Maryland Law Review

Volume 24 | Issue 1 Article 5

Interpretation Of Indemnity Clauses In Construction Contracts - Macon v. Warren Petroleum Corp.

Sheila K. Sachs

Interpretation Of Indemnity Clauses In Construction Contracts

Macon v. Warren Petroleum Corp.[1]

Plaintiffs were employees of an independent contractor who, pursuant to a construction contract containing an indemnity clause, had agreed to perform work at defendant-property owner's premises. They were injured while at work, solely as the result of defendant's negligence, and sued to recover. The defendant claimed that, as indemnitee under the indemnity clause in the contract, he was entitled to indemnification from the contractor-indemnitor. He relied on the following clauses of the indemnity agreement:

> " 'Contractor indemnifies and agrees to hold Owner harmless from any and all liability . . . resulting from injuries to or death of persons, including Contractor and Contractor's employees . . . while Contractor is performing the work, which arise out of or in connection with the activities of Contractor, Contractor's servants, agents and employees * * *'."[2]

[1] 202 F. Supp. 194 (W.D. Tex. 1962), *aff'd*, 316 F. 2d 287 (1963).
[2] *Id.*, 195.

The district court held that the agreement required the contractor to assume defendant's liability to the plaintiffs, even in the absence of terms expressly requiring indemnification for the defendant's negligence. The court ruled that "it is not necessary for the parties to say in so many words that they intend to protect the indemnitee against liability for negligence, it being sufficient if it clearly appears from the agreement that such was the intention of the parties."[3] Although the court recognized that the proper rule for construing such agreements is to give effect to the intent of the parties, it added:

> " 'In determining the rights and liabilities of the parties . . . their intention will first be ascertained by rules of construction applicable to contracts generally. At this point neither party is favored over the other simply because their agreement is one of indemnity. *After the intention of the parties has been determined, however, the doctrine of strictissimi juris applies and the liability of the indemnitor under his contract as thus interpreted will not be extended beyond the terms of the agreement.*' "[4]

And although in some cases an examination of the circumstances surrounding the making of the contract may be necessary to determine such intent, the court concluded that in this case it was "unnecessary to look beyond the express terms of the contract" to find such intent, with the result that the comment about strict construction was wholly gratuitous.

The courts generally are troubled by how to effect the parties' intent where indemnity agreements fail to refer

[3] *Id.*, 196. The District Court cited as support the case of Mitchell's Inc. v. Friedman, 157 Tex. 424, 303 S.W. 2d 775, 779 (1957). The Court of Appeals cited for further support the statements of the Supreme Court of Texas in two cases decided after the Macon case: "The rule is that when the wording of the contract is sufficiently broad to cover the negligence of the indemnitee and the situation of the parties with reference to the subject matter of the contract is such that it can clearly be said that the parties intended that the negligence of the indemnitee should be covered by the indemnity agreement, then liability thereunder will be sustained *whenever the injury asserted as a basis for indemnity is one which arose out of the operations embraced by the contract.* (Emphasis supplied.)" Spence & Howe Construction Co. v. Gulf Oil Corp., 365 S.W. 2d 631 (Tex. 1963); "The 'express negligence' doctrine has, in effect, been rejected in this state not only in instances involving the rental or leasing of property, but also in cases where an owner-contractor relationship exists. * * * In owner-contractor situations judicial construction of indemnity clauses to cover the indemnitee's negligence notwithstanding absence of an express provision to that effect in the contract has been said to be common." Ohio Oil Co. v. Smith, 365 S.W. 2d 621 (Tex. 1963).

