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PRACTICE AND PROCEDURE-JOINT TORTFEASORS-CROSS CLAIM AGAINST CO-PARTY

James F. Gordy
University of Michigan Law School

PRACTICE AND PROCEDURE—JOINT TORTFEASORS—CROSS CLAIM AGAINST CO-PARTY—Plaintiff was driving his team on the highway, closely followed by the auto of defendant Wood, which was in turn followed by that of defendant Perry. Perry, driving at a high rate of speed, collided with the rear of Wood's auto, causing it to collide with plaintiff's wagon. Plaintiff sued both defendants to recover for damage to himself and his wagon, alleging negligence in the conduct of each. Defendants answered, each denying his own negligence. Wood interposed a cross claim against Perry, alleging Perry's negligence to be the sole cause of the collision, and demanded judgment for damage to his auto. Perry's motion to strike the cross claim was overruled. On appeal, *held,* reversed. A defendant may file a cross claim against a co-defendant only if such cross claim is founded upon, or is necessarily connected with, the subject matter of the plaintiff's action. *Horton v. Perry,* (N.C. 1948) 49 S.E. (2d) 734.

Those few courts which have been faced with this question have generally accepted the premise stated in the principal case, but have disagreed in its meaning and application to this situation.[1] Three courts have construed the requirement narrowly. In Wisconsin "A defendant . . . may have affirmative relief against a co-defendant . . . but in all such cases such relief must involve or in some manner affect the . . . transaction . . . which is the subject matter of the [plaintiff's] action."[2] Though this provision seems broad enough to permit a cross claim like that in the principal case, the Wisconsin court, on similar facts, held that the subject matter of plaintiff's action was his primary right, invaded by defendant's act, which was entirely distinct from the relief demanded by defendant in his cross claim and therefore not cognizable in that action.[3] The North Carolina statute provides, "Judgment may be given for or against one or more of several . . . defendants; and it may determine the ultimate rights of parties on each side, as between themselves."[4] Although this would seem more liberal than the Wisconsin provision, it was held to permit determination of primary and secondary liability between joint tortfeasors but not consideration of cross claims between defendants as to matters not connected with the subject matter of plaintiff's action.[5] The principal case, in interpreting the North Carolina statute to determine whether defendant's cross claim is connected with the subject matter of plaintiff's action, follows Wisconsin's narrow approach. In Connecticut, where "cross complaints of the

[1] Cross claims against co-parties were unknown at common law, and only a few codes provide for them. See 26 MICH. L. REV. 1 at 41 (1927); 42 MICH. L. REV. 268 (1943).

[2] Wis. Stat. (1947) § 263.15.

[3] Liebhauser v. Milwaukee Electric Railway & Light Co., 180 Wis. 468, 193 N.W. 522 (1923), 43 A.L.R. 879 (1926). This fine analysis of the "transaction" and "subject matter," the dissent points out, in effect abrogates the effect of the statute. See also, POMEROY, CODE REMEDIES, 5th ed., § 682 (1929), where the author asserts that most code clauses covering this subject are practically a dead letter, only a few having been accepted and acted on according to their evident intent.

[4] N.C. Gen. Stat. (Michie, 1943) c. 1, § 1-222.

[5] Montgomery v. Blades, 217 N.C. 654, 9 S.E. (2d) 397 (1940).

nature of cross bills in equity, touching matters in question in the original complaint, may be filed by the defendant in any action,"[6] an unreasonably strict interpretation has held that in this situation the matter in demand in the cross claim does not touch matters in question in the original complaint.[7] Two jurisdictions have taken the contrary approach. The New York statute, like that of North Carolina in that it makes no specific provision for cross claims between co-parties, states that "where the judgment may determine the ultimate rights of the parties on the same side as between themselves . . . the party who requires such a determination must demand it in his pleading. . . . The controversy between the parties shall not delay a judgment . . . unless the court otherwise directs."[8] This the New York court held did not apply to authorize litigation between defendants which was in no way connected with plaintiff's cause of action, but did apply where the relief sought by defendant was based on the facts involved in plaintiff's claim, in order to avoid a multiplicity of suits arising out of the same transaction.[9] This view has the merit of liberality and can be applied at the court's discretion. New Jersey, on similar statutory authority,[10] has followed New York's lead in the liberal approach, holding that in a passenger's action for personal injuries against owners of colliding cars, one defendant may cross claim against the other.[11] The purposes of code provisions on procedure are to eliminate the rigid common law requirements, to promulgate more efficient and expedient administration of justice, and, by avoidance of a multiplicity of suits, to enable parties to determine their differences in one action as far as possible.[12] Further, whether the judgment is in favor of or against plaintiff as to either or both defendants, the issue of negligence is not res judicata in subsequent proceedings between the two defendants, and complete relitigation is thus necessary.[13] Supporting the narrow approach is the delay caused to plaintiff if he is compelled to become a mere observer in a contest between the two defendants.[14] On the other hand, the most obvious support for the liberal view is the converse delay and expense to both defendants in bringing a separate action, and to the witnesses who will again be called. Furthermore, there is the cost to taxpayers of such extended litigation. The most important consideration, however, should be the burden which the narrow view imposes on the courts themselves. It is inherent in the denial of such a cross claim that the court must twice go into

[6] Conn. Practice Book (1934) § 112.

[7] Puleo v. Goldberg, 129 Conn. 34, 26 A. (2d) 359 (1942).

[8] N.Y. Civil Practice (Cahill-Parsons 1946) § 264.

[9] Bigelow v. Dubukue, 141 Misc. 29, 252 N.Y.S. 79 (1930).

[10] Rev. Stat. N.J. §§ 2:27-2, 2:27-137 (1948).

[11] Canadiano v. Pittenger, 7 N.J. Misc. 1027, 148 A. 14 (1929). See also, Fed. Rule 13 (g), 28 U.S.C.A. (1946) Fall. Sec. 723c makes specific provision for cross claims against co-parties, in language similar to the Wisconsin statute; it is indicated this provision will be liberally interpreted and applied. 3 MOORE'S FEDERAL PRACTICE, 2d ed., 91 (1948).

[12] Coastal Produce Assn. v. Wilson, 193 S.C. 339, 8 S.E. (2d) 505 (1940). See also, POMEROY, CODE REMEDIES, 5th ed., § 16 (1929).

[13] JUDGMENTS RESTATEMENT, § 82 (1942).

[14] Liebhauser v. Milwaukee Electric Railway & Light Co., supra, note 3.

identical facts, when a consolidation of the two claims would resolve both in one action. Except as to individual damages, proof of both plaintiff's claim and defendant's cross claim will be substantially the same.[15] Such a minor delay to the plaintiff would not seem to justify a restrictive interpretation of language which lends itself to a more liberal and desirable construction.

James F. Gordy

[15] Jefno Realty Corp. v. Lloyds Film Storage Corp., 73 N.Y.S. (2d) 186 (1947).