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Contribution or Indemnity among Joint Tort-Feasors

William J. Kinnally

CONTRIBUTION OR INDEMNITY AMONG JOINT TORT-FEASORS

In many situations where we find a negligent act or acts causing damage or injury to innocent parties, there arises, in situations where there are two or more wrong-doers, a question as to the liability of either or any of such wrong-doers. If two or more parties, by their negligent acts, injure a third party (who is in no wise guilty of contributory negligence), and if such third party successfully sues *one* of the tort-feasors, can such latter party sue the other tort-feasor?

Since the terms "contribution" and "indemnity" are used interchangeably and almost synonymously by the courts, they will be used in such sense by the author, although, according to many authorities, there is a distinction between them. However, it is not the purpose of this paper to digress from the general principles underlying the liability of joint tort-feasors *inter sese*. It is not the author's intention to deal with the history of contribution or indemnity among joint tort-feasors [1] or with situations involving the relationship of master and servant, principal and agent, partners, and the like.

While the courts, as a general rule, have shown antipathy toward permitting one joint tort-feasor to recover against his fellow tort-feasor for judgments and expenses that the former had incurred as the result of successful litigation by an injured third party, there have been several exceptions to this rule appreciated by the courts. While some of these exceptions will appear to be "distinctions without a difference," they are being submitted merely to illustrate the various methods courts have adopted to circumvent the rule generally accepted by the judiciary.

I.

There are decisions holding that where a party does the act or creates the nuisance, and the other, while not joining

1 See Berger, "Contribution Between Tort-Feasors," 9 Ind. L. J. 229 (1934).

therein, is thereby exposed to liability and suffers damage, the rule that one of two joint tort-feasors cannot maintain an action against the other for indemnity or contribution does not apply, since the parties are not in *pari delicto* as to each other, though as to third persons, either may be held liable.

In the case of *Colorado & S. Ry. Co. v. Western etc. Power Co.*,[2] a joint judgment had been rendered against both the Railroad Company and the Power Company for the death of a passenger on the latter company's street car, after such car had collided with the Railway Company's train. The Power Company was successful in its suit against the Railway Company for indemnity and the case was affirmed upon appeal. In quoting from *Union Stockyards Company v. Chicago B. & Q. R. R. Co.*,[3] the Court said:

"Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done."

A more extensive discussion of the *Union Stock Yards Company Case* will be found on page 41. One of the landmark cases regarding the right on one wrong-doer to maintain an action against another to recover damages incurred as a consequence of their joint offense, is *Washington Gaslight Co. v. District of Columbia.*[4] In that case a woman who had sustained injuries as the result of tripping over a gas box in the sidewalk was successful in her suit for damages against the District of Columbia, the latter having repaired the sidewalk at the scene of the accident.

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2 73 Colo. 107, 214 Pac. 30 (1923).

3 196 U. S. 217, 224, 25 S. Ct. 226 (1905).

4 161 U. S. 316, 16 S. Ct. 564 (1896).

The District of Columbia had notified the Gas Company, and had given it an opportunity to defend in the original action.

In holding that the District of Columbia had a valid cause of action against the Gas Company, the Supreme Court of the United States stated: (p. 327)

" 'Our law, however, does not in every case disallow an action, by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, *in pari delicto potior est conditio defendentis.* If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offense. in respect to offenses, in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty and courts will not inquire into their relative guilt. But where the offence is merely *malum prohibitum,* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers.'

"In Brooklyn v. Brooklyn City Railroad, 47 N. Y. 475, 487, the same rule was applied, the court saying: 'Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offence in which both were concerned in different degrees as perpetrators.' All the cases referred to involved only the right of a municipal corporation to recover over the amount of the damages for which it had been held liable in consequence of a defective street, occasioned by the neglect or failure of another to perform his legal duty. The rule, however, is not predicated on the peculiar or exceptional rights of municipal corporations. It is general in its nature."

In an early Indiana decision,[5] after a third person had obtained judgment against the Gas Company and Road Company for injuries resulting from a ditch being left open and unguarded, the Road Company paid a part of the judgment and in the instant case, sued the Gas Company for the part of the judgment so paid. The plaintiff alleged that the defendant had unlawfully entered upon the plaintiff's turnpike, had constructed the ditch, and had then carelessly left it unguarded.

