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Torts—Tortfeasors in Pari Delicto—No Indemnification

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opinion that any connection was merely speculative seems, on the basis of the record presented, to be more accurate.

This Court goes further in this case than in any previous similar one in upholding the presence of a sufficient causal connection.[80] As a result, future claimants will probably find it easier to prove causal connection and, thus, may recover greater amounts of damages.

Tortfeasors In Pari Delicto—No Indemnification

The problem of indemnification between joint tortfeasors was recently considered in the case of *Harrington v. 615 West Corp.*[81] In this case a tenant recovered a judgment against her landlord and a painting contractor engaged by said landlord, when she tripped over a rope laid by the contractor while on her way to a clothesline maintained for the convenience of the tenants. The Court of Appeals, affirming trial term, dismissed the landlord's cross complaint against the contractor for indemnification, after it had been reinstated by the Appellate Division.[82]

The crucial problem involved in the present appeal concerns the right of indemnification as between the co-defendants. Clearly the weight of authority in this jurisdiction recognizes the right of recovery of a passive wrongdoer over against a primary, active wrongdoer whose misconduct created the dangerous condition.[83] It then becomes necessary, once the joint delinquency of the defendants has been established, that the dealings between the parties be observed so as to ascertain whether their negligence is active or passive.[84] This Court in approaching the problem held that the negligence of both defendants lies solely in their failure to take proper precautions as to the danger created by the rope, with the knowledge of each that the rope was there and that tenants were accustomed to pass that way. Consequently the negligence of each co-defendant was active; thus barring any application of the rule of indemnification as between active and passive wrongdoes.[85]

The dissent, relying on the opinion of the Appellate Division, contended that the act of the painting contractor in placing the rope without the proper

80. *Ibid.;* Brooks v. Rochester Railroad Co., 156 N.Y. 244, 50 N.E. 945 (1898); Wilker v. State, 284 App. Div. 996, 135 N.Y.S.2d 342 (3rd Dep't 1954); Avesato v. Paul Tishman Co., 142 N.Y.S.2d 760(Sup. Ct. 1955).

81. Harrington v. 615 West Corp., 2 N.Y.2d 476, 161 N.Y.S.2d 106 (1957).

82. 1 A.D.2d 435, 151 N.Y.S.2d 564 (1st Dep't 1956).

83. Hyman v. Barrett, 224 N.Y. 436, 121 N.E. 271 (1918); Tipaldi v. Riverside Mem. Chapel, 298 N.Y. 682, 82 N.E.2d 585 (1948).

84. McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 464 (1952).

85. Oceanic Steam Nav. Co. v. Compagnia, 134 N.Y. 461, 31 N.E. 987 (1892).

precautions constituted active and primary negligence, while at best the landlord could only be charged with passive negligence for failing to correct a dangerous condition.[86] In answer to this the majority emphasized that the contractor was not liable for the mere placing of the rope, but for his failure to take proper safety precautions. It therefore follows that when the landlord knew of the dangerous condition and failed to take the proper safeguards he also became guilty of active negligence.

The conclusion reached by this court indicates that the existence of notice, either actual or constructive, to the landlord of the dangerous condition changes his position from a passive to an active tortfeasor. Thus, being placed in pari delicto with the other active wrongdoer, no right of indemnification arises as between them.[87]

Right Of Indemnification.

Burke v. City of New York[88] involved a city's right to indemnity against a co-defendant street railway. Plaintiff had been injured due to defective trolley car tracks. The railroad had contracted with the city to keep these tracks in good repair, although they were not presently being used. In consideration for this covenant, the city did not demand the track's removal when the defendant company changed from trolley to bus transportation. The company also covenanted that its liablity in relation to the presence of said tracks would be the same as before the cessation of trolley operations.

The majority uses a two-fold argument to hold for the city. First, they feel the city had a right to rely on the railway's contract to keep the streets in good repair.[89] Although a municipality has a non-delegable duty to keep its streets in a safe condition, when one contracts with a municipality to maintain part of the street, in consideration for a self-benefiting use of said streets, he in effect contracts to perform that duty to the public in place of the municipality.[90]

Secondly, the Court feels that under the clause in the contract, that the company's liability would be the same as before the cessation of trolley operations, the city has a right of indemnification. This liability emanates from section 178

86. Dollard v. Roberts, 130 N.Y. 269, 29 N.E. 104 (1890).
87. Wischnie v. Dorsch, 296 N.Y. 257, 72 N.E.2d 700 (1947).
88. 2 N.Y.2d 90, 157 N.Y.S.2d 1 (1956).
89. City of Rochester v. Campbell, 123 N.Y. 405, 25 N.E. 937 (1890).
90. City of Brooklyn v. Brooklyn City Railway, 47 N.Y. 475 (1872).