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Torts—Automobile-Owner Indemnification

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TORTS

Automobile-Owner Indemnification

Section 59 of the Vehicle and Traffic Law provides for liability of the owner whose vehicle was used with his permission by another person. In *Traub v. Dinzler*,[1] involving this section, the Court of Appeals, reversing the Appellate Division,[2] held that when liability is purely statutory and predicated on ownership of a motor vehicle within the purview of section 59, the owner is entitled to recover over against his actively negligent bailee and the latter's employee-driver.

This section, which imputes the negligence of the driver to the owner, was enacted to remove the hardship of the common law rule by preventing the owner from escaping liability by saying that the car was not used in his business.[3]

However, the statute may not be invoked to impute the driver's negligence to the owner in actions other than those brought by a third party against the owner;[4] thus a negligent bailee cannot escape liability to the owner for any damage done to the latter's car.[5] In a recent case it was held that section 59 did not bar the bailor of a negligent bailee from asserting a cause of action for common law indemnification against the owner and operator of the other automobile involved in the collision.[6]

Prior to the decision in the instant case, a lower court case held that in an action for wrongful death suffered when a truck struck the intestate, the third-party complaint could be maintained by the owner of the truck against the company by which the truck was hired at the time of the accident, since vicarious liability imposed on an owner by statute leaves him with a claim against the active wrongdoer's employee.[7]

The refusal of the Court in the instant case to impute the driver's negligence to the owner, where indemnity is sought by the latter, is consistent with the intent of the Legislature in enacting section 59. In this case the Court of Appeals

1. *Traub v. Dinzler*, 309 N. Y. 395, 131 N.E. 2d 564 (1955).
2. *Traub v. Dinzler*, 284 App. Div. 969, 134 N. Y. S. 2d 620 (2d Dep't 1954).
3. *Palumbo v. Ryan*, 213 App. Div. 517, 210 N. Y. Supp. 225 (2d Dep't 1925).
4. *Mills v. Gabriel*, 259 App. Div. 60, 18 N. Y. S. 2d 78 (2d Dep't 1940), *aff'd* 284 N. Y. 75, 31 N.E. 2d 512 (1940).
5. *Kurzon v. Union Ry. Co. of New York City*, 172 Misc. 37, 14 N. Y. S. 2d 530 (City Ct. 1939).
6. *Petro v. Eisenberg*, 207 Misc. 380, 138 N. Y. S. 2d 705 (Sup. Ct. 1955).
7. *Roscher v. Cecere*, ——Misc.——, 132 N. Y. S. 2d 840 (Sup. Ct. 1954); See also *Elliott v. Flushing Sand & Stone Co., Inc.*, 273 App. Div. 782, 75 N. Y. S. 2d 333 (2d Dep't 1947).

did not pass upon a brand-new point of law, but rather re-affirmed previous cases so holding.[8]

Statutory Duty of Subcontractor

In an action by an employee of a general contractor against an excavating subcontractor, the latter impleaded the general contractor. The Court of Appeals, affirming the Appellate Division's dismissal of the third party complaint, *held* that the violation of the excavating contractor of statutory duty to provide shoring and bracing[9] rendered him an active joint tort-feasor, and as such not entitled to indemnification.[10]

At common law, even in the absence of express agreement to indemnify, a party guilty of passive negligence could implead a party actively negligent and recover from him the full amount of the judgment paid to the injured plaintiff.[11] Since the excavating contractor was no longer on the premises and the general contractor was in exclusive possession and control, the subcontractor claimed that he was at best only passively negligent, and thus entitled to indemnification.

In the *Semanchuk* case [12], which re-affirmed the holding of the *Walters* case,[13] the Court abolished the distinction between active and passive negligence for purposes of indemnity in cases involving violation of section 241 of the Labor Law. The Court in both cases held that the section imposed a positive command upon owners and contractors, violation of which rendered *both* active joint tort-feasors not entitled to indemnity. In the *Schwartz* case[14] the Court refused to extend the rule enunciated in the above cases to fields not expressly covered by section 241 of the Labor Law.

Regardless of whether or not a case involved violation of section 241 of

8. See Note 7 *supra*; *Gorham v. Arons*, 282 App. Div. 147, 121 N. Y. S. 2d 669 (1st Dep't 1953), *aff'd mem.* 306 N. Y. 782, 118 N.E. 2d 600 (1954).

9. N. Y. LABOR LAW §241 (6) The board of standards and appeals may make rules to provide for the protection of workmen in connection with the excavation work for the construction of buildings. . . . . 3 N. Y. OFFICIAL COMPILATION OF CODES, RULES AND REGULATIONS DEPT. OF LABOR §23-4.4. The sides of every trench excavation five feet or more in depth where . . . there may be procured an unsafe condition, shall be securely held by timber bracing. . . .

10. *Rufo v. Orlando*, 309 N. Y. 345, 130 N.E. 2d 887 (1955).

11. *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855 (2d Dep't 1905), *aff'd without opinion* 185 N. Y. 580, 78 N.E. 1110 (1906).

12. *Semanchuk v. Fifth Ave. & 37th St. Corp.*, 290 N. Y. 412, 49 N.E. 2d 507 (1943).

13. *Walters v. Rao Elec. Equip. Co.*, 289 N. Y. 57, 43 N.E. 2d 810 (1943).

14. *Schwartz v. Merola Bros. Construction Corp.*, 290 N. Y. 145, 48 N.E. 2d 299 (1943). The situation here involved some terrazzo bags piled on the sidewalk, a situation not expressly covered by section 241 of the Labor Law.