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Torts—Specific Intent to Indemnify Indemnitee for His Active Negligence Found Despite Equivocal Contract Language

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volving the traditional classifications of realty or personalty, its utility breaks down when it becomes necessary to consider a combined classification. If an individual owning his residential module rents a space in which to place it, should he be treated as a tenant because he is renting a space, or should he be considered a fee owner because he owns his "apartment"? Thus, the distinction between real and personal interests as regarding damages in the instant case becomes more and more difficult to apply. Rather than merely focusing on the legal differences and similarities, the courts should move away from relying on formalistic distinctions, and focus instead on the *practical* aspects of a given interest.

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TORTS—SPECIFIC INTENT TO INDEMNIFY INDEMNITEE FOR HIS ACTIVE NEGLIGENCE FOUND DESPITE EQUIVOCAL CONTRACT LANGUAGE

In November, 1964, a Shell service station exploded seriously injuring two employees. The explosion and ensuing fire were caused by a defective heater located inside the station. Both Shell Oil Company and Visconti, the tenant-operator of the station, were aware of the defect but took no remedial action. The employees brought suit against Shell who in turn impleaded Visconti on the basis of an indemnification clause contained in the service station lease. The indemnification clause stated that Visconti would indemnify Shell

> against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property . . . caused by or happening in connection with the premises . . . or the condition maintenance, possession or use thereof or the operations thereon.[1]

The trial court ruled for the plaintiffs in the principal action and for Shell as third-party plaintiff in the indemnification action.[2] The appellate division affirmed the verdict in favor of the employees but modified the judgment by dismissing Shell's third

1. Levine v. Shell Oil Co., 28 N.Y.2d 205, 210, 269 N.E.2d 799, 801, 321 N.Y.S.2d 81, 84 (1971) [hereinafter cited as instant case].
2. *Id.* at 206. 269 N.E.2d at 800, 321 N.Y.S.2d at 83.

party claim.[3] The New York Court of Appeals, while affirming the plaintiffs' judgment, reinstated the verdict in favor of Shell on the third party action.[4] *Held,* the indemnification clause between Shell and Visconti was sufficiently explicit to entitle Shell to indemnification despite its own active negligence. *Levine v. Shell Oil Co.,* 28 N.Y.2d 205, 269 N.E.2d 799, 321 N.Y.S.2d 81 (1971).

It is a general rule that a lessee may be validly bound by a contract providing indemnification for any future claims arising as a result of his own active negligence or due to the passive negligence of the lessor.[5] It is also well settled that a party who is actively negligent is not entitled to indemnification in the absence of an express agreement to that effect.[6] This agreement must clearly show that the intent of the contracting parties, as manifested by unequivocal language, is to grant indemnification despite the lessor's active negligence.[7] To ascertain the intentions of the parties involved, courts have often examined the surrounding circumstances and the relationship of the parties.[8] In doing so, indemnification has been allowed for the indemnitee's[9] active negligence where this clearly appeared to be the purpose and objective of the contracting individuals.[10]

In applying the above principles, New York courts in the past have required specific reference to the indemnitee's active

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3. Levine v. Shell Oil Co., 35 App. Div. 2d 575, 313 N.Y.S.2d 581 (2d Dep't 1970).

4. Instant case at 213, 269 N.E.2d at 803, 321 N.Y.S.2d at 87.

5. *See* Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299 (1943); 1 WARREN'S NEGLIGENCE, *Indemnity & Contribution* § 1.03 (R. Benoit ed. 1965).

6. Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); Fuller Co. v. Fischbach & Moore, Inc., 7 App. Div. 2d 33, 180 N.Y.S.2d 589 (1st Dep't 1958); Salamy v. N.Y. Cent. Sys., 1 App. Div. 2d 27, 146 N.Y.S.2d 814 (3d Dep't 1955); Ellis v. Fuller Co., 17 Misc. 2d 687, 182 N.Y.S.2d 594 (Sup. Ct. 1959).

7. Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966); Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936).