[4] Macon v. Warren Petroleum Corp., 202 F. Supp. 194, 196-197 (W.D. Tex. 1963), *aff'd*, 316 F. 2d 287 (1963).

expressly to the indemnitee's negligence.[5] They have *purported* to look beyond the express terms by considering the language used, the circumstances under which the contract was made and the objects sought to be attained by the contract.[6] What is certain is that there is no rule of interpretation which can be and is consistently applied; results often depend on whether the terms of the contract are strictly or liberally construed.[7]

In the name of "strict construction", provisions have frequently been construed against the indemnitee.[8] The meaning of "strict construction", however, is not altogether clear. It has been suggested that:

> "It is somewhat misleading to say that an indemnity agreement must be strictly construed in favor of the

[5] See Potamkin and Plotka, *Indemnification Against Tort Liability — The "Hold Harmless" Clause — Its Interpretation and Effect Upon Insurance*, 92 U. Pa. L. Rev. 347 (1944).

[6] See Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403 (1958) and cases cited therein; *but see* Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E. 2d 604 (1946); Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907). See also, Annot., 175 A.L.R. 8, 29; see 12 M.L.E. *Indemnity* § 3, at 161-162 (1961).

[7] See 6A CORBIN, CONTRACTS § 1472, at 598 (1962).

[8] See Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403, 406 (1958). "There will frequently be found in the cases the statement that an indemnification clause will not cover the indemnitee in respect to a claim against it arising out of its own negligence unless the contract contains a clear and unequivocal expression of such intent. . . . However, a critical evaluation of the cases in the widely variegated types of transactions and indemnity clauses involved will show that the rule referred to is not generally applied to necessarily frustrate coverage of the indemnity clause as against losses partially attributable to negligence of the indemnitee, if the language of the agreement and the surrounding circumstances are indicative of that broad a contractual intent; *but that rule is commonly stated in support of conclusions against coverage* in cases where the precise nature of the relationship between the indemnitee's negligence and the particular loss or claim is such as to negate any intent that the parties designed to cover it by their agreement of indemnification." (Emphasis added.)

The court in Stern v. Larocca noted that in cases involving accidents due solely to indemnitee's negligence, courts are harder pressed to find a relationship between indemnitee's negligence and terms of the contract in the absence of an express provision, than they are in concurrent negligence situations. [*E.g.*, Humble Oil Refining Company v. Wilson, 339 S.W. 2d 954 (Tex. Civ. App. 1960)]. Moreover, in the concurrent negligence cases the courts reason that "to preclude recovery in every case where the negligence of the indemnitee contributed at all to the loss would leave practically no occasion where the indemnity provision would be operative." *Id.*, 408. Since the all-inclusive clause may still be applicable to concurrent negligence situations the courts do not feel that the provision is entirely nullified if they "read into" the agreement a provision excluding indemnitee's sole negligence on the theory that the parties intended such a provision but neglected to spell it out. See Hartford Accident & Indemnity Co. v. Worden-Allen Co., 238 Wis. 124, 297 N.W. 436, 439 (1941); Sinclair Prairie Oil Co. v. Thornley, 127 F. 2d 128, 133 (10th Cir. 1942). "We can read nothing into the contract that would require [contractor] . . . to indemnify [owner] . . . against liability from its own negligence [of owner] . . ."; Annot., 175 A.L.R. 8, 32 (1948).

> indemnitor and against the indemnitee. Although the distinction has not been frequently noted, the doctrine of strictissimi juris is not a rule of construction but is a principle of substantive law which is applicable after the intention of the parties has been ascertained by ordinary rules of construction."[9]

Nevertheless, the doctrine of *strictissimi juris* generally has been applied as a rule of construction, with the result that some courts have persisted in strictly construing provisions against the indemnitee, and have thereby perpetuated the idea that indemnity clauses "are not favorites of the law".[10] To this end, the doctrine has been supported by the propositions, (1) that where " 'its [the provision's] meaning is ambiguous or reasonably susceptible of two interpretations, it must be construed most strongly against the party who drew it' ";[11] and (2) that the indemnity provisions are presumed to have been inserted at the request of the indemnitee, who was found in some cases to have enjoyed a superior bargaining position.[12] As a practical matter,

> "The so-called rule of 'strict construction' of indemnification clauses has been justified because of fear en-

---

[9] Mitchell's Inc. v. Friedman, 157 Tex. 424, 303 S.W. 2d 775, 777 (1957). See Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403 (1958); Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P. 2d 460 (1959).