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5 Westfield Gas etc. Co. v. Noblesville, etc. Road Co., 13 Ind. App. 481, 41 N. E. 955 (1895).

Although many of the Indiana cases (hereinafter discussed) adhere to the general rule precluding recovery between or among joint tort-feasors, the Court in the *Westfield Gas Co. Case* appreciated one of the exceptions to the general rule when it made the following statement: (p. 482)

"The complaint as it seems to us clearly and sufficiently shows that the recovery of the judgment resulted from appellant's" (defendant's) "wrongful act. Under such circumstances, although both the parties might be liable to the injured party, as between themselves they were not in *pari delicto* and on well established principles, the appellant," (defendant) "who was the primary and active wrongdoer, can be compelled to make good to the appellee" (plaintiff) "the loss thereby occasioned to it. The rule that there is no contribution nor right of indemnity between joint tort-feasors does not apply to a case where one does the act or creates the nuisance and the other does not join therein, but is thereby exposed to liability."

It should be observed that the litigation in the above case resulted from that involved in *The Westfield Gas etc. Co. et al v. Abernathy,*[6] which will be treated more extensively in this paper.

II.

The general rule regarding the denial of indemnity between wrongdoers does not apply in negligence cases based not on willful wrongdoings, but growing out of legal duties and obligations. In the latter cases, a distinction must be made between the liability of the person primarily negligent and that of the one only secondarily negligent, so far as the liability to a third person is concerned. There are authorities to the effect that the person secondarily liable has a right to indemnity from the person primarily negligent.

The case of *Pennsylvania Steel Co. v. Washington & B. Bridge Co.*[7] involved a situation where an employee of the plaintiff had recovered a judgment against the latter for injuries sustained when the bridge upon which plaintiff was erecting a superstructure collapsed. The plaintiff in the in-

[6] 8 Ind. App. 73 (1893). See also Churchill v. Holt, 127 Mass. 165, 34 Am. Rep. 355 (1879).

[7] 194 Fed. 1011 (1912).

stant case contended that the collapse was due to the negligence of the defendant, who had contracted to construct the entire bridge and who was supervising the plaintiff in the latter's portion of the construction. The plaintiff had notified the defendant of the prior action, requesting it to come in and defend, and stating that defendant (in the case at bar) would be held liable for any judgment rendered against plaintiff. The defendant's demurrer was overruled, and when the case was appealed to the Federal District Court of West Virginia, the liability between joint tort-feasors was treated in the following manner: (p. 1014)

"Careful consideration of these and other similar authorities must inevitably lead to the conclusion that in negligence cases based not upon willful wrongdoing, but growing out of legal duties and obligations — acts not *malum in se* but *malum prohibitum* — a clear distinction must be drawn between the liability of the party primarily negligent and that of one secondarily so to the extent of being liable to a third party injured. In such case, it is well settled that the second party, while he may not escape liability to the third party injured, may hold the first party, primarily negligent, for indemnity. Such ruling is sound in both law and good morals, in that it secures greater care on the part of all engaged in the work, and lessens the danger of accidents. While this is true, it is also true that the question as to which party is primarily negligent must be carefully determined from the facts in each case."

In another case [8] the plaintiff had paid a judgment to a third person who had fallen into a coal hole in the sidewalk in front of plaintiff's house where the defendants had been delivering coal.

Although the plaintiff was unsuccessful in his action to recover from the defendants the amount of the judgment and expenses plaintiff had incurred in the prior suit, the Court made the following statement: (p. 795)

"Where the liability rests upon two or more persons who are as against the person injured jointly liable for the injury, the rule invoked by the defendants that the Court should not interfere as between joint tort-feasors is not applicable, where one of the two or more persons chargeable with negligence is primarily liable therefor and the others are only liable by reason of their ownership of the property, and not by

8 Scott v. Curtis, 195 N. Y. 424, 88 N. E. 794 (1909).

reason of any negligence occurring by their active interposition or with their affirmative knowledge and assent. When an employe or independent contractor assumes the duty of performing an act which is dependent upon his personal care and attention, and an injury arises by reason of lack of such care and attention, such person is liable to the owner of the property if he is called upon to pay and does pay the damages arising from such negligence."

From the above case, it can be seen that courts are cognizant of the fact that there can be a primary and a secondary liability for injuries sustained by an innocent party. However, as stated above, the question as to which party is primarily negligent must be carefully determined from the facts in each case; it would be impracticable to attempt to enunciate any specific rule regarding the primary-secondary exception to the general rule.