8. Thibault v. New York, 6 App. Div. 2d 904, 177 N.Y.S.2d 905 (2d Dep't 1958), *aff'd,* 6 N.Y.2d 759, 159 N.E.2d 204, 186 N.Y.S.2d 658 (1959); Jordon v. City of New York, 3 App. Div. 2d 507, 162 N.Y.S.2d 145 (1st Dep't 1957), *aff'd,* 5 N.Y.2d 723, 152 N.E.2d 667, 177 N.Y.S.2d 709 (1958).

9. The indemnitor is the party contracting to compensate the indemnitee should a specified event occur.

10. Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966); Thibault v. New York, 6 App. Div. 2d 904, 177 N.Y.S.2d 905 (2d Dep't 1958), *aff'd,* 6 N.Y.2d 759, 159 N.E.2d 204, 186 N.Y.S.2d 658 (1959); Jordon v. City of New York, 3 App. Div. 2d 507, 162 N.Y.S.2d 145 (1st Dep't 1957), *aff'd,* 5 N.Y.2d 723, 152 N.E.2d 667, 177 N.Y.S.2d 709 (1958).

negligence in order to hold the indemnitor liable.[11] Accordingly, they have refused to impose liability on a contractor for the active negligence of the owner when the indemnitor agreed to "save the owner harmless from *any* expense or liability resulting from injury to persons . . . ."[12] Similarly, the phrase "any and *all* claims" was held to be too general to encompass active negligence.[13]

In the leading case of *Thompson-Starrett Co. v. Otis Elevator Co.*,[14] the subcontractor agreed to indemnify the general contractor "*against all claims* for damages to persons growing out of the execution of the work."[15] Holding this language not sufficiently unequivocal, the Court of Appeals stated,

> to say that . . . the appellant, by such general language as was here used, assumed the obligation of indemnifying respondent for claims resulting from accidents . . . caused by the negligence of respondent . . . is to place upon appellant an unreasonable burden . . . .[16]

This case became the leading example supporting the proposition that "contracts will not be construed to indemnify a person against his own [active] negligence unless such intention is expressed in unequivocal terms."[17]

In recent years New York courts have to some extent relaxed this specific language requirement. The clear intent to indemnify the indemnitee for his own active negligence must, however, still be evident.[18] In the case of *Yonke v. Central Hudson Gas & Electric Corp.*,[19] for example, the contractor agreed to save the owner harmless

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11. Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957); Fuller Co. v. Fischbach & Moore, Inc., 7 App. Div. 2d 33, 180 N.Y.S.2d 589 (1st Dep't 1958).

12. Ellis v. Fuller Co., 17 Misc. 2d 687, 690, 182 N.Y.S.2d 594, 597 (Sup. Ct. 1959) (emphasis added).

13. Rego v. City of New York, 285 App. Div. 834, 835, 137 N.Y.S.2d 5, 6 (2d Dep't 1955) (emphasis added).

14. 271 N.Y. 36, 2 N.E.2d 35 (1936).

15. *Id.* at 39, 2 N.E.2d at 36 (emphasis added).

16. *Id.* at 43, 2 N.E.2d at 38.

17. *Id.* at 41, 2 N.E.2d at 37.

18. Jordon v. City of New York, 3 App. Div. 2d 507, 162 N.Y.S.2d 145 (1st Dep't 1957), *aff'd*, 5 N.Y.2d 723, 152 N.E.2d 667, 177 N.Y.S.2d 709 (1958); Salamy v. N.Y. Cent. Sys., 1 App. Div. 2d 27, 146 N.Y.S.2d 814 (3d Dep't 1955); Silia v. Peter Kiewit Sons' Co., 35 Misc. 2d 807, 231 N.Y.S.2d 126 (Sup. Ct. 1962).

19. 52 Misc. 2d 1039, 277 N.Y.S.2d 806 (Sup. Ct. 1966), *aff'd*, 27 App. Div. 2d 888, 278 N.Y.S.2d 592 (3d Dep't 1967).

