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Torts—Negligence—Indemnity

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Plaintiff's intestate was found by village officials on the floor of the village firehouse, apparently incoherent and suffering from the cold. They placed him in the jail, where he did not receive medical attention for eighteen hours. He died of pneumonia several days later, with a broken arm and hip given as the direct cause. Plaintiff brought a death action.[39]

It is a well settled principle in New York that where there are several causes contributing to injury, the injury may be attributed to any or all of those causes.[40] The question is whether or not the defendant's acts or omissions *substantially* contributed to the injury.[41] This effectively disposes of the argument that because the broken arm and hip could have caused the death, the defendant is absolved from liability. The mere fact that the death *might* have resulted from another cause is insufficient.[42] In short, plaintiff is not required to eliminate by his proof all other possible causes. The question of what constitutes a substantial factor is here a jury question.

It becomes clear that this case merely fits the facts to the existing rules, neither adding to nor substracting from them.

Indemnity

There is no indemnity[43] between joint tortfeasors as a general rule.[44]. *In pari delicto potior est conditio possidentis.* This rule is not without exceptions. Among the many are: (1) The rule does not apply and there may be recovery where one party was only technically or constructively at fault and the negligent act of the party from whom indemnity is sought was the primary cause of the injury.[45] (2) The rule does not apply where both parties were at fault, but not in the same fault toward the person injured and the fault of the party against whom indemnity is claimed was the primary and efficient cause of the injury.[46]

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39. DECEDENT ESTATE LAW §130.

40. *Foley v. State of New York*, 294 N. Y. 275, 280, 62 N. E. 2d 69, 71 (1945); see also, RESTATEMENT, TORTS § 879.

41. *Cornbrooks v. Terminal Barber Shops*, 282 N. Y. 217, 223, 26 N. E. 2d 25, 27 (1940).

42. *Ingersoll v. Liberty Bank of Buffalo*, 278 N. Y. 1, 7, 14 N. E. 2d 828, 830 (1938).

43. There is an important distinction between indemnity, which shifts the entire loss, and contribution, which distributes the loss *among* the tortfeasors. PROSSER, TORTS 1117 (1941). For contribution among joint tortfeasors in New York see C. P. A. § 211-a.

44. *Wineck v. Yanoff*, 265 App. Div. 835, 37 N. Y. S. 2d 563 (1942).

45. *Commercial Casualty Ins. Co. v. Capital City Surety Co.*, 244 App. Div. 500, 231 N. Y. Supp. 169 (1928).

46. *Colonial Motor Coach Corp. v. New York Cent. R.*, 131 Misc. 891, 228 N. Y. Supp. 508 (Sup. Ct. 1928); *General Accident, Fire & Life Assur. Corp. v. Goodyear Tire & Rubber Co.*, 132 F. 2d 122 (2d Cir. 1942).

(3) Where the party seeking indemnity was guilty of *passive* negligence as distinguished from the other's active negligence.[47]

The right of indemnification between joint tortfeasors presupposes that the injured person has a cause of action against both. The right also depends upon the difference in the character of the wrong and not on comparative negligence. As between joint tortfeasors, the obligation to indemnify is not a consensual one; it is based altogether upon the law's notion—influened by an equitable background—of what is fair and proper between the parties.[48] The quasi-contractual idea of unjust enrichment, of course, underlies any holding that one who has been compelled in discharging his own legal obligation to pay a claim which in fairness and good conscience should be paid by another, can secure reimbursement from the other.[49]

In an action by a longshoreman against the charterer of a vessel, a booking agent of the charterer, a manufacturer and shipper of carbon tetrachloride, and the purchaser of that chemical, the plaintiff recovered for injuries sustained when he was overcome by fumes from the chemical in a poorly ventilated hold of the ship. The Court held in *McFall v. Compagnie Maritime Belge*:[50] (1) The charterer was entitled to indemnity in a third-party action against the plaintiff's employer and the manufacturer-shipper. (2) The manufacturer-shipper was *not* entitled to indemnity from the plaintiff's employer.

The jury found that the primary cause of the injury to the plaintiff was the combined negligence of the defendant manufacturer-shipper and the plaintiff's employer. This is evident from the fact that the jury awarded indemnity to the charterer against both the manufacturer-shipper and the employer. Let us examine the nature of the negligence of each of the three parties involved in the indemnity actions.

First, the manufacturer-shipper. The fact that forty-three out of the one hundred ten drums shipped were found to have developed leaks is sufficient evidence from which a jury mgiht infer that the drums were inadequate for the purpose intended. Even

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47. *Scott v. Curtis*, 195 N. Y. 424, 88 N. E. 794 (1909); *Trustees of Village of Geneva v. Brush Electric Co.*, 50 Hun 581, 3 N. Y. Supp. 595 (5th Dep't 1889). For other exceptions to the general rule see PROSSER, TORTS 1114-1116 (1941).

48. Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 147 (1932).

49. KEENER, QUASI-CONTRACTS 408; WOODWARD, QUASI-CONTRACTS 396.

50. 304 N. Y. 314, 107 N. E. 2d 463 (1952).

though the drums were roughly handled by another, the negligence of the shipper was active, although concurrent.