[10] Tyler v. Dowell, Inc., 274 F. 2d 890 (10th Cir. 1960); *cf.* Kansas City Power & Light Co. v. Federal Constr. Corp., 351 S.W. 2d 741, 745 (Mo. 1961).

> " 'Contracts of indemnity . . . are usually intended to provide against loss or liability of one party, through the operations of the other, or caused by physical conditions that are under the control of the other — over which the party indemnified has no control, and the party indemnifying has control. Indeed, it would take clear language to show that a contract of indemnity was intended to cover conditions or operations under the control of the party indemnified, and not under the control of the indemnifying party, such, for instance, as accidents, the proximate cause of which is the negligence of the party indemnified.' "

Rome Builders Supply, Inc. v. Kraft Company, 104 Ga. App. 488, 122 S.E. 2d 133 (1961).

> "A provision in a contract by which the plaintiff in this case agreed that 'in all of its operations hereunder' it would hold the defendant 'free from any claim and/or liability of any kind or character in connection therewith' is a waiver by the plaintiff of its right to sue the defendant for the defendant's negligence in connection with any of the operations of the plaintiff under the contract, but does not extend to negligence of the defendant not connected with an operation of the plaintiff."

See also Farrell Lines, Inc. v. Devlin, 211 Md. 404, 421, 127 A. 2d 640 (1956).

[11] Pittsburgh S. Co. v. Patterson-Emerson-Comstock, Inc., 404 Pa. 53, 171 A. 2d 185, 189 (1961).

[12] See Tyler v. Dowell, Inc., 274 F. 2d 890 (10th Cir. 1960).

> tertained that to include the indemnitee's sole negligence within the indemnification coverage would impose upon the indemnitor a liability the extent of which would be uncertain and indefinite and entirely in the hands of the indemnitee — a liability which could not only wipe out all profit but might exceed the total consideration for the job or even the indemnitor's entire fortune."[13]

In attempting to come to grips with the fundamental problems of interpretation and construction, the basic rule is that "contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms."[14] At one extreme, "unequivocal terms" is defined to require that the parties must *expressly stipulate* that the indemnitee is to be indemnified against his own negligence.[15] Most courts, however, seem to require something less than express reference to indemnitee's negligence. But many of those courts which are prepared to hold the indemnitor liable for the indemnitee's negligence, even without an "express stipulation", conclude that "broad terms", by themselves, are insufficient to establish the intent to cover the indemnitee's negligence.[16] This is particularly true where it is found,

---

[13] Cozzi v. Owens Corning Fiber Glass Corp., 63 N.J. Super. 117, 164 A. 2d 69, 74 (1960); *cf.* Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E. 2d 35 (1936); Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907); Mitchell v. Southern R. Co., 124 Ky. 146, 74 S.W. 216 (1903).

[14] Smith v. Ohio Oil Co., 356 S.W. 2d 443, 444 (Tex. Civ. App. 1962), *rev'd*, 365 S.W. 2d 621 (1963); *Accord* Pittsburgh S. Co. v. Patterson-Emerson-Comstock, Inc., 404 Pa. 53, 171 A. 2d 185 (1961); Kansas City Power & Light Co. v. Federal Constr. Corp., 351 S.W. 2d 741 (Mo. 1961); Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P. 2d 460 (1959). Other courts say that such construction must be required by "clear and explicit language". Cozzi v. Owens Corning Fiber Glass Corp., *supra* note 13; Farrell Lines, Inc. v. Devlin, 211 Md. 404, 127 A. 2d 640 (1956).

[15] See, *e.g.*, Perry v. Payne, 217 Pa. 252, 66 A. 553 (1907). In holding that an agreement to hold the owner of the premises harmless "from damages arising from accidents to persons employed in the construction of, or passing near the said work", did not require the contractor to indemnify the owner for his own negligence, the court reasoned that while the party against whose negligent act the owner would be indemnified was not designated, the necessity for indemnifying the owner against his own negligent acts could not have been anticipated by the parties. "[T]*here can be no presumption that the indemnitor intended to assume the responsibility unless the contract puts it beyond doubt by express stipulation.* No inference from words of general import can establish it." *Id.*, 557. (Emphasis added.) See George Sollitt Constr. Co. v. Gateway Erectors Inc., 260 F. 2d 165 (7th Cir. 1958); Westinghouse Electric Elevator Co. v. LaSalle Monroe Bldg. Corp., 395 Ill. 429, 70 N.E. 2d 604 (1946).