III.

Another limitation or exception to the general rule is recognized in cases where both parties have been in fault but not in the *same fault,* toward the party injured, and the claimant, guilty of only a negative tort, seeks redress from defendant whose *positive* tort was the primary and efficient cause of the injury.

This exception seems to be the one most involved in cases concerning contribution or indemnity among joint tort-feasors. There are innumerable cases where parties have negligently created situations which caused no harm to anyone until another wrong-doer acted or failed to act in such a way that his conduct, in conjunction with the situation originally created by the other joint tort-feasor, resulted in the injury complained of by an innocent third party.

In a case adjudicated by the Supreme Court of the United States,[9] the plaintiff Stock Yards Company was accustomed to switch railroad cars to their ultimate destination in its yards from a transfer track, on which the defendant Rail-

[9] Union Stock Yards Co. of Omaha v. Chicago, B. & Q. R. R. Co., 196 U. S. 217, 25 S. Ct. 226 (1905).

road Company placed them. It was the practice for the shipper to pay the defendant for transportation of the cars to their places of ultimate destination in the plaintiff's yards; defendant then paid plaintiff for the hauling done by the latter within its own yards. When both parties failed to discover a defect in a car (which could have been done by proper inspection), one of plaintiff's employees was injured as a result of such defect and was successful in his suit against the plaintiff *alone*. Plaintiff herein then sued defendant for the amount paid to the former's employee under the judgment.

The Circuit Court of Appeals propounded the following question to the Supreme Court:

"Is a Railroad Company which delivers a car in bad order to a Terminal Company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation to be paid to it by the railroad company, liable to the Terminal Company for the damages which the latter has been compelled to pay to one of its employés on account of injuries he sustained, while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

This question was answered in the negative by the Supreme Court, although the Court did recognize the exceptions to the general rule regarding indemnity or contribution among joint tort-feasors.

Thus (p. 224): "* * * the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the *principal* wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one *principally* responsible for the injury done. * * *" (Author's italics)

After referring to various authorities, including *Washington Gaslight Co. v. District of Columbia* [10] (herein discussed on page 37), the Court went on to say (p. 227):

10 161 U. S. 316, 16 S. Ct. 564 (1896).

"* * * the exception engrafted upon the general rule of non-contribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown with a view to fastening the ultimate liability upon the one whose wrong has been *primarily* responsible for the injury sustained. * * *" (Author's italics)

It should be noted that, so far as revealed by the opinion, no notice was given by the plaintiff to the defendant regarding the action instituted against the former by its employee, nor, apparently, was the defendant called upon to come in and defend, in the other action. However, the giving of such notice and the demand to come in and defend are usually found in such cases, as indicated by several of the authorities cited by the Court in its opinion. In the case of *Washington Gaslight Co. v. District of Columbia*,[11] it was stated by the Court (p. 329):

"* * * Where one having such right" (to recover over) "is sued, the judgment rendered against him is conclusive upon the person liable over, provided notice be given to the latter, and full opportunity be afforded him to defend the action. * * *"

The Court then continued, quoting from *Boston v. Worthington and others* [12] to the following effect (p. 330):

" 'When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he were the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not.' "

It would seem, then, that the party primarily liable must be notified of, *and* given the opportunity to defend, the action brought by the injured party against the party secondarily liable.

It should be noted at this point that in an earlier Indiana case, *Catterlin v. The City of Frankfort*,[13] a "remedy over"

11 161 U. S. 316, 16 S. Ct. 564 (1896).

12 10 Gray (Mass.) 496, 71 Am. Dec. 678 (1858).

13 79 Ind. 547 (1881). See also Hoosier Casualty Co. v. Miers, et al, 217 Ind. 400, 403, 27 N. E. (2d) 342 (1940).

was denied one wrong-doer, in his action against his fellow wrong-doer to recover for a judgment paid by the former to an injured third party, primarily, so it seems, on the ground that the plaintiff had neglected to allege in its complaint that it had notified the defendant of the prior action and had given it an opportunity to come in and defend.

