ISSUE OF PASSIVE OR ACTIVE NEGLIGENCE HELD CONTROLLING IN SUIT FOR INDEMNITY BETWEEN CONCURRENT TORTFEASORS

The Ohio Fuel Gas Co. v. Pace Excavating Co.
187 N.E.2d 89 (Ohio Ct. App. 1963)

Plaintiff gas company's amended petition claimed that defendant building contractors negligently struck and permanently damaged a gas main while they were making an excavation for a home. Defendants allegedly later backfilled the trench and covered the damaged main without having it repaired or warning others of the dangerous condition. The gas main was so weakened that it ultimately failed and leaking gas percolated into the newly constructed house and caused an explosion. The occupants of the home were injured and filed actions against the gas company for damages. The company, upon investigation, concluded that it had been passively and secondarily negligent by failing to discover and correct the dangerous condition that had been created by the contractors. The gas company tendered the defense of the actions to the contractors, who refused to accept it. Subsequently the company settled the claims for four hundred thousand dollars. The gas company then sought indemnification for the settlement, legal fees, and expenses from the construction companies. The court of common pleas sustained defendant's demurrers to the amended petition, and the gas company appealed. The sole question before the court of appeals was whether the gas company's amended petition stated a cause of action. The court of appeals reversed and remanded the case for further proceedings, holding that since the gas company admitted only passive negligence in its petition a good cause of action was stated.[1]

A joint tort is an injury resulting from the concerted action of two or more persons.[2] In such a case of common purpose, each wrongdoer is liable for the entire damage inflicted, and all wrongdoers can be joined as defendants in the same action at law.[3] A concurrent tort results from the independent action of two or more persons producing a single injury.[4] Where one of two or more joint or concurrent tortfeasors has been compelled to pay damages for the joint or concurrent wrongful act, he cannot maintain an action against his co-tortfeasors for contribution or indemnity.[5] This rule that there can be no contribution between joint tortfeasors had its inception in the early English case of *Merryweather v. Nixan*,[6] an action for a willful tort. The

[1] Ohio Fuel Gas Co. v. Pace Excavating Co., 187 N.E.2d 89 (Ohio Ct. App. 1963).

[2] Knell v. Feltman, 174 F.2d 662 (D.C. Cir. 1949).

[3] Prosser, Torts 234 (2d ed. 1955).

[4] Knell v. Feltman, *supra* note 2.

[5] Maryland Cas. Co. v. Gough, 146 Ohio St. 305, 65 N.E.2d 858 (1946).

[6] 8 T.R. 186, 101 Eng. Rep. 1337 (K.B. 1799).

rule was subsequently applied in cases involving negligence,[7] and Ohio has adopted this rule of no contribution between negligent tortfeasors.[8] There is an obvious lack of justice in a rule which permits the entire burden of loss, for which two tortfeasors are responsible, to fall on one alone while the other goes free.[9] This rule is especially harsh in cases where a person is negligent under the law, but yet free from fault as that term is generally understood.[10] There is also an important distinction between contribution, which distributes the loss among the tortfeasors by requiring each to pay his proportionate share, and indemnity, which shifts the entire loss from one tortfeasor to another.[11]

The underlying notion of indemnification is that a primary liability should be imposed on one tortfeasor even though others are for various reasons also liable to the injured party.[12] The non-contractual obligation to indemnify another has been considered a quasi-contractual obligation, and is based on the theory that one person has been compelled to discharge an obligation which should more properly rest on another, and therefore the latter has been benefited unjustly by having his obligation discharged.[13] Although the ancient superficial argument that the courts will not allow one tortfeasor to recover in an action against another tortfeasor, because no one should be permitted to found a cause of action on his own wrong, would appear to apply equally to indemnity, the courts have allowed indemnity suits, but not contribution actions.[14]

A theory which has recently been accepted by many courts is that the

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[7] "The rule that there cannot be contribution between joint tortfeasors is firmly embedded in our law. So long as the rule exists, of necessity, an indemnitor of one joint tortfeasor cannot receive any sum paid to any injured third party from the other joint tortfeasor." Royal Indemnity Co. v. Becker, 122 Ohio St. 582, 173 N.E.2d 194 (1930).

[8] The original meaning of joint tort was vicarious liability for concerted action. But this rule was extended in Wery v. Seff, 136 Ohio St. 307, 25 N.E.2d 692 (1940), where the court held: "When the negligence of two or more persons concur to produce a single indivisible injury, such persons are jointly and severally liable, and the existence of common duty, common design or concerted action is not essential." This effectively eliminated any distinction between independent concurrent tortfeasors and joint tortfeasors.

[9] The entire burden can fall on one joint tortfeasor according to the accident of a successful levy of execution, plaintiff's whim or benevolence, or his collusion with the other wrongdoer. Prosser, *supra* note 3, at 298.