[16] See, Batson-Cook Company v. Industrial Steel Erectors, 257 F. 2d 410, 412 (5th Cir. 1958), "while [indemnity] . . . need not be done in any particular language or form, unless the intention is unequivocally ex-

as a matter of fact, that the causal relationship between the indemnitor's performance of duties under the contract and the injury is markedly remote and uncertain.[17] Furthermore, the very problems of fact finding encourage the courts to decide on the basis that failure to refer to the indemnitee's negligence indicates an intent *not* to protect the indemnitee against liability for his own negligence;[18] thus the distinction between the rule which requires that the indemnitee's negligence be referred to expressly, and that which purports not to require such express reference is all but eliminated by many courts holding for the indemnitor. Where the courts hold for the indemnitee, "unequivocal expression" has been construed to mean that express reference to the indemnitee's negligence is *not necessary if* the intent of the parties *is* "unequivocally" manifested by the language as construed in light of the circumstances surrounding the agreement, *i.e.*, the conditions under which the work is to be performed and the objects sought to be attained by the performance.[19]

---

pressed in the plainest of words, the law will consider that the parties did not undertake to indemnify one against the consequences of his own negligence." *Cf.* Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P. 2d 460 (1959); Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403 (1958).

[17] See, *e.g.*, Batson-Cook Company v. Industrial Steel Erectors, *supra* note 16, 413. An employee of the indemnitor (sub-contractor) was injured when he slipped from a ladder negligently installed by the indemnitee's employee. The indemnification clause covered injuries "sustained in connection with or to have arisen out of or resulting from the performance of the work by subcontractor." The court held that while the language was "well adapted to defining the areas of the application, it is not peculiarly apt to define causes either in terms of physical or legal responsibility"; Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W. 2d 806 (Tex. Civ. App. 1961) (subcontract for installation of elevators). Subcontractor's employee was injured by falling object that fell into the shaft due to contractor's negligence. The subcontractor had agreed to "indemnify and save harmless Contractor from and against any and all loss [etc.] . . . growing out of, or incident to or resulting from the performance, or failure to perform the Work or the provisions of this Subcontract." The court held that indemnity only extended to performance by Westinghouse in installing elevators and that the negligent conduct of the general contractor's employees had no connection with the installation of elevators; Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E. 2d 35 (1936). (Involving facts similar to those in the Childs-Bellows case, *supra*.) The mere fact that the employees of the subcontractor were working under his contract at the time was not enough to make the injury one growing out of the execution of work. While it could not have occurred but for the presence of the subcontractor's employees at the given time and place, the work of the subcontractor was not the cause of the injury.

[18] See dissent in Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P. 2d 460 (1959); Annot., 175 A.L.R. 8, 32.

[19] See, *e.g.*, Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403, 409 (1958), where contractor agreed to convert an old building into a garage. Contractor's employee was stripping the plaster off the partition wall as part of the work specified, when part of the ceiling collapsed. The court rejected the requirement of express reference to indemnitee's negligence. In

A number of cases which find for the indemnitee rest on indemnity clauses that are precise enough to amount to stipulation even though the words "indemnitee's negligence" do not appear.[20] Generally, however, the language is not unequivocal. In such cases, recovery by the indemnitee in the absence of express indemnification for his own negligence has been sustained on the very breadth of the language, rather than on its precision, *e.g.*:

> "The Contractor hereby expressly binds himself to indemnify and save harmless the City and its Engineer from all suits and actions of every nature and description brought against the City or any person or persons on account of the construction of this work *or* by reason of any act of omission, misfeasance, malfeasance of the Contractor or his agents, subcontractors or employees."[21]

Under the above indemnification provision it is arguable that the terms pertaining to the contractor's acts modify

---

order to ascertain the intent of the parties the court considered that the building was old, that the agreement provided that the contractors were to completely familiarize themselves with the building before beginning work and that, therefore, the defective condition was known to the parties. Such circumstances justified the court's conclusion that in agreeing to indemnification for losses "by or on account of the prosecution of the work until possession is taken by the owner . . ." the parties must have anticipated the risk involved in such remodeling work.