In *Union Stock Yards Co. v. Chicago, B. & Q. R. R. Co.*[14] it would seem that the statements of the court regarding the exception of the general rule would not be applicable to *all* actions between joint wrong-doers, for on page 228 we find:

"* * * In all these cases" (coming under the exception) "the wrongful act of the one held finally liable *created* the unsafe or dangerous condition from which the injury resulted. The principal and *moving* cause, resulting in the injury sustained, was the act of the *first* wrongdoer, and the other has been held liable to third persons for *failing to discover or correct* the defect caused by the positive act of the other." (Author's italics)

It is submitted that the above limited application of the exception to the general rule would be of little assistance to a plaintiff joint tort-feasor attempting to recover from a defendant joint tort-feasor where both had acted *simultaneously* and had committed *positive* acts of negligence (not mere failure "to discover or correct").

One of the earliest cases involving an exception to the general rule is *Lowell v. Boston & L. R. R. Co.*[15] In that case, defendant Railroad Corporation, in constructing a railroad, removed some barriers which it had placed across the highway to protect travelers, and as a result two persons were injured when they drove into the cuts defendant had made in the road. Plaintiffs (inhabitants of the Town of Lowell) were bound by law to keep the road in repair, and had approved and adopted the barriers voluntarily erected by the defendant. After the injured persons had recovered in their

14 196 U. S. 217, 25 S. Ct. 226 (1905).

15 40 Mass. (23 Pick.) 24, 34 Am. Dec. 33 (1839). See also Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 S. Ct. 564 (1896). (See p. 2 for discussion.)

action against plaintiffs herein, the latter sued defendant to recover for the amounts recovered in the prior case (which plaintiffs had defended on the ground that they had no sufficient notice of the defect in the road, and that the remedy was against the defendant in the case at bar).

In rendering judgment for the plaintiffs, the Court held (p. 32):

"Our law, however, does not in every case disallow an action, by one wrong-doer against another, to recover damages incurred in consequence of their joint offence. * * * If the parties are not equally criminal, the principal delinquent may be held responsible to his co-delinquent for damages incurred by their joint offence. * * * where the offence is merely *malum prohibitum,* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrong-doers."

The Court apparently felt that the ultimate responsibility and liability should fall upon the party primarily at fault, as indicated by its saying (p. 34):

"* * * The defendants' agent, who had the superintendence of their works, was the *first* and *principal* wrong-doer. It was his duty to see to it that the barriers were put up when the works were left at night; his omission to do it was gross negligence; and for this, the defendants were clearly responsible to the parties injured." (Author's italics)

It is interesting to note that while the injured persons had recovered *double* damages against plaintiffs herein in the prior action, the Court in the instant case refused to grant plaintiffs either a "full indemnity" or the costs and expenses of the other suit (p. 35):

"* * * To this extent" (single damages) "only were the defendants liable to the parties injured; and so far as the plaintiffs have been held liable beyond that extent, they have suffered from their own neglect; and whether it was actual or constructive, is immaterial. The damages were doubled by reason of the neglect of the town; and although there was, in fact, no actual negligence, yet constructive negligence was sufficient to maintain the action against them; and they must be responsible for the increased amount of damages, and cannot throw the burden on the defendants."

It is submitted that the last-quoted paragraph is in direct conflict with the one immediately preceding it referring to

the fact that for the omission of defendants' agent in failing to put up the barriers "defendants were clearly responsible to the parties injured." Also, there would seem to be some question as to whether the prior action could be maintained against plaintiffs herein because of their "constructive" negligence. The author has been able to find only one case [16] where the term "constructive negligence" was used, and there the Court's statement was to the effect that:

"The term 'constructive negligence' is not properly applicable to the failure of a banker to look to the interest of his depositor * * *" by ascertaining that the signature of the payee of a check presented to the bank for payment is genuine.

The Court, in *Lowell v. Boston & L. R. R. Co., supra,* obviously resorted to a play of words in order to hold the defendant Railroad Company liable for single damages only and no more. It would seem that since the Court *felt* that it was only just and equitable that defendant should "indemnify them" (plaintiffs) "so far as they" (defendants) "have been relieved from a legal liability; * * *" (p. 34), defendant should reimburse plaintiffs only to the extent of *single* damages, on the ground that defendant would have paid only single damages if the injured persons had successfully sued defendant instead of plaintiffs, in the prior action.

IV.

Another exception to the general rule, recognized by the courts, is that between two joint tort-feasors, the one guilty of no more than negative or passive negligence may recover against the one whose negligence was positive and active.

