinafter cited M.R.Civ. P.) Rule 14. Third-party practice. (a) When defendant may bring in third party. "At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . ."

<sup>2</sup>M. R. Civ. P., Rule 14 (b) allows a plaintiff who has been served a counterclaim to implead in the same manner as a defendant.

<sup>3</sup>For general discussion of impleader see: J. MOORE, 3 MOORE'S FEDERAL PRACTICE, Chapter 14 [hereafter cited Moore]; C. WRIGHT AND A. MILLER, 6 FEDERAL PRACTICE AND PROCEDURE, § 1441 *et seq.* (1971) [hereafter cited Wright and Miller].

<sup>4</sup>*Wheat v. Safeway Stores, Inc.*, 146 Mont. 105, 404 P.2d 317 (1965) and *Crosby v. Billings Deaconess Hospital v. Fuller and Cain*, 149 Mont. 314, 426 P.2d 217 (1967) discuss the application of M. R. Civ. P., Rule 14 to Montana law.

<sup>5</sup>*Duchesneau v. Silver Bow County*, 158 Mont. 369, 492 P.2d 926 (1971).

<sup>6</sup>For a more detailed if somewhat apocalyptic account of these events see the MONTANA STANDARD, August 27, 1968, pp. 1 and 2 and pictures scattered throughout the issue.

Joseph L. Wilson, the owner of Wilson Motor Company and his insurer, Hardware Mutual Insurance Company sued the county and Bolton using the theory of negligence. Wilson and Hardware Mutual joined as defendants Roberts Rocky Mountain Equipment claiming that Roberts had negligently installed the power steering unit, and Mack Trucks claiming that Mack had sold the defective power steering unit to Roberts. All the rest of the plaintiffs, the injured parties and the owners of the damaged cars, chose not to sue Roberts and Mack. They joined only the county as defendant.

The county found itself sole defendant in several suits. To try to avoid being solely liable to these plaintiffs the county impleaded Roberts and Mack wherever they were not already defendants. The county's third party complaint, served according to Rule 14, reads:<sup>7</sup>

II. That the negligence, damage and liability alleged by Ray Reid in his complaint is [sic] not the liability of Silver Bow County and the accident made the basis of said complaint was beyond the control of the said Silver Bow County and the Third Party Defendants are liable for said accident and any proximate damage or injury therefrom . . .

WHEREFORE, Defendant, Silver Bow County prays that the plaintiff take nothing by virtue of his complaint and the said Third Party Plaintiff further demand judgment against the Third Party Defendants for all sums that may be adjudged against the said Silver Bow County in favor of the plaintiff, Ray Reid.

The third-party complaint seems to make two claims. First the complaint says that the county is not liable but Roberts and Mack are. Second the complaint claims the right to recover from Roberts and Mack any sums for which the county is found liable.

The trial court disagreed with both claims.<sup>8</sup> Roberts and Mack were granted summary judgment in all suits, both as defendants and as third-party defendants. Summary judgment went against the county in all suits on the issue of liability. The county appealed all the summary judgments. To appreciate the Montana supreme court's disposition of the appeal it is necessary to examine the background of Rule 14, Montana's impleader provision.

### THE ORIGIN OF IMPLEADER IN MONTANA

#### IMPLEADER AND THE FEDERAL RULES OF CIVIL PROCEDURE

Impleader was one of the innovations<sup>9</sup> of the Federal Rules of Civil Procedure when they were adopted in 1938<sup>10</sup> for use in the federal dis-

<sup>7</sup>Duchesneau, *supra* note 5 at 934, quoted by Castles, J., in his dissent to the refusal to grant rehearing.

<sup>8</sup>*Id.* at 928.

<sup>9</sup>MOORE, *supra* note 3 at 441-478 gives a comprehensive survey of existing law at the time of the adoption of the Federal Rules of Civil Procedure providing rights similar to impleader. See also WRIGHT, *supra* note 3 at 199-200.

strict courts. Impleader traces its immediate parentage to maritime law.<sup>11</sup> It was designed to accomplish three general goals:<sup>12</sup>

1. To avoid circuity of actions by settling all disputes arising from one occurrence in one suit;
2. To spare an unsuccessful defendant the burden of bearing a judgment against him while he brought suit against someone liable to him for the plaintiff's claim; and
3. To prevent inconsistent judgments on the same facts.

