

Spring 1963

Procedure--Third Party Practice--Non-Contractual Indemnification

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Recommended Citation

Marvin E. Wright, *Procedure--Third Party Practice--Non-Contractual Indemnification*, 28 Mo. L. REV. (1963)
Available at: <http://scholarship.law.missouri.edu/mlr/vol28/iss2/8>

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but is supplemental and appears to be a more adequate device. Its use is permissive, and the failure to use the device will not affect any substantive rights.⁹

The purpose of the rule has been said to be "to accomplish ultimate justice for all concerned with economy of litigation and without prejudice to the rights of another."¹⁰ It will allow the defendant to defend the action and at the same time assert his right of indemnification against the party ultimately responsible for the damages. This will lead to a saving of time and money.

This article is primarily concerned with the use of impleader in the case of non-contractual indemnification. The normal rule does not allow impleading joint tort-feasors, as there is ordinarily no right to contribution.¹¹ This is subject, however, to the refinement that indemnification can be obtained when the joint tort-feasors are not in *pari delicto*.¹² Since indemnity shifts the entire loss from the tort-feasor who has been compelled to pay it to the shoulder of another who should bear it instead,¹³ third party practice is allowed. The material following will point out some of the instances where indemnification has been allowed. In most cases the third party practice was not used, although its use would have been beneficial.

II. GENERAL PRINCIPLES OF RECOVERY IN NON-CONTRACTUAL INDEMNIFICATION

It is difficult to state any general rule or principle as to when indemnification will be allowed in non-contractual situations.¹⁴ The basic principle is that the right of indemnity does not exist where the parties are in *pari delicto*.¹⁵ To circumvent that rule, a number of theories have been advanced and applied, all of which seem to be attempts to apply equitable principles and none of which satisfactorily explain all cases.¹⁶ These theories include the use of distinctions as to primary and secondary liability, constructive liability, derivative liability, respective duties owed by the tort-feasors, and active and passive negligence. Recovery has been allowed by applying the theory of implied contract, quasi-contract, or implied warranty, once an application of one of the above principles has shown that indemnification is proper.¹⁷ The reason for allowing such recovery has been expressed as follows:

9. 3 MOORE, *op. cit. supra* note 7, ¶ 14.06.

10. Hipp v. Kansas City Pub. Serv. Co., 241 Mo. App. 169, 172, 237 S.W.2d 928, 930 (1951).

11. § 537.060, RSMo 1959. Impleading of a joint tort-feasor who was in *pari delicto* would in essence be allowing contribution. It thus is mandatory to show a right of indemnification, not contribution, before impleading is proper.

12. Simply an inverse statement of the general rule.

13. PROSSER, TORTS § 46 (2d ed. 1955).

14. *Ibid.*

15. C.J.S., *Indemnity* §§ 21, 27 at 596, 605 (1944).

16. Crouch v. Tourtelot, 350 S.W.2d 799, 807 (Mo. 1961) (en banc); McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788, 793 (Mo. 1959).

17. Hunter v. DeLuxe Drive-In Theaters, Inc., 257 S.W.2d 255, 260 (K.C. Ct. App. 1953); City of Springfield v. Clement, *supra* note 8, at 126, 225 S.W. 125.

The right to indemnity in such cases stands upon the principle that everyone is responsible for the consequences of his negligence; and if another person has been compelled to pay damages which ought to have been paid by the wrongdoer, they may recover from him.¹⁸

The basis for indemnification does not rest upon a difference in the degrees of the negligence of the parties, but upon the character of the negligence.¹⁹ It is also apparent from the cases that the last clear chance doctrine is not grounds for allowing recovery in this area.²⁰

The principle most frequently used to determine a difference in the character of the negligence, and thus the appropriateness of allowing indemnity, is that of primary and secondary liability. Where a party is found to be secondarily liable, courts will allow recovery over from the one who is primarily liable. The Missouri courts have relied heavily upon this theory, and have expressed it as follows:

Without multiplying instances, it is clear that the right of a person vicariously or secondarily liable for a tort to recover from one primarily liable has been universally recognized. But the important point to be noted in all the cases is that secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relations between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of one primarily responsible. In the case of concurrent or joint tort-feasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among authorities everywhere that no right of indemnification exists on behalf of either against the other; in such a case, there is a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other.²¹

Generally speaking, secondary liability arises in three situations: (1) liability imposed because of legal relations with the one primarily liable; (2) some positive rule of common or statutory law; or (3) a failure to discover or correct a dangerous condition. If the liability arose for a reason other than these three, indemnification would not be granted.