A case coming within this exception is *Austin Elec. R. R. Co. v. Faust.*[17] There, after a team and wagon had been struck when they veered sharply into the path of a street car the team ran away and inflicted injuries upon the appellee, who was in a buggy. The appellee sued both the Rail-

16 Jordan Marsh Co. v. National Shawmut Bank, 201 Mass. 397, 87 N. E. 740, 742 (1909).

17 63 Tex. Civ. App. 91, 133 S. W. 449 (1911).

way Company (owner of the street car) and the Ice Company (owner of the team and wagon).

In its treatment of this exception to the general rule, the Texas Court said (p. 453):

"But as to the two negligent parties, if the negligence of one was merely passive, or was such as only to produce the occasion, and the other negligent party was the active perpetrator of the wrong, the former may recover over against the latter. As between the two negligent parties, the negligence of the active perpetrator of the wrong would be the proximate cause of the injury to the party whose negligence did no more than produce the condition."

The case of *George A. Hormel & Co. v. General Motors Truck Co.*[18] involved a situation wherein the defendant had repaired plaintiff's truck in a negligent manner, causing the truck to collide with the car of a third person. The plaintiff herein, through an insurance company, was forced to make payment to such third person, and in the instant case sued the defendant for contribution for the use of the insurance company.

While recovery for contribution was denied on the ground that the plaintiff's failure to inspect the truck amounted to an actual participation in the proximate cause of the accident, yet it was said by the Court (p. 416):

"It is the general rule that where one of two or more joint tort-feasors has been compelled to satisfy damages arising from a joint tortious transaction, he cannot maintain an action for indemnification against those joining with him in the tort; but if the liability of the tort-feasor who has been compelled to pay the damages arises merely from negative acts or omission on his part, such as failing in his duty to inspect, and the proximate cause of the injury, with respect to the joint tort-feasors, consists in active, positive acts of negligence on the part of the other tort-feasor, in which the one compelled to pay the damages did not participate in such case an exception to the general rule would exist."

V.

There are some authorities to the effect that even though the negligence of both parties as between them and the injured person, proximately caused the injury, as between

18 55 Ga. App. 476, 190 S. E. 415 (1937).

themselves the doctrine of last clear chance may be applied and the claimant will be excepted from the operation of the general rule against contribution among tort-feasors. Where the doctrine of last clear chance in such situations is successfully applied by a claimant seeking indemnity, his negligence is considered to have been a remote cause only, and that of the defendant the proximate cause of the injury.

This principle has been followed by the courts of New Hampshire.

In the case of *Nashua Iron & Steel Co. v. Worchester, etc. R. R. Co.*[19] the plaintiff's horse was frightened by the defendant's train, and as a consequence ran away and injured a third party. The plaintiff paid a judgment rendered against him in favor of such third party, having previously requested the defendant to come in and defend. The overruling of the defendant's demurrer was affirmed on appeal.

In applying the doctrine of last clear chance to the factual situation, it was said by the Court:

"The defendant is liable here * * * because ordinary care on his part would have prevented the injury. The fact that one had carelessly exposed his property in a dangerous situation does not absolve his neighbors from the obligation of conducting themselves in regard to it with ordinary care. An injury which that degree of care would prevent is caused by the want of it, and not by the owner's negligence in leaving his property in a perilous position." (p. 162)

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"No one can justly complain of another's negligence, which, but for his own wrongful interposition, would be harmless." (p. 163)

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"* * * he only, who by ordinary care can and does not prevent an injury, is responsible in damages * * *."

"An accident may result from a hazardous situation caused by the previous negligence of one or both parties. * * * If due care on the part of either at the time of the injury would prevent it, the antecedent

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19 62 N. H. 159 (1882). See also Boston & M. R. R. Co. v. Brackett, 71 N. H. 494, 53 Atl. 304 (1902).

negligence of one or both parties is immaterial, except it may be as one of the circumstances by which the requisite measure of care is to be determined. In such a case the law deals with their behavior in the situation in which it finds them at the time the mischief is done, regardless of their prior misconduct. The latter is *incuria,* but not *incuria dans locum injuriae* — it is the cause of the danger; the former is the cause of the injury." (p. 164)

"* * * if the plaintiffs' carelessness consisted solely in permitting the horse to be where it was at the time, and ordinary care by the defendants would have prevented its fright, or, if the plaintiffs, by proof of any state of facts competent to be shown under the declaration, can make it appear that at the time of the occurence they could not, and the defendants could, by such care have prevented the accident, they are entitled to recover." (p. 166)

The last clear chance doctrine seems to have been recognized to some extent in the *Restatement of the Law of Restitution,*[20] wherein we find:

"A person whose negligent conduct combined with the reckless or intentionally wrongful conduct of another has resulted in injury, for which both have become liable in tort to a third person, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability, if the other knew of the peril and could have averted the harm at the time when the negligent tort-feasor could not have done so."