> from claims for damages for personal injury including death to any employee or other person . . . which may arise . . . *in any manner* from the carrying out of this Contract . . . .[20]

Indemnification was granted despite the fact that the owner was actively negligent and no express provision including active negligence was contained in the indemnity clause. The court concluded that the phrase "in any manner" could reasonably be interpreted to show the intention of the parties to grant indemnification for active negligence on the part of the owner.[21] Similarly, in *Powell v. Senville 35th St. Realty Co.*,[22] the court held that the owner of a building under construction was entitled to indemnification, despite his active negligence. The indemnity clause therein stated that the carpentry contractor would assume responsibility for "any and all" damages or injuries "caused or occasioned *directly* or *indirectly* by the Contractor or its work."[23] Again, no specific mention was made in the contract of the indemnitee's active negligence, yet the indemnitor was held liable because the court reasoned that the clause was sufficiently explicit to indicate the intent of the parties to allow indemnification in such an event.

In holding Visconti liable under his lease, the Court of Appeals, in the instant case, was required to determine whether the trial court correctly applied the law of indemnification. The court acknowledged that an actively negligent tortfeasor is not entitled to indemnification unless there exists a contractual agreement manifesting such intent.[24] Although recognizing that traditionally such contracts have been strictly construed[25] and that courts have frequently searched for specific mention of active negligence within the indemnity clause, the court in the instant case maintained that such references were unnecessary.[26] The court further observed that

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20. *Id.* at 1040, 277 N.Y.S.2d at 808 (emphasis added).

21. *Id.* at 1041, 277 N.Y.S.2d at 808.

22. 29 Misc. 2d 77, 214 N.Y.S.2d 39 (New York City Ct. 1961).

23. *Id.* at 79, 214 N.Y.S.2d at 41 (emphasis added).

24. Instant case at 211, 269 N.E.2d at 801, 321 N.Y.S.2d at 85.

25. Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 27, 276 N.Y.S.2d 612, 615 (1966); Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 37, 2 N.E.2d 35, 37 (1936).

26. Instant case at 211, 269 N.E.2d at 802, 321 N.Y.S.2d at 85. Several examples were cited in which the intent of the parties was deemed to be sufficiently clear to justify the granting of indemnification despite the fact that no specific mention of the indemnitee's active negligence was made. Among the examples cited were Jordon v. City of New York, 5 N.Y.2d 723, 724, 152 N.E.2d 667, 177 N.Y.S.2d 709 (1958) (contractor agreed to "be solely responsible for all physical injuries to persons or damage to property . . . whether

the recent cases of *Kurek v. Port Chester Housing Authority*[27] and *Liff v. Consolidated Edison Co.* [28] had made substantial inroads upon the requirement of unequivocal contractual terms before the active negligence of the indemnitee could be indemnified. This, the court contended, was due to the liberal interpretations of such requirements given by the *Kurek* and *Liff* courts.[29] Indeed, it was implied that the *Kurek* and *Liff* cases, in which indemnification for active negligence was granted, contained the least explicit indemnity clauses yet found in New York.[30]

It was further recognized that the indemnification clause in the instant case was different from those in the *Kurek* and *Liff* cases, since the phrases "of whatsoever kind or nature" and "or otherwise" were present in the latter cases but not in the instant case. However, the court considered this only a "semantical distinction without a difference."[31]

The Court of Appeals was also concerned that contractual provisions should not be construed in such a manner as to render any clause a nullity. The court asserted that if the indemnity clause in the instant case were construed so as not to include liability for active negligence of the indemnitee, the clause would be meaningless.[32] Such, it was said, "could not have been the intent of the parties."[33]

In addition, the court in a dictum stated that the agreement was not a contract of adhesion[34] since Shell was not obligated to lease the service station to Visconti, and Visconti was not obligated to accept the lease if he disapproved of the terms.[35]

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such damages or injuries be attributable to negligence of the Contractor or his employees or otherwise"); Walters v. Rao Elec. Co., 289 N.Y. 57, 60, 43 N.E.2d 810, 811 (1942) (indemnity phrase read: "Should any person or persons or property be damaged or injured by the Subcontractor, or by any person, or persons employed under him, in the course of performance, by him of this agreement or otherwise, said Subcontractor shall alone be liable, responsible and answerable therefore, and does hereby agree . . . to hold harmless and indemnify the Contractor of and from all claims . . . .").

