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Torts—Right of Indemnification

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precautions constituted active and primary negligence, while at best the landlord could only be charged with passive negligence for failing to correct a dangerous condition.[86] In answer to this the majority emphasized that the contractor was not liable for the mere placing of the rope, but for his failure to take proper safety precautions. It therefore follows that when the landlord knew of the dangerous condition and failed to take the proper safeguards he also became guilty of active negligence.

The conclusion reached by this court indicates that the existence of notice, either actual or constructive, to the landlord of the dangerous condition changes his position from a passive to an active tortfeasor. Thus, being placed in pari delicto with the other active wrongdoer, no right of indemnification arises as between them.[87]

Right Of Indemnification.

Burke v. City of New York[88] involved a city's right to indemnity against a co-defendant street railway. Plaintiff had been injured due to defective trolley car tracks. The railroad had contracted with the city to keep these tracks in good repair, although they were not presently being used. In consideration for this covenant, the city did not demand the track's removal when the defendant company changed from trolley to bus transportation. The company also covenanted that its liablity in relation to the presence of said tracks would be the same as before the cessation of trolley operations.

The majority uses a two-fold argument to hold for the city. First, they feel the city had a right to rely on the railway's contract to keep the streets in good repair.[89] Although a municipality has a non-delegable duty to keep its streets in a safe condition, when one contracts with a municipality to maintain part of the street, in consideration for a self-benefiting use of said streets, he in effect contracts to perform that duty to the public in place of the municipality.[90]

Secondly, the Court feels that under the clause in the contract, that the company's liability would be the same as before the cessation of trolley operations, the city has a right of indemnification. This liability emanates from section 178

86. Dollard v. Roberts, 130 N.Y. 269, 29 N.E. 104 (1890).
87. Wischnie v. Dorsch, 296 N.Y. 257, 72 N.E.2d 700 (1947).
88. 2 N.Y.2d 90, 157 N.Y.S.2d 1 (1956).
89. City of Rochester v. Campbell, 123 N.Y. 405, 25 N.E. 937 (1890).
90. City of Brooklyn v. Brooklyn City Railway, 47 N.Y. 475 (1872).

of the New York Railroad Law[91] having been interpreted[92] to place the duty of indemnification upon the railway even though an express indemnity clause was absent from the contract, as in the instant case.

The dissent raised the company's main defenses that both city and railway have a duty to the public, and are in par delicto and there is no indemnity, only contribution,[93] and indemnification against a party's own negligence will not be implied, but must be expressed in clear and unequivocal terms in the contract.[94]

The concurring opinion explains away these defenses, and explains the majority's statement that explicit language of indemnity is not needed in the contract to have indemnity in this situation. Recovery here is not upon contract law principles, but upon the theory of implied indemnity, in tort.

Implied indemnity is an equitable doctrine that eases the harsh rule that bars recovery among wrongdoers,[95] where their respective delinquencies are such as to make one primarily liable, and the other only secondarily, or legally liable. In situations of implied indemnity the court will consider the entire factual situation, the contract being just one element to be taken into account.

The equities here are on the side of the city; the contract with its all but specific indemnity language, the reliance the city should be able to place on the company's covenant to repair, coupled with the benefit the railway obtains when it is able to alter and use the streets for a self-serving purpose. On this last basis the holding in this decision fits in with a line of New York cases[96] which hold that when an abutting landowner makes any change upon the adjoining street or sidewalk for his accommodation and benefit, the law imposes upon him an obligation to use due care to keep the way safe for the public use in return for the benefit conferred—the special use of the street for a self-serving purpose. In the present case, and above situation, the change in the public way is for the alterer's benefit and this enables the city to escape the ultimate liability as regards that part of the street which has been changed. The city has the duty, albeit only a technical one to maintain its streets, and is still liable to third persons for

91. N.Y. RAILROAD LAW §178 states:
> Every street surface railroad corporation so long as it shall continue to use or maintain any of its tracks in any street . . . shall have and keep in permanent repair that portion of such street . . . between its tracks, the rails of its tracks and two feet of its width outside its tracks. . . .

92. Schuster v. Forty Second Street M&T St. N. Ry., 192 N.Y. 403, 85 N.E. 670 (1908).
93. N.Y. CIV. PRAC. ACT. §211-a.
94. Thompson-Starrett v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936).
95. Washington Gas Light Co. v. District of Columbia, 161 U.S. 316 (1896).
96. Trustees of Village of Canandaigua v. Foster, 156 N.Y. 354, 50 N.E. 971 (1898).

damages suffered by them due to the streets disrepair, but the city acquires the right to indemnity against this alterer of the streets, his affirmative action of changing the public way imposing upon him the duty to repair.

WORKMEN'S COMPENSATION

Heart Attack—Arising Out Of The Course Of Employment?

Until recently in workmen's compensation law the rule in respect to "heart" cases was that to be entitled to compensation the employee must have been subjected to unusual strain, while engaged in unusual work or in work beyond his normal duties.[1] It was subsequently decided that whether an employee who has suffered a heart attack was subjected to unusual strain is an issue of fact and the mere fact that he was performing his customary duties or lighter duties does not necessarily exclude finding that he was subjected to unusual strain.[2] The claimant's past history of work is not as important as the question of whether the exertion significantly contributed to this injury.

In the case of *Burris v. Lewis*,[3] claimant's son dropped dead while lifting a nail keg weighing about fifty pounds from the ground to the tailboard of his employer's truck. The medical witness described the long-term deterioration of the employee's heart and stated that no fresh leisions were discovered in his examination.

In light of the fact that a compensation claim for heart injury cannot be sustained without medical testimony to the effect that the injury was caused by the strain of work,[4] the Court rejected the claim on the grounds that the claimant's heart had so deteriorated that any exertion became an overexertion, and that claimant died at work merely because he was engaged in some kind of physical activity.

The Court expressed the fear that if this employee were to receive compensation, then anyone who dies of a heart attack while working would be entitled to compensation. The law, however, intended that to be compensable the injury must be the result of a risk of the employment.[5] In the instant case the medical testimony did not indicate that the injury could reasonably be associated with the work.

1. La Fountain v. La Fountain, 284 N.Y. 792, 31 N.E.2d 199 (1940).
2. Masse v. James H. Robinson Co., 301 N.Y. 34, 92 N.E.2d 56 (1950). *Cf.* Deyo v. Village of Piermont Inc., 283 App. Div. 67, 126 N.Y.S.2d 523 (3rd Dep't 1953).
3. 2 N.Y.2d 323, 160 N.Y.S.2d 853 (1957).
4. Owens v. McGovern, 309 N.Y. 449, 131 N.E.2d 729 (1956).
5. N.Y. WORKMEN'S COMPENSATION LAW §2 (7).