In *Knippenberg v. Lord & Taylor*[21] the plaintiff was forced to drive over the sidewalk and in so doing struck a third party, such action being caused by the negligence of defendant's truck driver. The third party having recovered against the plaintiff herein, the latter sued to recover the sum so paid. While the case was reversed upon appeal for the defendant because the complaint did not state facts sufficient to constitute a cause of action, leave to amend was granted.

Although the Court did not state directly that the doctrine of last clear chance was applicable or involved in the case,

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20 Sec. 97, Page 421.

21 184 N. Y. Supp. 785, 193 App. Div. 753 (1920). See also Colo. & Southern R. R. Co. v. Western Light & Power Co., 73 Colo. 107, 214 Pac. 30 (1923). (Discussed hereinbefore on p. 2.)

yet there appeared to be an indirect reference to the principles underlying such doctrine when the Court said (p. 788):

"* * * A recovery over may be had where the party against whom a judgment has been recovered for his own negligence can show that his negligence was antecedent, and that, through the subsequent negligence of the party against whom he seeks to recover over, he was unable to prevent the accident at the immediate time of its occurrence and it could have been prevented by the exercise of ordinary care on the part of the party against whom he seeks to recover over.

"It is the rule in this jurisdiction that, if the antecedent negligence of a plaintiff be not a proximate cause of the injuries * * * to a third person to whom he owed a duty which he failed to perform, and notwithstanding such antecedent negligence on his part, or failure to perform the duty, if the accident and injuries could have been avoided by the exercise of ordinary care by the defendant, or where the accident and injury were caused by the active negligence of the defendant, who as between him and the plaintiff was the wrongdoer, the remote antecedent negligence of the plaintiff in the one case, and his negligence, which was not active, in the other, does not bar a recovery, if the defendant's negligence was the direct and proximate cause of the injuries."

INDIANA DECISIONS

An examination of the Indiana authorities has disclosed that while there are a number of cases adhering to the general rule precluding the recovery of contribution or indemnity between joint tort-feasors, there are several cases that intimate or hold indirectly, that one wrong-doer might recover from his fellow wrong-doer.

The latest enunciation of the Supreme Court of Indiana, in compliance with the general rule, is found in *Jackson, et al v. Record, Administrator, et al.*[22] There, plaintiff Administrator sued four defendants for the wrongful death of his decedent. Such decedent, while walking on the highway, was struck by the automobile of one of the defendants (driven by latter's agent, also a party defendant) as it attempted to pass another defendant's truck, which was driven by the latter defendant's agent, also a party defendant. The jury's

22 211 Ind. 141, 5 N. E. (2d) 897 (1937).

verdict was for the plaintiff as against the owner of the automobile and his agent. The jury found for the other defendants.

In its treatment of contribution among joint tort-feasors, the Court said: (p. 145)

"It will be noted that this is an action founded upon an alleged tort. The defendants are sued jointly as joint tort-feasors. The liability of the appellants and their co-defendants as joint tort-feasors is several and suit may be maintained against all, or one or any number of them. 'There is no right of contribution that can be enforced as between such defendants or persons liable for the same tort. A satisfaction for such claim for damages obtained from one or any another of such defendants or persons so liable for the same tort ends all liability therefor as against any and all persons against whom liability might have been enforced before such satisfaction was obtained.' * * *"

This statement of the rule is in conformity with the earlier Indiana decisions:

In *Nichols v. Nowling, et al,*[23] the defendant left Indiana after committing an assault and battery upon one Rutherford. After Rutherford had brought suit for damages against plaintiff and defendant herein, the latter (not having been served with process) wrote plaintiff to the effect that if plaintiff were put to any cost in the litigation, defendant would reimburse him; defendant also stated in the letter that plaintiff was not to blame. After plaintiff hired counsel and defended the action unsuccessfully, he was compelled to pay Rutherford five hundred dollars, which he sought to recover from defendant herein.