Second, the plaintiff's employer. There is sufficient evidence of this party's active negligence in roughly handling the drums. Of course, it is also the employer's duty to provide a safe place to work and warn employees of any dangers.[51]

Third, the charterer. Maritime law and not state law must be applied.[52] A longshoreman engaged to load a ship is entitled to a reasonably safe place to work.[53] The owner has a duty to warn longshoremen of hidden dangers.[54] This duty cannot be delegated,[55] and the fact the longshoremen's employer owed him the same duty is of no consequence; the duty is concurrent.[56] Here, if the drums had not been inadequate or handled roughly the accident would not have occurred even though the drums were stored in the poorly ventilated hold. In short, for the charterer to be actively negligent, there must be a showing that he *knew* the drums were leaking when they were stored, or it must be shown that the act as to the plaintiff had possibilities of danger so many and apparent as to entitle him to be protected against its commission.[57] The mere act of storage is not pregnant with those dangers. The fact that the jury returned a verdict for the charterer against the manufacturer-shipper and employer implies that the charterer had no knowledge of the leak. The charterer's negligence may be characterized as one of omission—failure to provide a safe place to work, the failure to warn of the properties of the chemical.

The fact that both the employer and the charterer owed the same duty to provide a safe place to work for plaintiff does not necessarily mean they are *in pari delicto*.[58]. The primary duty rests on the employer.[59]

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51. *Porello v. United States,* 153 F. 2d 605, 608 (2d Cir. 1946), *rev'd in part and aff'd in part sub nom, American Stevedores v. Porello,* 330 U. S. 446 (1947).

52. *Knickerbocker Ice Co. v. Stewart,* 253 U. S. 149 (1920).

53. *Fodera v. Booth Amer. Shipping Corp.,* 66 F. Supp. 319 (S. D. N. Y. 1946), *aff'd,* 159 F. 2d 795 (2d Cir. 1947).

54. *Ibid.*

55. *Sciolaro v. Asch,* 198 N. Y. 77, 91 N. E. 263 (1910).

56. *Anderson v. Lorentzen,* 160 F. 2d 173 (2d Cir. 1947).

57. *Palsgraf v. Long Island R.,* 248 N. Y. 339, 345, 162 N. E. 99, 101 (1928).

58. *Tipaldi v. Riverside Memorial Chapel,* 273 App. Div. 414, 418, 78 N. Y. S. 2d 12, 17 (1st Dep't 1948) *aff'd,* 298 N. Y. 686, 82 N. E. 2d 585 (1948).

59. *Supra* n. 51.

Thus, as outlined, the charterer's negligence consisted of nonfeasance, while that of both the employer and the manufacturer-shipper consisted of misfeasance--one an omission, the others a commission; one passive, the others active. The conclusion, therefore, that the tortfeasor passively negligent may be indemnified by the active tortfeasors, and the active tortfeasors may not be indemnified as between themselves, is in harmony with the settled principles of joint torts.

B. *Intentional Torts*

Right of Privacy

The law of torts provides protection to an individual's person and property. The development of the law to afford principles to protect an individual's *intangible* rights in his person is evidence of the growth and flexibility of the common law.[60] The right to be "let alone"[61] or the right to privacy was discussed in a legal periodical before the courts took cognizance of the right.[62] In New York a common law right to privacy is not recognized.[63]. The only remedy in New York is conferred by a statute which confined redress to the appropriation of some element of the plaintiff's personality for commercial use.[64] Even thus limited, the statute has received a narrow construction from the courts in interpreting what is a use for "advertising purposes" or "purposes of trade."[65] The use of a name or picture in a newspaper, magazine, or newsreel in connection with an item of news or of general public interest is not a use for purposes of trade.[66]

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60. *E.g.*, some courts have recognized the intentional causing of mental disturbance as a tort. *Emden v. Vitz*, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948).

61. COOLEY, TORTS 29 (2d ed. 1888).

62. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

63. *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538, 64 N. E. 442 (1902); *Rhodes v. Sperry Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097 (1908).

64. N. Y. CIVIL RIGHTS LAW §§ 50-51: "Any person whose name, portrait or picture is used within this state for *advertising purposes or for purposes of trade* . . . may sue and recover damages . . ." (Italics added)

65. *Maloney v. Boy Comics*, 277 App. Div. 166, 98 N. Y. S. 2d 119 (1st Dep't 1950). see Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941).

66. *Sidis v. F-R Publication Corp.*, 113 F. 2d 806 (2d Cir. 1940); *Humiston v. Universal Film Mfg. Co.*, 189 App. Div. 467, 178 N. Y. Supp. 752 (1st Dep't 1919); *Coyler v. Fox Publishing Co.*, 162 App. Div. 297, 146 N. Y. Supp. 999 (2d Dep't 1914); *Lahiri v. Daily Mirror*, 162 Misc. 776, 295 N. Y. Supp. 382 (Sup. Ct. 1937). But the right of privacy was held violated where an individual not in public life was unduly singled out in a newsreel, *Blumenthal v. Picture Classics*, 235 App. Div. 570, 257 N. Y. Supp. 800 (1st Dep't 1932), *aff'd*, 261 N. Y. 504, 185 N. E. 713 (1933), and a public figure's news value was used for purely commercialization in *Redmond v. Columbia Pictures Corp.*, 277 N. Y. 707, 14 N. E. 2d 636 (1938); *Franklin v. Columbia Pictures Corp.*, 246 App. Div. 35, 284 N. Y. Supp. 96 (1st Dep't 1935), *aff'd*, 271 N. Y. 554, 2 N. E. 2d 691 (1936). See 1 BFLO. L. REV. 174 (1951).