27. 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966).

28. 29 App. Div. 2d 665, 286 N.Y.S.2d 354 (2d Dep't), *aff'd*, 23 N.Y.2d 854, 245 N.E.2d 800, 298 N.Y.S.2d 66 (1969).

29. Instant case at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

30. *Id.*

31. *Id.*

32. *Id.* at 212-13, 269 N.E.2d at 803, 321 N.Y.S.2d at 86. It is not entirely clear from the court's opinion why the clause would be of no value if not held to include active negligence.

33. *Id.* at 213, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

34. *See* text accompanying *supra* notes 61, 62.

35. Instant case at 213, 269 N.E.2d at 803, 321 N.Y.S.2d at 86-87.

In analyzing the holding of the instant case it is necessary to examine the cases reviewed by the court. The *Thompson-Starrett* case was dismissed with the statement that "it is no longer a viable statement of the law."[36] As stated previously, that case stood for the proposition that an actively negligent indemnitee is not entitled to indemnification in the absence of a contract containing unequivocal terms manifesting such intent.[37] The court agreed with prior cases holding that unequivocal words are no longer required for indemnification to be awarded to an actively negligent indemnitee. Nevertheless, the fact remains that such must be *clearly* shown to have been the *intent* of the parties.[38] In light of this, it is difficult to understand why the court gave such little weight to *Marks v. New York City Transit Authority*.[39] Instead of comparing the contract in *Marks* to that in *Levine* with respect to intent, the court merely listed *Marks* as one of five cases supporting the proposition that courts have often searched for specific reference to active negligence.[40] In *Marks*, a painting contractor's employee was injured while on the job. It was found that the Authority was negligent in failing to provide a safe place to work. The indemnity agreement stated that the contractor would "be *solely* responsible for all injuries . . . and . . . [t]he liability of the Contractor under this paragraph is *absolute* . . . ."[41] There it was held that the Authority was not entitled to indemnification because the above quoted phrase fell "short of manifesting a clear and unequivocal intent to protect the Authority against the consequences of its own negligence."[42] Visconti asserted that the indemnification clause in *Marks* was clearly more explicit in demonstrating an unmistakable intent than the clause found in the instant case. Thus, since *Marks* held the clause inadequate and denied indemnification Visconti argued that it should also be

36. *Id.* at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

37. Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 41, 2 N.E.2d 35, 37 (1936). *See supra* notes 14-17 and accompanying text.

38. *See* cases cited in *supra* note 18, and text accompanying *supra* notes 19-23.

39. 17 Misc. 2d 583, 187 N.Y.S.2d 693 (Sup. Ct. 1959), *rev'd*, 11 App. Div. 2d 993, 205 N.Y.S.2d 642 (1st Dep't 1960), *aff'd*, 13 N.Y.2d 620, 191 N.E.2d 91, 240 N.Y.S.2d 606 (1963).

40. Instant case at 211, 269 N.E.2d at 802, 321 N.Y.S.2d at 85.

41. Court of Appeals brief for Third-Party Defendant-Respondent New York City Transit Authority at 4.

42. Marks v. New York City Transit Authority, 11 App. Div. 2d 993, 994, 205 N.Y.S.2d 642, 645 (1st Dep't 1960).

denied in the case at bar.[43] A comparison of the indemnity clauses lends support to Visconti's contention.

The court may have also inaccurately applied the *Kurek* and *Liff* cases. In *Kurek*, the indemnification clause stated that the indemnitor would indemnify the Authority for "all claims . . . of *whatsoever kind or nature* . . . ."[44] On the basis of this phrase, indemnification was granted. *Kurek* was cited in the instant case to support the proposition that inroads had been made on the *Thompson-Starrett* doctrine. The argument that less explicit language is sometimes held to be sufficient to require indemnification, however, misses the point. What is essential is that it must be evident that such was the *unmistakable intent* of the contracting parties. The phrase "of whatsoever kind or nature" gave an all-encompassing scope to the indemnity clause. Hence the court concluded that the phrase illustrated a clear intent to include active negligence on the part of the indemnitee as one of the elements to be covered by the indemnitee's agreement. It is apparent that although the *Kurek* case was used by the court to demonstrate a liberalization of the unequivocal language requirement, it really was not opposed to Visconti's position. The *Kurek* clause, with an all-inclusive phrase, manifested the intent of the parties to include the active negligence of the indemnitee under the indemnity agreement. Although the case at bar contained no such all-inclusive phrase, the Court of Appeals held that the intent of the parties to grant indemnification despite active negligence on the indemnitee's part was "unmistakable."[45]