The Supreme Court affirmed the sustaining of defendant's demurrer on the ground that the contract to reimburse plaintiff was without consideration, pointing out that plaintiff could have made any kind of settlement with Rutherford, even though it left the defendant yet liable.

In regard to contribution among tort-feasors, it was stated: (p. 490)

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23 82 Ind. 488 (1882).

"There is no implied obligation to contribute between tort-feasors, and if such liability can be created by express promise, the promise must rest upon some other consideration than the fact of the tort and of the relation of the accused parties to each other in the guilty transaction; and in this respect we do not perceive that it makes any difference that the plaintiff is alleged to have been innocent and the defendant guilty. There must be some new consideration, such as mutual promises, the transfer of some value, the deprivation of some right or advantage, or the like, which the law recognizes as constituting a valid consideration."

In another early case, *Silvers v. Nerdlinger and Another,*[24] defendant had contracted to erect a building for plaintiffs, there being no special provision in the contract that defendant should guard excavations. After one Dwelly had recovered judgment against plaintiffs herein for injuries sustained from his falling in an excavation made in the sidewalk for construction purposes under the contract, plaintiff sued defendant.

The trial court found that while defendant had known of the suit against plaintiffs, no notice of the same had been given him by plaintiffs.

As a conclusion of law upon the facts, the Court also found that the defendant herein was bound by the judgment against plaintiffs and was liable to pay the amount thereof, with interest from the date of payment.

The Supreme Court reversed the judgment in favor of the defendant.

It is interesting to note that in treating the sufficiency of the notice to defendant of Dwelly's suit against plaintiffs, the Court held that it was unnecessary to examine such question: (p. 58)

"* * * we put out of view all question as to the sufficiency of the notice to Silvers of the pendency of that suit, to make it conclusive upon him if he is otherwise liable."

The Court pointed out that plaintiffs in the case at bar did not controvert their legal liability to Dwelly, and that their right to recover against defendant was based upon the assumption that they were properly held liable.

24 30 Ind. 53 (1868).

In *Ryan et al v. Curran et al* [25] the Court questioned the reasoning in the *Silvers Case, supra,* and overruled it so far as it conflicted with the principal case. However, it would not seem that the above discussion of the *Silvers Case* would be affected by the decision in the *Ryan Case.*

There are several other Indiana decisions adhering to the same general rule precluding recovery by one joint tort-feasor against another.[26]

One of the earliest Indiana cases recognizing that there were exceptions to the general rule is *Hunt v. Lane, Administrator* [27] wherein it was stated (p. 250):

"It is a general rule that there is no contribution amongst wrong-doers. Chitty on Contracts, pp. 446, 525, with references to numerous authorities, *English* and *American,* which fully sustain the text. There are exceptions to this rule — as where an illegal act is done by one in good faith, by the command of another, the latter is bound to indemnify the former. *Id.* 445. * * *"

It should be observed that the Court used "contribution" and "indemnity" synonymously. Also, the author submits that where a party performs an act "by the command of another," such party is an *agent* of the person so commanding. It would seem, therefore, that the Court's statement would not be applicable to a situation involving a pure joint tort-feasor relationship.

The *Westfield Gas Co. et al v. Abernathy Case* [28] was the litigation that caused the suit involved in *Westfield Gas, etc. Co. v. Noblesville, etc. Road Co.*[29] which has heretofore been discussed on page 3 as coming within one of the exceptions to the general rule. In the *Abernathy Case* the plaintiff was injured when he and his horse fell into an unguarded

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25 64 Ind. 345 (1878).

26 The American Express Co. et al v. Patterson, 73 Ind. 430, 436 (1881); Hess v. Lowrey, 122 Ind. 225, 230, 36 N. E. 156 (1889). (Contribution arising from Partnership Relationship.) City of Valparaiso v. Moffit, et al, 12 Ind. App. 250, 254, 39 N. E. 909 (1894). Smith, et al v. Graves, 59 Ind. App. 55, 59, 108 N. E. 168 (1915).

27 9 Ind. 248 (1857).

28 8 Ind. App. 73 (1893).