[10] For example, carriers who accept passengers entrusted to their care must use "the utmost caution characteristic of very careful prudent men" to protect them. Pennsylvania Co. v. Roy, 102 U.S. 451 (1880). See generally, Ehrenzweig, Negligence Without Fault (1951).

[11] McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952).

[12] Keeton, "Contribution and Indemnity Among Tortfeasors," 27 Ins. Counsel J. 630 (1960).

[13] Leflar, "Contribution and Indemnity Between Tortfeasors," 81 U. Pa. L. Rev. 130 (1932).

[14] Prosser, *supra* note 3, at 249.

tortfeasor who is only passively negligent is entitled to indemnification from the tortfeasor who is guilty of active negligence.[15] This theory seems to be an outgrowth of the principle that one who is vicariously liable is entitled to indemnification from the tortfeasor whose unlawful conduct caused the injury.[16] The distinction between active and passive negligence does not rest on a chronological sequence, or whether the act is one of commission or omission.[17] A person is passively negligent when he did not participate in commission of the tort, and his liability arises only by operation of law,[18] that is, one who has a duty to keep the instrumentality involved safe by reason of his relationship to it is guilty of passive negligence in not discovering and correcting the dangerous condition.[19]

While many courts have founded the right to indemnification on a passive-active negligence standard, some courts have attempted to solve every noncontractual indemnity case by the manipulation of the words active and passive to justify a predetermined result. The resulting tangle is reason enough for any court to avoid the use of the active-passive formula.[20] The principal objection to the passive-active negligence standard is that it is a test which often depends on the manner of expression of a factual situation.[21] For example, *X* might be considered actively negligent in digging a hole in the street, or only passively negligent by failing to barricade the hole. Again, *X* might be thought to be actively negligent if he drives his car at an excessive speed, but passively negligent when he fails to bring it to a timely stop.[22] In *Pace* one defendant argued most strenuously that the gas company was actively negligent in sending highly volatile gas through lines that it either did not inspect or negligently inspected. Conversely, plaintiff in *Pace* described its activity as passive negligence because it failed to discover and correct the dangerous condition that had been created by defendants.[23] The difficulty in making such a distinction illustrates that the active-passive negligence standard is too nebulous a ground on which to base a determination of liability.[24]

Some courts have rejected any rule which would attempt to grant or withhold indemnification based upon a determination that the negligence

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[15] Keeton, *supra* note 12, at 632.

[16] *Ibid.*

[17] Pelky v. State Sales Inc. 210 F. Supp. 924 (E.D. Mich. 1962).

[18] *Id.* at 925.

[19] Massachusetts Bonding Insurance Co. v. Doogle-Clark Co., 142 Ohio St. 346, 52 N.E.2d 340 (1943).

[20] Davis, "Indemnity Between Negligent Tortfeasors: A Proposed Rationale," 37 Iowa L. Rev. 517 (1951).

[21] Falk v. Crystal Hall, Inc., 200 Misc. 979, 105 N.Y.S.2d 66 (1951).

[22] Davis, *supra* note 20, at 541.

[23] Ohio Fuel Gas Co. v. Pace Excavating Co., *supra* note 1, at 93.

[24] In Cohen v. Noel, 165 Tenn. 600, 56 S.W.2d 744 (1933), the failure of a garage owner to properly light the entrance of his garage was held to be active negligence while the driving of an automobile into the garage without keeping a proper lookout was held to be passive negligence.

of the party seeking relief was active or passive.[25] The trial judge has a difficult task in formulating an intelligible instruction for the jury based on so slender a distinction. Alternative tests have been proposed to determine when indemnification will be allowed, for example: only when the indemnitor owes a duty of his own to the indemnitee,[26] where there is a "great difference" in the gravity of the fault of the two tortfeasors,[27] or when there is a disparity or difference in character of the duties owed by the two to the injured plaintiff.[28] Any rule which lessens the harsh doctrine of no contribution between joint and concurrent tortfeasors is welcome,[29] but the confusion could be lessened if courts attempted to solve indemnification cases by concentrating on the basis of the liability of each tortfeasor to the injured person rather than manipulating word formulae to determine whether liability exists.[30]

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25 Humble Oil & Refining Co. v. Martin, 148 Tex. 175, 222 S.W.2d 995 (1949)

26 *Id.* at 185, 222 S.W.2d at 1002.

27 Slattery v. Marra Bros., 186 F.2d 134 (2d Cir. 1951). See Prosser, *supra* note 3, at 251.

28 Davis, *supra* note 20, at 546.

29 Half a century of vigorous denunciation has had its effect in the passage of statutes in some twenty states, which to a greater or less extent permit contribution among tortfeasors. See Prosser, *supra* note 3, at 249.

30 Davis, *supra* note 20.