The *Liff* case, a very recent Court of Appeals decision, was also relied upon in the instant case. The relevant clause in that case read:

> The Contractor shall indemnify . . . the Company from and against any and all liability . . . occasioned wholly or *in part* by . . . the Contractor . . . including any and all expense, legal *or otherwise* . . . .[46]

This clause was determined to be sufficient to justify an indemnity award. The *Liff* case can be distinguished from the instant case

43. Brief for Defendant-Respondent at 7, instant case.

44. Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 456, 223 N.E.2d 25, 28, 276 N.Y.S.2d 612, 615 (1966) (emphasis added).

45. Instant case at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

46. Court of Appeals brief for Third-Party Plaintiff-Respondent Consolidated Edison at 13.

by its use of the term "or otherwise." It may be argued that this phrase gave the indemnity clause in *Liff* an all-inclusive scope which is noticeably absent in the instant case. The "or otherwise" phrase in *Liff* would serve much the same purpose as the phrase "of whatsoever kind or nature" present in *Kurek*. Both may be seen as evidence of the intent of the contracting parties to grant indemnification under a wide variety of circumstances, including instances where the indemnitee is actively negligent.

The *Liff* case may be further distinguished from the case at bar in that the former contains the phrase "in part." It is reasonable to assume that one of the parties who is only partially at fault *could be* the indemnitee. The inclusion of the phrase "in part" may arguably have been designed to manifest the intent of the parties to grant indemnification to the indemnitee even when he was actively negligent.[47] Thus, while the language in the *Liff* case is not as *explicit* as other cases in which indemnification for active negligence was granted,[48] the phrase "in part" implies that such was the intent of the parties.[49] It is possible it was because of this underlying implication, which demonstrates the intent of the parties to grant indemnification despite active negligence, rather than the contention that the language was sufficiently unequivocal, that indemnification was granted in the *Liff* case. For this reason, the *Liff* case may be inapplicable to the case at bar.

Leaving aside for a moment the fact that both the *Kurek* and *Liff* cases may have been misconstrued, there remains to be considered the court's contention that the phrases "of whatsoever kind or nature" and "or otherwise" contained in *Kurek* and *Liff* were insignificant differences without real meaning.[50] Several cases which had indemnification clauses very similar to *Kurek* and *Liff* but without the above quoted phrases have been held not to adequately express the intent of the parties concerning indemnification for active negligence. In *Semanchuck v. Fifth Ave. & 37th St. Corp.*,[51] for example, the clause stated that the contractor would assume

47. Brief for Defendant-Respondent at 12, instant case.

48. Kurek v. Port Chester Housing Authority, 18 N.Y.2d 450, 223 N.E.2d 25, 276 N.Y.S.2d 612 (1966); Farrell v. General Tel. Co., 29 App. Div. 2d 51, 285 N.Y.S.2d 662 (3d Dep't 1967); Yonke v. Central Hudson Gas & Elec. Corp., 52 Misc. 2d 1039, 277 N.Y.S.2d 806 (Sup. Ct. 1966), *aff'd*, 27 App. Div. 2d 888, 278 N.Y.S.2d 592 (3d Dep't 1967).

49. Brief for Defendant-Respondent at 12-13, instant case.

50. Instant case at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

51. 290 N.Y. 412, 49 N.E.2d 507 (1943).

