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Torts—Active Negligence by Cross-Complainant Bars Indemnity Against Co-Defendant

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show, the surgeon's liability has not been imposed on him vicariously. He is liable by reason of his own negligence. Therefore, the case is not a deviation or extension of the *Bing* case. It merely holds that where the surgeon in charge of the operation, as well as the hospital and the anesthetist, is negligent, all three are liable as joint tortfeasors.

W. L.

ACTIVE NEGLIGENCE BY CROSS-COMPLAINANT BARS INDEMNITY AGAINST CO-DEFENDANT

In *Bush Terminal Buildings Co. v. Luckenbach S.S. Co.*,[35] plaintiff sued three corporations, Luckenbach, Atlantic and Muehlstein for alleged negligent injury to property caused by a fire and explosion upon a Brooklyn pier. The defendant Atlantic had been hired by the pier operator Luckenbach to repair cargo-handling equipment, and in the course of the repairs, Atlantic used oxyacetyline torches. The fire and explosion resulted when sparks from the torches ignited foam rubber scraps on the pier, and these in turn touched off a shipment of explosives that were nearby. The scrap rubber had been delivered by Muehlstein about a month previously and it is alleged that it was so poorly packed that it had spilled onto the dock.

Defendant Luckenbach, seeking indemnity, filed a cross-complaint against defendant Muehlstein. Muehlstein seeks to reverse an order of the Appellate Division,[36] which modified an order of the Special Term dismissing Luckenbach's cross complaint.[37] The Appellate Division certified the following question: "Is the cross-complaint against the defendant Muehlstein . . . [by Luckenbach], sufficient in law?" The answer to that question involves a determination of whether Luckenbach may seek indemnity. Luckenbach alleged the primary active negligence of Muehlstein and claims that if it is held liable it will be due to Muehlstein's active fault.

It has been held in New York that the culpability of the person seeking indemnity determines whether recovery will be allowed against a joint tortfeasor and that a right to implied indemnity does not exist if a defendant's conduct was active.[38] Moreover, acts of omission constitute active negligence as well as acts of commission,[39] and where the defendant is alleged, as here, to have participated in the wrong which caused the damage, there is no right of recovery over.[40] Where there is a charge of notice, failure to perform the duty to inspect may not be deemed mere passive negligence. But where a complaint

35. 9 N.Y.2d 426, 214 N.Y.S.2d 428 (1961).
36. 11 A.D.2d 220, 202 N.Y.S.2d 172 (1st Dep't 1960).
37. 22 Misc. 2d 791, 196 N.Y.S.2d 515 (Sup. Ct. 1959).
38. Berg v. Town of Huntington, 7 N.Y.2d 871, 196 N.Y.S.2d 1001 (1959); Bernardo v. Fordham Hoisting Equip. Co., 6 N.Y.2d 733, 185 N.Y.S.2d 817 (1959); Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 186 N.Y.S.2d 15 (1959).
39. Putvin v. Buffalo Elec. Co., supra note 38.
40. Oceanic Steam Nav. Co., Ltd. v. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892).

alleges several separate and distinct theories of negligence, a claim over may be allowed if the recovery sought is based on passive negligence.[41]

After examining the plaintiff's allegations referring to Luckenbach's knowledge of Atlantic's torch operations and the storage of poorly packed inflammable and explosive materials on the pier, the Court concluded that the gravamen of the plaintiff's charges was that Luckenbach negligently maintained its pier so as to constitute a fire hazard. The complaint did not contain allegations of passive negligence against Luckenbach which would make Luckenbach liable for Muehlstein's active negligence. Since actual fault was the predicate for liability against Luckenbach, the Court concluded that it could not claim over against Muehlstein. The Court, in making its decision, stressed quite heavily the fact that Luckenbach knew as well as anyone the nature of the materials it had carelessly stored on its pier and that the maintenance problems were within the ambit of its responsibility. The Court reasoned in this context that decisions in regard to the continued acceptance and storage of such cargo after notice could hardly be deemed passive.

Bd.

RISKY CONDUCT BY EXPERIENCED WORKER AS CONTRIBUTORY NEGLIGENCE

Plaintiff, in a personal injury action, was awarded more than $98,000 for injuries received on the job as a structural steel worker.[42] The Appellate Division modified the judgment by reducing the damages to $70,000.[43] The Court of Appeals, in *McAllister v. New York City Housing Authority*, reversed and dismissed the complaint.[44] In this case, the plaintiff, who had more than 33 years experience in his field, attempted to crawl through a window frame opening that was only temporarily set in place. The opening proved too narrow and as a result of plaintiff's attempts to squeeze through, the frame fell on him causing the injuries complained of.

The Court found that the plaintiff had various alternatives presented to him whereby he might have entered the area safely. In addition, he knew that the frame was only temporarily set in position. These facts, taken together with plaintiff's unquestioned experience, led the Court to conclude that he was contributorily negligent as a matter of law. The decision merely reaffirms settled doctrine in New York law that conduct involving an undue risk of harm to the actor himself will normally prevent recovery.

Bd.

SUBCONTRACTOR FULFILLING ALL CONTRACTUAL DUTIES NOT LIABLE FOR NEGLIGENT INJURY OF PEDESTRIAN

The plaintiff was injured in a fall on a New York City sidewalk that had been temporarily repaired following an excavation job. Although the Court of

41. Putvin v. Buffalo Elec. Co., supra note 38.
42. McAllister v. New York City Housing Authority, 24 Misc. 2d 230, 197 N.Y.S.2d 337 (Sup. Ct. 1959).
43. 12 A.D.2d 626, 210 N.Y.S.2d 766 (3d Dep't 1960).
44. 9 N.Y.2d 568, 216 N.Y.S.2d 77 (1961).