The aim was to settle the ultimate liability for a claim with a minimum of effort and expense.<sup>13</sup>

The Rule 14 adopted in the federal courts in 1938 attempted to reach these ends by allowing the defendant in an action to implead anyone who was or might be "liable to him or to the plaintiff for all or part of the plaintiff's claim against him."<sup>14</sup> (emphasis added) Thus under the terms of the original Rule 14 a defendant could bring into the suit someone whom the plaintiff had not joined as a defendant but who might nevertheless be liable to the plaintiff directly. But the early cases generally,<sup>15</sup> although not universally,<sup>16</sup> held that when a defendant impleaded someone who was directly liable to the plaintiff, the plaintiff could not be forced to amend his complaint and proceed against the impleaded party as well as the original defendant.<sup>17</sup> Under this interpretation, impleading someone directly liable to the plaintiff whom the plaintiff had already decided not to sue did nothing more than add a superfluous party to the action. The words "or to the plaintiff" were dropped from the federal Rule 14 by order of the United States Supreme Court in 1946.<sup>18</sup>

After the 1946 change, a defendant no longer could implead a person unless that person either was or might be liable to the defendant. It was no longer enough that the person impleaded was liable either to the plaintiff or to the defendant. The only liability that mattered for purposes of impleader was liability of the person impleaded to the defendant. A defendant might, however, implead someone whose liabil-

<sup>11</sup>See *supra* note 15 and the discussion in *Atlantic Coast Line R. v. United States Fidelity & Guaranty Co.*, 52 F. Supp. 177 (D.C.M.D. Ga. 1943).

<sup>12</sup>MOORE, *supra* note 3 at 501, WRIGHT *supra* note 3, § 1442. See also, *Developments In the Law—Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874, 906-12 (1958).

<sup>13</sup>*Id.*

<sup>14</sup>Order, 308 U.S. 645, 681-2 (1939).

<sup>15</sup>*Satink v. Holland Tp.*, 31 F. Supp. 229 (D.C. N.J. 1940); *Delano v. Ives* 40 F. Supp. 672 (E.D. Pa. 1941).

<sup>16</sup>In *Atlantic Coast Line R. Co. v. United States Fidelity & Guaranty Co.*, *supra* note 11, the court argued from analogy to Admiralty Rule 56, then 28 U.S.C.A. § 723, which it found to be the predecessor of Rule 14 that the defendant can force the original plaintiff to amend his complain and proceed against the impleaded party. Landis and Landis, *Federal Impleader*, 34 CORNELL LAW Q. 404-5 (1949).

<sup>17</sup>*Ives*, *supra* note 15 at 673 and cases cited.

<sup>18</sup>Order, 280 U.S. 843, 852 (1946).

ity to him was contingent—dependent upon a prior recovery by the plaintiff against the defendant.<sup>19</sup> Warranty,<sup>20</sup> contribution<sup>21</sup> and indemnity<sup>22</sup> are all typical examples of the contingent liability forming the basis for impleader in jurisdictions recognizing these rights.

#### IMPLEADER AND THE MONTANA RULES OF CIVIL PROCEDURE

In 1959, the Legislative Assembly of the State of Montana authorized the creation of a commission "to make possible the adoption of the Federal Rules of Civil Procedure so far as seems presently practicable to the existing Montana Code."<sup>23</sup> The commission's report took effect as the Montana Rules of Civil Procedure in 1962.<sup>24</sup> The Federal Rules of Civil Procedure as they stood at that time, including Rule 14, were adopted almost verbatim.<sup>25</sup>

Montana adopted the federal Rule 14 impleader sixteen years after the 1946 amendment. For 16 years it had been settled law in the federal system that a defendant could not implead a person who was liable to the plaintiff but not to the defendant. The person impleaded must be liable to the defendant for the plaintiff's claim, either immediately or contingently through some theory such as warranty,<sup>26</sup> contribution<sup>27</sup> or indemnity.<sup>28</sup> The basic scheme of Montana's Rule 14 has not been changed since the rule was adopted.

#### DUCHESNEAU AND IMPLEADER

##### THE DUCHESNEAU HOLDING

This, then, is the background upon which the Montana supreme court could draw when the county appealed the lower court's order denying impleader. The supreme court reversed.<sup>29</sup> Holding that Roberts and Mack had properly been impleaded the court said:

Next, Roberts and Mack Truck argue that the third party complaints of Silver Bow County do not state a claim against them, because there is no right to contribution in Montana and there is no right of indemnity until after payment. This argument misconstrues the gist of the third party claim against Roberts and Mack Trucks.

<sup>19</sup>MOORE, *supra* note 3 at 531-534, 551-557, 571-577; WRIGHT AND MILLER, *supra* note 3 at § 1446.

<sup>20</sup>Altac Inc. v. FWD Corp., 399 F.2d 860 (C.A. 5th 1968).

<sup>21</sup>Smith v. Whitmore, 270 F.2d 741, (3d Cir. 1959).

<sup>22</sup>Crosby v. Billings Deaconess Hospital v. Fuller and Cain, *supra* note 4.