"the obligation to save the Owner harmless and indemnify him from...liability...by reason of any injury to any person...resulting from any action...under this contract."[52] With the exception of the phrase "of whatsoever kind or nature" present in *Kurek*, the two indemnity clauses were very similar. Yet in *Semanchuck* indemnification was denied. Furthermore, very similar indemnity clauses, absent the all-inclusive language "of whatsoever kind or nature" found in *Kurek*, were present in *Rego v. City of New York*[53] and *Batson-Cook Co. v. Industrial Steel Erectors.*[54] In both of these cases, indemnification was denied. The only apparent distinction between the *Kurek* and *Liff* cases and those cited above was the inclusion in the former of the all-inclusive key phrases. Yet in the case at bar these phrases were dismissed as "semantical distinction[s] without a difference."[55]

In interpreting the intent of the parties the courts must construe the contract so that it "should have not an arbitrary, that is, an unduly liberal or harshly strict, construction, but a fair construction that will accomplish its stated purpose."[56] As a result, if *any* ambiguity or doubt does exist as to the intent, such doubt must be resolved against the party drafting the contract[57]—Shell in the present case. In light of these considerations, it appears that the court in the instant case did not construe the indemnity clause in accordance with precedent. The phraseology of the *Levine* lease

52. *Id.* at 419, 49 N.E.2d at 509.

53. 285 App. Div. 834, 835, 137 N.Y.S.2d 5, 6 (2d Dep't 1955). In this case the contractor agreed to:

> be solely responsible for all physical injuries to persons or damage to property occurring on account of the work hereunder, and shall indemnify and save harmless the City from loss and from liability upon any and all claims on account of such injuries to person or damage to property.

54. 257 F.2d 410, 412 n.4 (5th Cir. 1958). The indemnity clause read:

> Subcontractor assumes entire responsibility and liability for losses, expenses, demands and claims in connection with or arising out of any injury, or alleged injury (including death) to any person . . . sustained in connection with or to have arisen out of . . . the work by the Subcontractor, his subcontractors, agents, servants and employees . . . and agrees to indemnify and hold harmless Contractor . . . from any and all such losses . . . .

55. Instant case at 212, 269 N.E.2d at 802, 321 N.Y.S.2d at 86.

56. Northern Pac. Ry. v. Thornton Bros. Co., 206 Minn. 193, 196, 288 N.W. 226, 227 (1939). Even the *Levine* court acknowledged that the unequivocal intent of the parties was controlling when it stated: "[W]e see no reason why more should be required to establish the unmistakable intent of the parties." Instant case at 212, 269 N.E.2d at 803, 321 N.Y.S.2d at 86.

57. Ratigan v. New York Cent. R.R. Co., 181 F. Supp. 228 (N.D.N.Y.), *aff'd*, 291 F.2d 548 (2d Cir.), *cert. denied*, 368 U.S. 891 (1960); Fugate v. Greenberg: Publisher, 16 Misc. 2d 942, 189 N.Y.S.2d 948 (Sup. Ct. 1959).

appears to be as vague as that found in many of the previous cases which were ruled to be too equivocal to include the active negligence of the indemnitee. The appellate division recognized this when it said that the *Levine* lease "lacks the all-embracing language upon which an unmistakable intention to indemnify under circumstances such as these can be spelled out."[58]

From the above it can be discerned that similar indemnity clauses may be subject to disparate constructions. This naturally results in a lack of predictability in the outcome of litigation in this field. Although the unequivocal language requirement set forth in *Thompson-Starrett* is no longer followed, it is still necessary that the intent of the parties be clearly established before indemnification for active negligence is granted. In *Kurek* and *Liff* it was held that the intent of the contracting parties was sufficiently clear to justify indemnification despite the fact that the indemnity clauses were less explicit than those previously held to be adequate. The instant case, with an even more equivocal indemnity clause, throws wide open the question of where to draw the line in finding specific intent. It is feared that this case may have destroyed the last vestige of predictability in the field of indemnification.[59]

The Court of Appeals in the instant case stated in a dictum that the lease in question was not a contract of adhesion. The court's argument was predicated on the belief that Visconti was not forced to accept a lease containing any provisions to which he objected.[60] The court further maintained that if Visconti decided to lease a service station from Shell, he should have bargained over any of the terms he deemed unfair. This was possible, the court reasoned, because there was here involved an "arm's length transaction."[61]