[20] See, *e.g.*, Southern Pav. Co. v. Fellows, 22 Cal. App. 2d 87, 71 P. 2d 75, 77 (1937).

> "The indemnity clause in the contract, undertaking, as it does, to indemnify railroad company from and against '*any and all* claims, loss, damage, *injury and liability howsoever the same may be caused, resulting directly or indirectly* from work covered by this agreement,' is so sweeping and all-embracing in its terms that, although it does not contain an express stipulation indemnifying appellant against liability caused by its own negligence, it accomplishes the same purpose." (Emphasis added by the court.)

See, Cozzi v. Owens Corning Fiber Glass Corp., 63 N.J. Super. 117, 164 A. 2d 69, 70 (1960). Indemnification included all accidents "whether occasioned by said Contractor or his employees or by Owner or his employees. . . ." The court said, "Surely it is not necessary that parties incorporate into the language of their agreement all the specific possibilities through which the indemnitee — owner might cause an accident — by sole negligence, concurrent negligence, active sole negligence, passive concurrent negligence, etc." *Id.*, 72. The court discussed Stellato v. Flagler Park Estates, 11 Misc. 2d 413, 172 N.Y.S. 2d 90 (Sup. Ct. 1958), *aff'd*, 6 A.D. 2d 843, 178 N.Y.S. 2d 242 (App. Div. 1958) and George A. Fuller Co. v. Fischbach & Moore, Inc., 7 A.D. 2d 33, 180 N.Y.S. 2d 589 (App. Div. 1958), where the clauses involved were "arising out of or in consequence of the performance of this contract * * * due to any negligence of the owner, subcontractor or general contractor * * *." The indemnitor claimed that the work must be the proximate cause of injury but the New York courts said that the injured person only had to be in the scope of his employment since the clause was one of absolute indemnity.

[21] Metropolitan v. Gordon Herkenhoff & Assoc., 66 N.M. 41, 341 P. 2d 460, 461-62 (1959); see Fosson v. Ashland Oil & Refining Company, 309 S.W. 2d 176, 177 (Ky. 1957).

the general scope of liability in the preceding phrase. But the court in *Metropolitan Paving Co. v. Gordon Herkenhoff & Assoc.*[22] construed the foregoing clause to impose liability upon the indemnitor for an injury occurring "on account of the construction of this work", regardless of fault. While the disjunctive construction may be grammatically sound, it does not obviate the patent ambiguity in the provision,[23] that is, an ambiguity based on disjunctive wording.

In *Macon,* the indemnity provision was similarly held applicable to any injury occurring "in connection" with the contractor's activities[24] — the connection between the contractor's activities and the injury being established by the fact that *but for* the contractor's agreement to perform certain carpentry work at the defendant's plant laboratory, his employees would not have been present when the defendant negligently permitted a poisonous gas to escape into the room where they were working. Further, in *Macon,* it was not apparent from the language of the indemnity clause itself that the parties contemplated limiting the terms with reference to negligent acts of either party. However, it is the breadth of language in *Macon* which points out the ambiguity and which, at the same time, admits of two conflicting but equally valid implications:

1) if the parties did actually intend to provide coverage for indemnitee's negligence they would have expressed this intention in specific language; and
2) "if the parties had intended some limitation of the all-embracing language, they would have expressed such limitation."[25]

In adopting the latter view, the court in the instant case supports its position on the grounds that:

---

[22] Metropolitan v. Gordon Herkenhoff & Assoc., *supra* note 21, 463.

