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Indemnity - Right of Master Against Servant - Necessity of Prior Judgment Against Claimant

A. M. Posner

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unless it can be said that clipping a coupon or depositing a check is an administration of property. The conclusion that the court reached is well substantiated by all previous judicial interpretations on the subject.

JOHN D. DAGGETT

INDEMNITY—RIGHT OF MASTER AGAINST SERVANT—NECESSITY OF PRIOR JUDGMENT AGAINST CLAIMANT—A widow brought suit for $44,265 against the driver whose negligence allegedly caused her husband's death and against the driver's employer. The trial in the lower court resulted in a judgment in the widow's favor against the employer in the amount of twelve thousand dollars. Before either party appealed, the claim was compromised by the widow and the employer, the latter paying seven thousand dollars and both agreeing not to prosecute an appeal. The employer then sought indemnity from the driver in the amount thus paid the widow. He stated as his cause of action that he had been compelled to pay seven thousand dollars in order to be rid of the judgment for twelve thousand dollars and that the cause of the judgment being rendered against him was the driver's negligence in causing the death of the widow's husband. On appeal, the Louisiana Supreme Court sustained the driver's exception of no cause or right of action. This decision was based primarily upon the ground that the plaintiff employer had not been compelled by a final judgment to pay any amount to the widow. *Winford v. Bullock*, 26 So. (2d) 822 (La. 1946).

A review of the jurisprudence indicates that Louisiana is among that minority of states which allow contribution between joint tortfeasors.[1] The recent trend toward allowing such contribution has been evidenced in some states by legislative enactments[2] and in others by judicial action.[3] The Louisiana rule,

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1. The general rule at common law has long been that there is no right of action for contribution between joint tortfeasors. Gobble v. Bradford, 226 Ala. 517, 147 So. 619 (1933); Central Georgia Ry. v. Swift & Co., 23 Ga. App. 346, 98 S.E. 256 (1919); Village of Portland v. Citizens' Telephone Co., 206 Mich. 632, 173 N.W. 382 (1919); Brown v. Southern Ry., 111 S.C. 140, 96 S.E. 701 (1918); City of Tacoma v. Bonnell, 65 Wash. 505, 118 Pac. 642, 36 L.R.A. (N.S.) 582 (1911).

2. Ky. Rev. Stat. (1944) § 412.030; Md. Code Ann. (Flack, Supp. 1943) art. 50, §§ 21-27; Mo. Rev. Stat. (1939) § 3658; New York Civil Practice Act, § 211-a; N.C. Code Ann. (Michie, 1935) § 618; Tex. Ann. Rev. Civ. Stat. (Vernon, 1935) art. 2212; Va. Code Ann. (Michie, 1942) § 5779; W. Va. Code Ann. (Michie, 1943) § 5482.

3. Underwriters at Lloyd's of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); Ellis v. Chicago & N.W. Ry., 167 Wis. 392, 167 N.W. 1048 (1918).

that, as between parties concurrently negligent, the one who has paid more than his share of the damages to an injured third person can recover contribution from the others only where a joint judgment has been rendered against both in the suit by the injured person, was first announced in the leading case of *Quatray v. Wicker.*[4] There it was stated that the right of action is granted by the Civil Code[5] in Articles 2324 and 2103. Under Article 2324, the liability of joint tortfeasors for damages resulting from their concurrent negligence is a solidary liability. Article 2103 declares that those who are liable in solido for an indebtedness to a third party are liable, each for his share of the debt, to each other.

The court in *Quatray v. Wicker* distinguishes the earlier case of *Sincer v. Widow and Heirs of Bell,*[6] in which contribution was denied because there had been judgment against only one of the parties. The rule of the *Quatray* case was affirmed in a later case.[7]

The principal case, however, is not one for contribution but one for indemnity. The plaintiff did not contend that the damage resulted from the concurrent negligence of himself and the defendant. On the contrary, he claimed that it was due solely to the negligence of the defendant and that his, the plaintiff's, liability to the widow arose only by virtue of the doctrine of *respondeat superior.*

In the early case of *Brannan, Patterson & Holliday v. Hoel,*[8] the plaintiff had compromised without suit a claim for damages caused by the negligence of the defendant, its employee. In the subsequent action for indemnity, full recovery was allowed, the court saying, "the compromise of the demand of [the injured party] against the plaintiff cannot prejudice the right of the latter to recover."[9]

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4. 178 La. 289, 151 So. 208 (1933). It is interesting to observe that under French law there is no such requirement of a joint judgment. 1 Sourdat, La Responsabilité on l'Action en Dommages-Intérêts (6th Ed. 1911) n° 163; 3 Demolombe, Traité des Contrats (1875) n° 308; 2 Baudry-Lacantinerie et Barde, Traité des Obligations (1902) n° 1305; 6 Planiol et Ripert, Traité Pratique du Droit Civil Francais (1925) n° 687.

5. La. Civil Code of 1870.

6. 47 La. Ann. 1548 (1895).

7. Aetna Life Ins. Co. v. DeJean, 185 La. 1074, 171 So. 450 (1936), where the action failed under circumstances similar to those in *Sincer v. Widow and Heirs of Bell.* See dictum to same effect in Toye Bros. Yellow Cab Co. v. V-8 Cab Co., 18 So.(2d) 514 (1944).

8. 15 La. Ann. 308 (1860).

9. 15 La. Ann. 308, 309.