The theories of constructive and derivative liability are used interchangeably with primary and secondary liability. If one's liability is said to be constructive or derivative, it is the same as secondary.

A theory based upon the respective duties of joint tort-feasors has been adopted by the courts of Texas.²² The Missouri Supreme Court discussed it in

18. *City of Springfield v. Clement*, *supra* note 8, at 127, 225 S.W. at 125.

19. *Crouch v. Tourtelot*, *supra* note 16, at 805.

20. *Johnson v. California Spray Chem. Co. v. Byers Tran. Co., Inc.*, 362 S.W.2d 630, 635 (Mo. 1962).

21. *State ex rel. Siegel v. McLaughlin*, 315 S.W.2d 499, 507 (St. L. Ct. App. 1958).

22. *Humble Oil Co. v. Martin*, 148 Tex. 175, 222 S.W.2d 995 (1949); *Wheeler v. Glazer*, 137 Tex. 341, 153 S.W.2d 449 (1941).

State ex rel. Siegel v. McLaughlin,²³ but did not rest its decision upon that basis. Applicability of indemnity under this test is found by comparing the respective duties that the tort-feasors owe to each other. If the tort-feasor seeking indemnity can show that he has not breached a duty owed to the other tort-feasor, and that the other has breached a duty owed to him, indemnity will be granted. However, the principle can lead to confusion when one seeks to determine what duties were owed and what duties have been breached.²⁴

The theory of active and passive negligence is the test utilized by some jurisdictions. It was not actually used in Missouri until recently,²⁵ although Missouri courts had from time to time mentioned that certain types of negligence were either active or passive. The basis of the rule is that a tort-feasor who was passively negligent may recover over from one who was actively negligent. Unfortunately, however, the distinction between active and passive negligence has never been made entirely clear.²⁶ Active negligence has been described as the negligence of that party who is responsible for a dangerous condition.²⁷ On the other hand, it has also been said that mere motion does not characterize the distinction.²⁸ Thus, in describing the distinction, it has been stated:

Passive negligence exists where one person negligently brings about a condition or an occasion, and is a failure to do something that should have been done, and active negligence exists where another party negligently acts on that condition and perpetrates the wrong.²⁹

A literal interpretation of the two definitions given above will reveal a definite conflict. Accordingly, the results of a case would vary depending upon which description or definition was being used. Missouri decisions utilize active negligence as being that negligence which brought about the dangerous condition, with passive negligence being that of the party acting on the dangerous condition. Under certain fact situations, however, it is extremely difficult to state that one is actively negligent and the other passively, as is evident from a Tennessee decision concerning an automobile accident.³⁰ There, it was a matter of individual classification and disagreement upon what was to be considered active negligence.

23. *Supra* note 21, at 503, 504.

24. *Humble Oil Co. v. Martin*, *supra* note 22.

25. *Kansas City Southern Ry. Co. v. Payway Feed Mills, Inc.*, 338 S.W.2d 1 (K.C. Ct. App. 1960).

26. *Lane v. Celanese Corp. of America*, 94 F. Supp. 528, 530 (N.D.N.Y. 1950): Until the terms are authoritatively defined this court will assume that passive negligence exists under circumstances where a legal liability arises through the fault of an actual wrongdoer whose misconduct has brought about such liability.

27. *Supra* note 25.

28. *Ibid.*

29. *Southwestern Greyhound Lines, Inc. v. Crown Coach Co.*, 178 F.2d 628, 632 (8th Cir. 1949) (bus line leasing another bus company's terminal liable to a passenger who fell over luggage because of poor lighting conditions; first bus line able to recover contribution from the other under Texas statute because both were passively negligent).

30. *Davis v. Broad Street Garage*, 191 Tenn. 320, 232 S.W.2d 355 (1950). See dissent at 326, 232 S.W.2d 358.