[23] See Westinghouse Electric Corp. v. Childs-Bellows, 352 S.W. 2d 806 (Tex. Civ. App. 1961), where denial of recovery by the indemnitee under a similarly phrased provision is based on a conjunctive construction. See also Compania Anonima Venezolana v. Cottman Company, 145 F. Supp. 761, 763 (D. Md. 1956), where the court discusses the effect of grammatical structure of a given clause.

[24] Macon v. Warren Petroleum Corp., 202 F. Supp. 194 (W.D. Tex. 1962), *aff'd,* 316 F. 2d 287 (1963). See Princemont Const. Corp. v. Baltimore & Ohio R. Co., 131 A. 2d 877 (D.C. 1957). ("To assume all liability for any and all loss and damage to property and claims for injury to or death of persons in connection with or growing out of the use of said premises."); Russell v. Shell Oil Co., 339 Ill. App. 168, 89 N.E. 2d 415 (1949). (" 'Contractor shall hold Shell harmless from any and all claims for injury . . . resulting from or arising in connection with any of Contractor's operations'. . . .").

[25] Princemont Const. Corp. v. Baltimore & Ohio R. Co., *supra* note 24, 878.

> "To require that there be a causal connection between their 'activities' and the thing that produced the injuries, would be to place a highly restricted meaning upon that term ["in connection with"] and to read into the agreement words that simply are not there. It is unnecessary to look beyond the express terms of the contract itself to see that the parties intended that [the owner] should be indemnified by [the contractor] for any loss sustained as a result of injuries to [the contractor's] employees, even though they resulted from [the owner's] own negligence. *Whether or not the agreement was a wise one from the standpoint of [the contractor], is not a subject of inquiry by this Court.*"[26]

If the agreement is clearly unwise, how can the court in good conscience conclude that, in agreeing to indemnify the defendant for injuries "in connection with" his activities, the contractor *intended* to assume liability for an injury for which he is in no way responsible?

To say that the words "in connection with" do not require a causal connection between the injury and the indemnitor's conduct would seem to be reasonable only where the indemnitor has *control* of the premises or instrumentality, the defective condition of which (due to the indemnitee's negligence) is the cause of the injury. For this reason it has been suggested by an intermediary state court in Texas that a uniform rule should not be applied to all indemnity relationships.[27] Where under the principal agreement the contractor is in sole occupancy of the premises during the time of performance, the courts may be justified in allowing indemnitee to recover *under general provisions* for injury caused by defective conditions, because the indemnitor-contractor generally agrees to take equipment or premises "in the condition in which he finds them".[28] But where the owner or his employees are pres-

[26] Macon v. Warren Petroleum Corp., *supra* n. 24, 197. (Emphasis added.) On the rejection of causal connection *cf.* Russell v. Shell Oil Co., *supra* note 24, 417; Smoke v. Turner Const. Co., 54 F. Supp. 369, 372 (D. Del. 1944), and cases cited therein.

Note that where the ambiguity is resolved in favor of the indemnitor it is because the court *is* concerned with the wisdom of the agreement from the point of view of the party assuming the additional risk of liability. See cases cited *supra* note 13.

[27] Smith v. Ohio Oil Company, 356 S.W. 2d 443 (Tex. Civ. App. 1962), *rev'd*, 365 S.W. 2d 621 (1963). Note the rejection of this suggestion by the Texas Supreme Court in Ohio Oil Co. v. Smith, 365 S.W. 2d 621 (Tex. 1963). See Judge Miller's dissent in Moses-Ecco Company v. Roscoe-Ajax Corporation, 320 F. 2d 685, 690 (D.C. Cir. 1963).

[28] See, *e.g.*, the facts in Mitchell's Inc. v. Friedman, 157 Tex. 424, 303 S.W. 2d 775, 778 (1957), illustrating a type of situation in which the in-

ent on the premises, increasing the hazard and risk inherent in the contractor's performance and making it impossible for the parties to anticipate and control the sources of injury, express reference to the indemnitee's negligence should be required. In *Macon*, there was no such control over the premises by the indemnitor as to justify indemnification for injuries caused by independent acts of the owner. And, indeed, the injury was caused by poisonous gas escaping from a pipeline in the owner's plant, an instrumentality over which contractor neither had nor could have had any effective control.