Between *Brannan v. Hoel* and the principal case, the courts considered a number of cases for indemnity arising out of tort. Indemnity was allowed in *Costa v. Yochim*[10] where an employer had been compelled by judgment to pay the injured person and then sued the negligent employee, and in *Appalachian Corporation v. Brooklyn Cooperage Co.*,[11] where the plaintiff owner recovered from the occupier of premises after paying a judgment to the injured third person. Analogous factual situations were presented in *Sutton v. Champagne*[12] and in *American Employer's Insurance Company v. Gulf States Utilities Company*,[13] except that in each of these latter instances the injured party had obtained a joint judgment against both plaintiff and defendant. Here again indemnity was awarded. Although in each of the above four cases the plaintiff had been compelled by final judgment to pay the claim of the third person, in none of them did the court venture that such a judgment was a condition precedent to the plaintiff's right of action for indemnity.

In the instant case, the court made no mention of *Brannan v. Hoel*, although it is directly in point and reflects the majority view of other state courts[14] and of the federal courts.[15] Whatever may be the merits of holding that a joint judgment in favor of the injured third person is a prerequisite to a right of action for contribution between defendants concurrently or jointly negligent, there appears to be no logical reason for the proposition that a judgment against one only constructively or derivatively liable for damages is necessary in order for him to seek indemnity from the actual wrongdoer. Such a judgment in a suit to which the latter was not a party would not be conclusive as to him,[16]

10. 104 La. 170, 28 So. 992 (1900).

11. 151 La. 41, 91 So. 539 (1922).

12. 141 La. 469, 75 So. 209 (1917).

13. 4 So.(2d) 628 (La. App. 1941).

14. Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647 (1875); Fahey v. Harvard, 62 Ill. 28 (1871); Miles v. Southeastern Motor Truck Lines Inc., 295 Ky. 156, 173 S.W.(2d) 990 (1943); Inhabitants of Swansey v. Chace, 82 Mass. 303 (1860); Minneapolis Mill Co. v. Wheeler, 31 Minn. 121, 16 N.W. 698 (1883); Hanover v. Dewey, 58 N.H. 485 (1878); Frank Martz Coach Co., Inc. v. Hudson Bus Transportation Co., Inc., 133 N.J.L. 342, 44 A.(2d) 488 (1945); Button v. Kinnitz, 88 Hun 35,, 34 N.Y. Supp. 522 (1895); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.(2d) 790 (1944); Aberdeen Constr. Co. v. City of Aberdeen, 83 Wash. 429, 147 Pac. 2 (1915).

15. George A. Fuller Co. v. Otis Elevator Co., 245 U.S. 489, 38 S.Ct. 180, 62 L.Ed. 422 (1918); Donald v. Guy, 127 Fed. 228 (E.D. Va. 1903).

16. Brannan v. Hoel, 15 La. Ann. 308 (1860).

and in the action for indemnity he would be entitled to complete relitigation of all issues.[17]

The court seemed impressed by the fact that no prior judgment had been rendered against the claimant and indicated that therefore his payment to the widow had been made without compulsion. Whether the compromise settlement was made under legal compulsion or voluntarily is a matter to be decided in the action for indemnity. In most jurisdictions it is encumbent upon the plaintiff to prove that his compromise was fair and reasonable and that he was legally liable to the injured person,[18] but in at least one state the compromise itself is prima facie evidence of the fairness of the settlement and of the liability of the plaintiff to the payee.[19] In either case the question of compulsion is an issue to be litigated and determined on the merits, and the absence of prior judgment against the plaintiff should not be a bar to the action.

It is submitted that the decision in *Winford v. Bullock* finds no support in the jurisprudence of Louisiana and is a departure from the general rule of other states and of the federal system.

A. M. POSNER

PRESCRIPTION—CONTINUING TORT—BURDEN OF APPORTIONMENT—Plaintiff sued for damages to his land caused by salt water, waste oil and other refuse which flowed intermittently from the defendant's oil wells for four years. Defendant's plea of one year prescription under Article 3536 was sustained, the court being convinced that a greater portion of the damages occurred long prior to the period fixed for prescription. The opinion is interesting because of a dictum statement, the burden of proof rests on plaintiff to show what part of the damage was sustained after the period fixed for prescription. *Parro v. Fifteen Oil Company*, 26 So. (2d) 30 (La. App. 1946).

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17. City of Wabasha v. Southworth, 54 Minn. 79, 55 N.W. 818 (1893); Popkin Bros., Inc. v. Volk's Tire Co., 20 N.J. Misc. 1, 23 A.(2d) 162 (1941); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.(2d) 790 (1944); Aberdeen Constr. Co. v. City of Aberdeen. 83 Wash. 429, 147 Pac. 2 (1915).

18. Smith v. Foran, 43 Conn. 244, 21 Am. Rep. 647 (1875); Inhabitants of Swansey v. Chace, 82 Mass. 303 (1860); Frank Martz Coach Co., Inc., v. Hudson Bus Transportation Co., Inc., 133 N.J.L. 342, 44 A.(2d) 488 (1945); Globe Indemnity Co. v. Schmitt, 142 Ohio St. 595, 53 N.E.(2d) 790 (1944); Aberdeen Constr. Co. v. City of Aberdeen, 83 Wash. 429, 147 Pac. 2 (1915).

19. See Miles v. Southeastern Motor Truck Lines, Inc., 295 Ky. 156, 173 S.W.(2d) 990 (1943).

1. Art. 3536, La. Civil Code of 1870.