29 13 Ind. App. 481, 41 N. E. 955 (1895).

excavation adjacent to the road. He then sued the Road Company and several other defendants and recovered for the injuries sustained.

On page 80 we find a statement that:

"As between the defendants, there may be a right of contribution depending upon their relations towards each other. Is the tort declared on in the complaint the joint tort of all the defendants or the separate tort of each?"

While the Court recognized that there "may be a right of contribution" between defendants, such statement must be considered as quite impotent, since the question of contribution among or between joint tort-feasors was neither involved in nor pertinent to the case.

There have been several cases involving the right of a municipality to maintain an action against a wrong-doer in order to recover expenses and judgments that the former had incurred as a result of litigation with injured third parties. While the application of these cases might be limited because they involve municipalities, they have been treated merely to illustrate the attitude of the Indiana courts regarding the right of one joint tort-feasor to recover from another.

Wickwire, et al v. The Town of Angola [30] involved an action by the Town against the two defendants to recover a sum of money the Town had been compelled to pay another party for injuries sustained as a result of the latter's falling into an excavation in front of defendant's property. The Town notified the defendants of the prior action and requested them to defend the same, which they did only on the ground (as alleged in their answer in the instant case) that they were taxpayers. Judgment had been recovered against the Town alone, however, in that action.

The Court treated the failure to guard the area for three weeks as "negligence, *both* upon the part of the town and the appellants." (Author's italics) In affirming the judg-

30 4 Ind. App. 253, 30 N. E. 917 (1891).

ment of the trial court in favor of the Town, the Court held that defendant's liability was predicated upon the theory that (p. 258):

"* * * Public streets are for public travel, and no one has the right to make any permanent use of a street which will impair its safety as a public thoroughfare. It is well settled that one who places a dangerous obstruction in a street, or makes an excavation in or under a sidewalk, whereby its safety as a thoroughfare is materially impaired, is guilty of creating or maintaining a nuisance, and is liable civilly for whatever damages may result therefrom."

While the Court did not baldly state that there was contribution or indemnity among joint tort-feasors, or even that the parties here were joint tort-feasors, it would seem that the defendants were held ultimately liable because they were *primarily* liable, i. e., they created the nuisance causing the injuries sustained by the original plaintiff.

The case of *McNaughton et al v. City of Elkhart* [31] involved facts similar to those in *Wickwire, et al v. The Town of Angola, supra,* and contained the following statement (p. 391):

"It is well settled that when a town or city has been compelled to pay damages on account of excavations and obstructions in its streets, wrongfully made, or lawfully made and negligently left in a dangerous condition, it has a right of action over against the author or authors of the nuisance for the amount so paid; and that, if properly notified of the action, such person or persons are bound and concluded by the judgment recovered against the corporation, as to all questions adjudicated in such action."

In *Catterlin v. The City of Frankfort* [32] it was held that a municipal corporation has a "remedy over against the person by whose act or conduct the sidewalk or street was rendered unsafe." However, the City's action against such "person" to recover for a judgment paid by the City to an injured third party, failed because the City neglected to allege in its complaint that it had notified the defendant and had given it an opportunity to come in and defend in the prior action.

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31 85 Ind. 384 (1882).
32 79 Ind. 547 (1881).

An unequivocal and succinct statement of the right of a municipality to maintain an action against a wrong-doer who has made the streets dangerous, is found in *The City of Elkhart v. Wickwire* [33] where the Court said (p. 80):

"There is no doubt that a municipal corporation may maintain an action against one who makes its streets dangerous for the recovery of damages it has been compelled to pay to one who has received injuries because of the unsafe or defective condition of the street."

The above cases pertaining to municipal corporations and their right of "action over" against parties liable in the first instance have been discussed merely for purposes of illustration. The general tort liability of municipal corporations has been treated extensively in an earlier issue of this publication.[34]

Conclusion

While several exceptions to the general rule have been treated in this paper, it is submitted that the facts of each particular case will determine whether any of the exceptions will be resorted to by the courts. However, it would seem that if any of the judiciary were inclined to permit one joint tort-feasor to recover against another, because, ostensibly, one was negligent to a greater degree than the other, one of the exceptions referred to above could be applied to the particular situation involved.

William J. Kinnally.

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33 87 Ind. 77 (1882).

34 Chattin, "Tort Liability of Municipal Corporations in Indiana," 10 Ind. L. J. 329 (1935).