But, the court said little more than that in an analogous case it was said that "if the agreement was held not to apply to the general contractor's negligence, it meant nothing for the [general contractor] could be held liable only for negligence."[29] The court in using this language apparently relates it to the rule that a property owner is generally liable for dangerous conditions on his property or for negligent conduct causing injury to persons on his property.[30] Therefore, since the contractor's presence (1)

---

demnitor's assumption of liability for indemnitee's negligence is clearly reasonable. In that case a customer of the lessee-indemnitor's assignee was struck by plaster and lathing which fell from the ceiling. The court held for the lessor-indemnitee under an agreement indemnifying against liability "for any damage to person or property . . . due to the building on said premises or any appurtenances thereof being improperly constructed, or being or becoming out of repair, nor for any damages for any defects or want of repair of any part of the building of which the leased premises form a part, but the Lessee accepts such premises as suitable for the purposes for which same are leased and accepts the building . . . and waives defects. . . ."; see also Griffiths v. Henry Broderick, Inc., 27 Wash. 2d 901, 182 P. 2d 18, 175 A.L.R. 1 (1947). See Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403 (1958), where the agreement is for the performance of construction work but the contractor was similarly in complete control of the premises.

[29] Macon v. Warren Petroleum Corp., 202 F. Supp. 194, 197 (1962). *Cf.* Moses-Ecco Company v. Roscoe-Ajax Corporation, *supra* note 27, 688.

[30] *Cf.* Moses-Ecco Company v. Roscoe-Ajax Corporation, *id.*, 690, dissenting opinion. See also cases involving railroad spur track leases where indemnitor-lessee has been held liable for railroad-lessor's negligent acts, completely removed from the lessee's control on the theory that if general terms were not construed to cover the railroad's negligence they would be meaningless since the railroad would *derive little benefit* from the agreement (the rent being a relatively insignificant part of the railroad's business income while the lessee has the advantage of a private siding from which to load and unload its materials) while the lessee's use of the track increased the possibility of accidents and liability to the railroad, *e.g.*, Princemont Const. Co. v. Baltimore & Ohio R. Co., 131 A. 2d 877 (D.C. 1957). *Cf.* District of Columbia v. General Heating Engineer Co., 168 A. 2d 903, 905 (D.C. 1961), applying the "benefit theory" where the District had granted a permit to excavate to a plumber, and a motorist was injured due to the District's negligence in failing to repave after the plumber had notified that the excavation was ready to be repaved. The court there stated, "The District, primarily responsible to the public for the safety of the street, was to gain nothing directly from the excava-

increased the risk of accident incident to the normal plant operations, and (2) enlarged the class of persons within the scope of the risk, the owner presumably wanted to be reimbursed for any loss he might suffer as a property owner under the given circumstances. But the rationale grounded on a property owner's usual liability does not meet the *Macon* problem. Although the property owner could have anticipated liability to the contractor's employees for injuries occasioned by their unfamiliarity with the normal conditions on the premises, it is improbable that the owner would expect the contractor to agree to assume the owner's liability for injuries due to the owner's active negligence unconnected with the normally existing state of the premises. In this situation, the mere statement that the owner can be "held liable only for negligence" seems to beg the question: did the parties *intend* to shift the risk of liability for negligence under these particular circumstances?

It is not unreasonable to expect an owner to seek to avoid the increased risk of liability to a *contractor's employee* whose duties bring him within the scope of the owner's plant operations. Since workmen's compensation laws in the jurisdiction generally "preclude a common law action by . . . an employee against [the contractor]", an action against the owner by the employee may have been one of the contingencies which the parties considered in their negotiations.[31] However, if the agreement is to be a wise one from the point of view of both parties, "the shift of liability [should be] a shift in the burden of providing adequate insurance coverage."[32] But as far as the courts are concerned, "the mere statement in a contract that a contractor shall carry workmen's compensation and public liability insurance for certain activities in connection with construction cannot be interpreted as a contract to indemnify the other party against liability arising out of these activities."[33]

---

tion, except perhaps a law suit."; for further application of the "benefit theory" see 6A CORBIN, CONTRACTS § 1472, n. 53 (1962).

