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Torts—Contractor Held Actively Negligent As A Matter Of Law And Not Entitled To Indemnification From Sub-Contractor

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TORTS

CONTRACTOR HELD ACTIVELY NEGLIGENT AS A MATTER OF LAW AND NOT ENTITLED TO INDEMNIFICATION FROM SUB-CONTRACTOR

Defendant Shulman (hereinafter called contractor) entered into a contract with defendant, Board of Education of the City of New York, to renovate certain rooms in a public school in the Bronx. In order to facilitate the work, contractor erected a boom which was suspended over the school play yard from a fourth floor window. To remove rubbish accumulated in the work area, contractor hired Andrew Bedden (hereinafter called sub-contractor). Contractor knew that the usual way of removing debris on this type of job was by use of a boom, that sub-contractor had used booms on other jobs, and that the boom constructed in the school was available for sub-contractor's use. Contractor did not mention safeguards to be used on the job. Reporting to the school, sub-contractor was directed to the fourth floor where the rubbish was located. Shortly thereafter, infant plaintiff, while "spinning his top" in the school play yard during recess, was hit on the head by a falling board. Plaintiff sued contractor and the Board of Education to recover damages for his personal injuries. Contractor commenced a third-party action against sub-contractor for common-law indemnification, but this complaint was dismissed as a matter of law. The jury then returned an award of $120,000 for the plaintiff. The Appellate Division unanimously affirmed the award but reversed, by a divided court, the dismissal of the third-party complaint.[1] On appeal by the sub-contractor to the Court of Appeals *held*, reversed, one judge dissenting. Under the facts and circumstances of this case, the failure of contractor to provide the required safeguards in an area of known inherent danger and his failure to correct the dangerous situation which he created was active negligence. *Colon v. Board of Educ.*, 11 N.Y.2d 446, 184 N.E.2d 294, 230 N.Y.S.2d 697 (1962).

Where the negligence of two or more persons concur to produce a single indivisible injury to a third party, all the wrongdoers are jointly and severally liable for the entire damage. In such a case if a *joint* money judgment is recovered, and one tort-feasor pays more than his *pro rata* share, he may obtain contribution from the other tort-feasors who were joined in the action.[2] Often, however, a wrongdoer will seek indemnity rather than contribution. The reason for this is that in contribution the loss is shared among the several wrongdoers, whereas if indemnity is obtained, a total shifting on the entire economic loss from one wrongdoer to another will be accomplished. Legally, contribution and indemnity are distinguished by the element of equal fault. If the parties are in pari delicto, indemnity will not be available. However, if it can be shown that one party is an active wrongdoer while the other is merely a passive wrongdoer, then a right to indemnity will arise in favor of the latter

1. 14 A.D.2d 842, 220 N.Y.S.2d 875 (1st Dep't 1961).
2. N.Y. Civ. Prac. Act § 211(a).

party.[3] The right to indemnity is not necessarily founded on contract. It rests on the principle that everyone is responsible for the consequences which flow from his wrong. Therefore, anyone compelled to pay damages which the wrongdoer ought to have paid will be allowed to recover his full loss.[4] If the parties are in pari delicto and only one is sued, such person cannot implead the other for the purpose of contribution.[5] However, if the person sued is only a passive wrongdoer then he can implead the active wrongdoer for indemnification.[6]

In the instant case the majority pointed out that contractor's liability was founded on his own negligence and did not rest upon the negligent conduct of the sub-contractor. The Court declared that contractor should have provided the necessary safeguards in an area of inherent danger. The Court then pointed out that contractor had created the danger, and as between himself and sub-contractor it was his primary duty to provide safeguards. Furthermore, the majority reasoned that contractor was chargeable with the knowledge that sub-contractor might use the boom. The Court then concluded that where, as here, there is an affirmative duty to act, acts of omission as well as acts of commission constitute active negligence. Therefore, the failure of contractor to carry out his non-delegable duty was active negligence. The dissent voted to affirm the majority decision of the Appellate Division. There it was held that the issue of whether the contractor was actively negligent was a jury question and should not have been resolved as a matter of law by the trial judge.