<sup>23</sup>Laws of Montana, 1959, Ch. 255.

<sup>24</sup>Laws of Montana, 1963, Ch. 16.

<sup>25</sup>The Advisory Commission's note to M. R. Civ. P., Rule 14 says that the only change from the federal rule was the addition of amendments making impleader a matter of right within a certain time period.

<sup>26</sup>Altac Inc. v. FWD Corp., *supra* note 20.

<sup>27</sup>Smith v. Whitmore, *supra* note 21.

<sup>28</sup>Crosby v. Billings Deaconess Hospital v. Fuller and Cain, *supra* note 4.

<sup>29</sup>Duchesneau v. Silver Bow County, *supra* note 5 at 931.

<sup>30</sup>*Id.* at 931.

Silver Bow County contends it was not negligent and no act or omission with which it is chargeable proximately caused the accident and that liability rests solely on Roberts and Mack Trucks. Here also, our previous holding that there are material issues of fact as yet unresolved concerning the liability of Silver Bow County and Bolton, renders the application of joint tortfeasor and indemnity principles premature. Accordingly this contention fails.<sup>30</sup>

The court appears to have reached two conclusions. First the court says that the county had properly impleaded Roberts and Mack by claiming that Roberts and Mack were directly liable to the plaintiffs. The court allowed the county to implead people who were only liable to the plaintiff. Second, the court said that neither contribution nor indemnity was relevant to a discussion of impleader because no final judgment had been reached on liability. A defendant apparently must wait until after judgment and then implead. The holdings are counter to both the spirit and the letter of Rule 14.

#### DUCHESNEAU AND SUBSTITUTION OF DEFENDANTS BY IMPLEADER

The *Duchesneau* court, citing no authority, allowed the county to implead Roberts and Mack because they might be directly liable to the plaintiffs.<sup>31</sup> Through impleader Roberts and Mack occupy the same relation to the plaintiff as the original defendants, even though the plaintiffs did not choose to sue them. As has been pointed out above, the federal Rule 14 was amended twenty-five years before *Duchesneau* was decided with the express purpose of avoiding this result.<sup>32</sup> Montana's Rule 14 is the federal rule as it stood after the 1946 amendment.<sup>33</sup> Montana's Rule 14 states that only persons who are or may be liable to the defendant may be impleaded.<sup>34</sup> This much of the *Duchesneau* holding cannot be supported by the words of Rule 14.

Impleader of persons directly liable to the plaintiff can only defeat the goals impleader was designed to achieve. The court did not discuss whether the plaintiff must amend his complaint and proceed against the impleaded parties as defendants. If the plaintiff is not forced to amend his complaint he is likely to abide by his decision to sue only the original defendant. Impleader has only forced the impleaded party to go to the expense of answering the third-party complaint the defendant served upon him. Even if the plaintiff is forced to amend, the final result would be the same. The original defendant is still a party to the suit. The plaintiff can pursue his remedy against the defendant to a judgment. The defendant can use the same defenses regardless of whether the impleaded person is a party to the suit. Once again the only gain is in additional expense and effort for the impleaded party.

<sup>30</sup>*Id.*

<sup>31</sup>See discussion *supra*.

<sup>32</sup>Compare the Montana impleader provision quoted in relevant part *supra*, note 1, with the federal rule as amended discussed in the text *supra*.

<sup>33</sup>M. R. Civ. P. Rule 14, *supra* note 1.

Holding that the defendant may implead persons not liable to him, but directly liable to the plaintiff, only adds superfluous parties to the lawsuit.

#### DUCHESNEAU AND INDEMNITY AS A BASIS FOR IMPLEADER

The *Duchesneau* holding would have been justified if it had been based upon a recognition that impleader is proper when the defendant is seeking indemnity from the third party defendant. As seen above, Rule 14 allows a defendant to implead someone who is or may be liable to the defendant for the plaintiff's claim.<sup>35</sup> Persons whose liability to the defendant is contingent upon the defendant's being held liable to the plaintiff may properly be impleaded.<sup>36</sup> Indemnity is a good example of such a contingent liability.<sup>37</sup> The *Duchesneau* court expressly disapproved indemnity as a basis for impleader, at least until a judgment on the issue of liability had been rendered on retrial.<sup>38</sup> The court cited no authority for this ruling. It should have been bound by an earlier Montana case holding to the contrary.