[31] Stern v. Larocca, 49 N.J. Super. 496, 140 A. 2d 403, 409 (1958). See also MD. CODE (1957) Art. 101, § 58; 23 M.L.E. *Workmen's Compensation* § 342 *et seq.* (1961).

[32] Cozzi v. Owens Corning Fiber Glass Corp., 63 N.J. Super. 117, 164 A. 2d 69, 75 (1960).

[33] Potamkin and Plotka, *Indemnification Against Tort Liability*, 92 U. Pa. L. Rev. 347, 361 (1944). But see, Kansas City Power & Light Co. v. Federal Const. Corp., 351 S.W. 2d 741 (Mo. 1961), where holding for the indemnitor, the court reinforced its determination that the terms "in connection therewith" were intended to refer only to the contractor's acts by examining the scope of the liability insurance taken out by the contractor in contemplation of his possible contractual obligations under the indemnity agreement; Metropolitan Pav. Co. v. Gordon Herkenhoff & Assoc.,

Regardless of the underlying justification for shifting liability for the indemnitee's negligence to the indemnitor, the initial problem still remains: did the parties enter into the agreement aware of the owner's general liability and with the intent to relieve him thereof? As long as even some ambiguity is inherent in broadly drafted indemnity provisions, are not the courts placed in constant danger of rewriting contracts with a paucity of evidence as to the parties' intent?

The terms and effect of any insurance plan should, therefore, be made clear in the indemnity clause. To avoid misinterpretation under *any* rule of construction, the agreement should be drafted so as to convince the strictest court that the parties intended to protect the indemnitee (*e.g.*, "indemnitee's negligence" should be expressly included). And to prevent the courts from extending the indemnitor's liability, if the indemnitor does not accede to accepting responsibility for the negligence of the indemnitee, such negligence should be expressly excluded.[34]

SHEILA K. SACHS

---

66 N.M. 41, 341 P. 2d 460 (1959), where holding for the indemnitee the court did not discuss the effect of the performance bond but quoted provisions of the bond which included terms identical to those in the indemnity agreement between the contractor and the city; Fosson v. Ashland Oil & Refining Company, 309 S.W. 2d 176, 178 (Ky. 1957), where holding for the owned the court noted the fact that the contractor carried the broadest type of insurance but said, "Since we are not basing our decision on the type of insurance carried by the appellants, it is unnecessary to discuss their contention that their insurance contract with their carrier should not be considered as a part of the record."

Query whether the court in the principal case was influenced by the fact that insurance carriers' counsel was defending the indemnitor under a comprehensive liability policy.

[34] Lathrop, *Case Study: Drafting Indemnity Clauses —Experiences of the Southern Pacific Company in Non-Public Carrier Contracts*, 12 Hastings L.J. 158, 167-169 (1960):

"Since it is desirable to make it clear that the indemnity clause does include negligence on the part of the indemnitee, and use of the word 'negligence' in the clause may make it objectionable despite its probable insurability, we presently are using in some such cases the wording 'regardless of any act or omission on the part of Railroad employees.' * * * The most frequent modification we have encountered relates to negligence, and is required by the refusal of the indemnitor to assume any responsibility for the sole negligence of the indemnitee. In such a case, we have found the most acceptable phrasing to be to conclude the indemnitee clause with the words 'except when due to the sole negligence of' the indemnitee. The only reference to negligence being in the exclusion, the question may be raised whether the parties intended to include any negligence by the indemnitee, but it would seem clearly indicated that the parties were contemplating the effects of negligence and intentionally excluded only sole negligence, thus necessarily retaining coverage for joint negligence. We know of no judicial interpretation of this precise point, but feel it should be upheld. At any rate, it has been found acceptable from the standpoint of negotiations and attorneys on both sides have agreed in our interpretation."