58. Levine v. Shell Oil Co., 35 App. Div. 2d 575, 576, 313 N.Y.S.2d 581, 584 (2d Dep't 1970).

59. Perhaps as an overreaction to this possibility a New York Supreme Court in a subsequent case involving a service station lessee and Gulf Oil Corp. failed to find the requisite clarity of intent in an indemnity clause that read

> 'Lessee agrees to . . . protect and indemnify Lessor from any and all losses . . . which may arise or grow out of any injury . . . caused by or in any manner connected with the use . . . of said premises . . . .

Redding v. Gulf Oil Corp., — Misc. 2d —, 324 N.Y.S.2d 490, 491 (Sup. Ct. 1971). It is interesting to note that the court in the *Redding* case, while quite strictly construing the indemnity clause, maintained that it was guided by the principles set forth in the instant case. Yet, in the instant case a liberal interpretation of the indemnity clause, based on the same principles, was made.

60. Instant case at 213, 269 N.E.2d at 803, 321 N.Y.S.2d at 87.

61. *Id.*

A contract of adhesion as generally recognized, has several distinctive features. It consists of a standardized form signed by parties of unequal bargaining power. The party enjoying the advantageous position uses the standard form to limit his future liability.[62] It was said of indemnity agreements between major oil companies and their service station operators in a recent case, that "[t]hese agreements are standard forms used by the defendant [Mobil Oil Co.] and common to the industry."[63]

Another element in the definition of a contract of adhesion is that it adversely affects the public good, one aspect of which is public safety.[64] It has been recognized that

> A gasoline service station necessarily involves the storage and sale to the public of gasoline and oil, which are so highly inflammable and explosive that they increase the danger of fire and are, therefore, related to public safety.[65]

Certainly it would be in the public interest to see that such dangerous products are handled in the manner most likely to to insure safety. The indemnity clause in a gas station lease may produce the opposite result, as illustrated in the instant case. Shell was aware that the gas heater was defective and that it had been so for some time. However, Shell took no steps to repair it. This eventually led to the serious injury of the plaintiffs.

Indemnity clauses, such as the one in the instant case, permit the major oil companies to disclaim responsibility once the standard form lease is signed. Thus, even when such companies are

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62. *See* Tunkl v. Regents of the Univ. of Calif., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964). In such a contract the parties usually have greatly disparate bargaining powers and this inequality of economic status tends to make one party vulnerable to an unfavorable bargain. *See* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948). Obviously there would be a huge disparity of bargaining powers between Shell Oil Co. and any individual seeking to lease a single service station. This alone would serve to restrict Visconti's bargaining power and place him at a disadvantage.

63. Division of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc. 2d 720, 722, 304 N.Y.S.2d 191, 194 (Sup. Ct. 1969). *See also* Redding v. Gulf Oil Corp., — Misc. 2d —, 324 N.Y.S.2d 490 (Sup. Ct. 1971). There it was said the service station lease was "a printed form employed by the lessor [Gulf] in many similar transactions." *Id.* at —, 324 N.Y.S.2d at 491. It was also stated that "[t]he insertions are few and typewritten." It is significant that the conditions of the lease were not among the insertions open for negotiation.

64. *See* Tunkl v. Regents of the Univ. of Calif., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

65. People v. Faxlanger, 1 App. Div. 2d 92, 94, 147 N.Y.S.2d 595, 598 (4th Dep't 1955), *aff'd*, 1 N.Y.2d 393, 135 N.E.2d 705, 153 N.Y.S.2d 193 (1956).

aware of situations inimical to the public well-being and have the financial resources to remedy them, they are not bound to take any affirmative action. Thus, the major oil companies may freely reap all the financial benefits to be gained by the sale of their dangerous products, while individual tenant-operators, who can least afford it, must shoulder full financial responsibility for any accidents that occur. In view of these considerations it appears that the Court of Appeals acted less than prudently in dismissing so lightly the possibility of a contract of adhesion.

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