In *Crosby v. Billings Deaconess Hospital v. Fuller and Cain*,<sup>39</sup> the defendant hospital acting under Rule 14 joined as third party defendant the person who had leased to it television equipment which injured the plaintiff. The defendant's third-party complaint asked that the lessor indemnify the hospital for any damages collected by the plaintiff against the hospital. The Montana court held the third-party complaint not subject to a dismissal on a motion for summary judgment if the complaint stated a valid claim for indemnity.<sup>40</sup> In *Duchesneau*, the county's claim for relief asked that Roberts and Mack be held liable for any damages which might be adjudged against the county.<sup>41</sup> This is a simple plea for indemnity.<sup>42</sup> The *Crosby*<sup>43</sup> case was not specifically overruled in *Duchesneau*, nor was it mentioned. It should have been controlling. To hold otherwise is to encourage rather than reduce circuity of actions by forcing all claims for indemnity to wait until after the defendant has been held liable to the plaintiff. Then the defendant must bring his claim for indemnity in a new action. The defendant must bear the judgment in the meantime and face the risk of inconsistent judgments

<sup>35</sup>M. R. Civ. P., Rule 14, *supra* note 1.

<sup>36</sup>See *supra* note 19.

<sup>37</sup>*Crosby v. Billings Deaconess Hospital v. Fuller and Cain*, *supra* note 4.

<sup>38</sup>*Duchesneau v. Silver Bow County*, *supra* note 5 at 931.

<sup>39</sup>*Crosby v. Billings Deaconess Hospital v. Fuller and Cain*, 149 Mont. 369, 426 P.2d 217 (1967). The *Crosby* court at 219 deals with Rule 14 although it erroneously refers to the Rule 14 procedure as a cross-claim rather than a third-party complaint.

<sup>40</sup>*Id.* at 200.

<sup>41</sup>*Duchesneau v. Silver Bow County*, *supra* note 5 at 931.

<sup>42</sup>Note, *Contribution and Indemnity Among Joint Tortfeasors*, 31 MONTANA L. REV. 69 (1970) and authorities cited. See also, the discussion of indemnity in *Crosby*, *supra* note 39 at 219-220.

<sup>43</sup>*Crosby v. Billings Deaconess Hospital v. Fuller and Cain*, *supra* note 39.

on the same facts. All of the goals of impleader are defeated by such a holding.<sup>44</sup>

#### IMPLEADER AND THE DUCHESNEAU DISSENT

Justice Castles' dissent to *Duchesneau*<sup>45</sup> would seem to be erroneous for different reasons. Two points are the essence of the dissent. First it is argued that the county's third-party complaint is a demand for contribution from Mack and Roberts. Justice Castles concludes that since there is no right to contribution in Montana, the third-party complaint was properly dismissed below.<sup>46</sup>

A demand for contribution would be a demand by the county for payment of the proportionate share of the judgment against the county for which Mack and Roberts would be liable as joint tortfeasors.<sup>47</sup> The county's complaint asked for judgment against Mack and Roberts for all sums for which the county might be held liable.<sup>48</sup> The county asked for indemnity, not contribution.<sup>49</sup> No discussion of contribution was necessary in the case.

The second point of the dissent is that allowing impleader "thwarted" the plaintiff's claim.<sup>50</sup> It has already been seen that even if the plaintiff is forced to proceed against the impleaded party he still has his action against the original party as well.<sup>51</sup> The plaintiff's claim was "thwarted" by the majority's decision to reverse the lower court's judgment in favor of the plaintiff on the grounds of liability. Impleader had no effect.

#### CONCLUSION

Impleader under Rule 14 is an effective tool for saving a defendant effort and expense. Impleader allows him to join, on such theories as indemnity, contribution or warranty, those who might be liable to him for the plaintiff's claim but who were not originally parties to the suit. Used correctly, impleader can help reduce the number of suits necessary to settle the ultimate liability. Impleader can save the defendant the burden of a judgment against him while he seeks recompense from someone liable to him for the plaintiff's claim. Impleader can help the defendant avoid the possibility of inconsistent verdicts on the same facts. Impleader is no longer intended as a method of allow-

<sup>44</sup>See discussion *supra* and material *supra* note 12.

<sup>45</sup>*Duchesneau v. Silver Bow County*, *supra* note 5 at 933.

<sup>46</sup>*Id.*

<sup>47</sup>Note, *Contribution and Indemnity Among Joint Tortfeasors*, 31 MONTANA L. REV. 69 (1970) and authorities cited for a distinction between contribution and indemnity.

<sup>48</sup>*Duchesneau v. Silver Bow County*, *supra* note 5 at 934.

<sup>49</sup>See *supra* note 47.

<sup>50</sup>*Duchesneau v. Silver Bow County*, *supra* note 5 at 935.



ing a defendant to force upon a plaintiff a new set of defendants whom the plaintiff has chosen not to sue. *Duchesneau v. Silver Bow County* seems to deny the benefits of impleader in cases in which the defendant seeks indemnity. *Duchesneau* seems to allow a defendant to bring into the suit defendants whom the plaintiff has chosen not to sue. Both results should be disapproved.

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