Where the problem of indemnity arises, a court or jury will often be faced with a serious question of allocation of fault. There is, of course, little difficulty where liability has been imposed without fault because of some rule of public policy. Examples of this are to be found in the area of principal and agent, where the doctrine of respondeat superior applies, or in a situation where the owner of a vehicle has been held liable for the driver's negligence under Vehicle and Traffic Law, Section 388.[7] But the right of indemnity has been extended to cases where both parties are partially at fault. In such cases the right turns on a judicial determination of what constitutes active and passive negligence. In this regard the greatest problems are presented where, as in the instant case, there has been a failure to act, and the question becomes whether the omission is of such a nature as to defeat a right to indemnity. In situations of this type the words "active" and "passive" are almost valueless.

The concept of indemnity is a logical outgrowth of the fault principle of torts. It is an attempt to place the entire burden of loss on the ultimate wrong-

3. Schwartz v. Merola, 290 N.Y. 145, 48 N.E.2d 299 (1943).
4. Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903).
5. Fox v. Western New York Motor Lines Inc., 257 N.Y. 305, 178 N.E. 289 (1931).
6. Wischnie v. Dorsch, 296 N.Y. 257, 72 N.E.2d 700 (1947).
7. N.Y. Vehicle and Traffic Law § 388: "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence . . . by any person using or operating the same with the permission, express or implied, of such owner."

doer. However, experience shows that fault is not always in one individual; in fact, it is usually shared. In such circumstances financial losses ought also to be shared. This could be done by allowing contribution in all cases where there is concurrent negligence. Necessarily such action would have to be taken by the Legislature because the existing statute allowing contribution has been so narrowly construed.[8] In the instant case the sub-contractor's negligence was the immediate cause of the injury to the infant plaintiff. The failure of the infant plaintiff to join the sub-contractor defeated any possibility of contractor's obtaining contribution, and the Court's determination that contractor was actively negligent made indemnification impossible. Thus one of the primary wrongdoers escaped, undamaged financially. The need for a broader contribution statute is painfully apparent. Contribution closely approaches a distribution of losses according to fault, and this ought to be the goal of any legal system.

R. J. D.

EXEMPLARY DAMAGES AWARDED IN FRAUD AND DECEIT ACTION

Although it has long been the rule in New York State that punitive damages will not lie in cases of "ordinary" fraud and deceit, a recent Court of Appeals decision has opened the door to such damages in cases where the public in general has been the victim of illegitimate enterprises based upon fraud and deception. As a result, the argument has been raised that the old rule has been extended in a direction not supported by precedent, or within the traditional role of the judiciary. The question arises in *Walker v. Sheldon*,[1] an action against a publishing firm and its officers.

Plaintiff wished to publish a book of children's stories written by her mother, a non-professional writer. She was offered a contract wherein the defendants promised to print 2,400 copies of the book and promote their sale through the use of their alleged advertising and sales staff. The sum of $1,380 was to be paid by plaintiff for the printing, but it was represented that as a result of the promised promotional scheme, "liberal" royalties would result in the plaintiff recouping this amount. The complaint alleged that in fact the defendant never intended to publish the book in the sense represented by the contract or that understood among professional writers. Instead, the defendants intended to and did publish no more than a handful of the books to meet a minimal demand for them by plaintiff's friends and relatives, and the copies were sold in book shops in plaintiff's neighborhood only, with "advertising" limited to a token listing in an obscure local newspaper. It was further alleged that the defendants calculated their profit from the contract on this minimal

8. See 1952 N.Y. Law Rev. Comm. Report 21; 1941 N.Y. Law Rev. Comm. Report 17; 1939 N.Y. Law Rev. Comm. Report 67; 1936 N.Y. Law Rev. Comm. Report 699. The Commission in vain recommended to the Legislature a broadening of the right of contribution.

1. 10 N.Y.2d 401, 179 N.E.2d 497, 223 N.Y.S.2d 488 (1961).