III. CASES WHERE DEFENDANT IS ENTITLED TO INDEMNIFICATION

A. *Failure to Discover or Remedy a Dangerous Condition*

1. Municipalities

Municipalities are frequently held liable for injuries which occur upon their streets and sidewalks because of dangerous or defective conditions. This liability is often imposed, even when the municipality does not create the condition, because of the municipality's general duty to keep the sidewalks and streets safe. The right to recover over from the person who created the dangerous condition is confined to cases where the city is not considered to be in *pari delicto* with the wrongdoer. It must be a situation where the city's liability does not arise in whole or part from its own independent negligence.³¹ The city's negligence must be limited to failure to discover or remedy the consequences of the primary negligence of the wrongdoer. Thus, indemnity can be obtained when an abutting property owner or third person has negligently maintained a sidewalk grating,³² or has allowed a building water spout to expel water onto the sidewalk, so as to cause injury when it froze.³³ However, no recovery over is allowed where natural causes bring about the defect.³⁴

When a contractor has made an excavation in the streets and has failed to barricade, the city can recover over any damages it is compelled to pay because of the unguarded excavation.³⁵ However, if substantial barricades are knocked down at night and the city has knowledge of this fact, the city's own negligence in not taking action would appear to preclude recovery.³⁶ When the dangerous condition of the street is a necessary result of work the city had specifically contracted with the contractor to do, recovery is denied.³⁷ On the other hand, it has been stated that it is not a bar to recovery that the city has habitually permitted similar defects to exist,³⁸ nor that it failed to repair at the expense of the owner, as required by ordinance.³⁹

31. City of Springfield v. Clement, *supra* note 8.

32. Kilroy v. City of St. Louis, 242 Mo. 79, 145 S.W. 769 (1912); City of Memphis v. Miller, 78 Mo. App. 67 (St. L. Ct. App. 1899) (cellar door at sidewalk level defective); City of Independence v. Mo. Pac. Ry. Co., 86 Mo. App. 585 (K.C. Ct. App. 1901) (railroad negligently maintained sidewalk over right of way granted by city).

33. *Supra* note 31.

34. City of St. Louis v. Connecticut Mut. Life Ins. Co., 107 Mo. 92, 17 S.W. 637 (1891) (city ordinance required owner to keep sidewalk free from ice and snow). *Accord*, City of Seattle v. Sharrock, 100 Wash. 234, 170 Pac. 590 (1918).

35. City of Columbia v. Malo, *supra* note 8; Kinloch Tel. Co. v. City of St. Louis, 268 Mo. 485, 188 S.W. 182 (1916) (telephone company liable for injury to pedestrian who fell in depression around telephone pole).

36. Central Sur. & Ins. Corp. v. Hinton, 233 Mo. App. 1218, 130 S.W.2d 235 (1939) (indemnity allowed when surety reimbursed city in good faith, even though under a mistake of law).

37. City of Gary v. Bontrager Const. Co., 113 Ind. App. 151, 47 N.E.2d 182 (1943).

38. City of Corsicana v. Tobin, 23 Tex. Civ. App. 492, 57 S.W. 319 (Ct. App. 1900).

39. Ashley Borough v. Lehigh & Wilkes-Barre Coal Co., 232 Pa. 425, 81 Atl. 442 (1911).

In general, a city is allowed to recover over from a third person who negligently or unlawfully creates an obstruction, defect, or excavation in a street or sidewalk, when the city's negligence consists merely of failing to discover or remedy the dangerous condition which was created.

2. Owners and Possessors of Property

Owners and possessors of property are often held liable for injuries that result from an unsafe condition on their property.⁴⁰ The owner can obtain indemnification if it can be shown that a third person's negligence brought about the unsafe condition.⁴¹ The principle underlying such a result is that where one party creates the condition which causes injury, and the owner does not join therein but is nevertheless exposed to liability, the rule that joint tort-feasors cannot maintain an action for indemnification does not apply. This principle was utilized by the Missouri Supreme Court in *Barb v. Farmers Ins. Exch.*,⁴² where a landlord recovered over from a tenant who had stacked boxes in a hallway. The boxes fell on an employee of another tenant, causing injury. The negligence of the landlord consisted solely of not discovering the dangerous condition. However, where a possessor or owner permits the condition to continue after discovering it, indemnification will be denied.⁴³

Some decisions have emphasized that the owner or possessor was only passively negligent.⁴⁴ Such a finding seems to depend upon whether the negligence consisted of anything more than failure to discover the condition.⁴⁵ But, even where the owner knows of the dangerous condition, it would seem that he can recover over from a third person who has assumed the duty of guarding against it.⁴⁶

A somewhat different situation is that involving a person who has been adjudged liable to a third person, who seeks indemnification from a property owner,

40. *E.g.*, *Gray v. Gas Light Co.*, 114 Mass. 149 (1873) (party who fastened wire on landlord's chimney, resulting in landlord being liable to one injured when chimney fell due to pull of the wire, held liable to the landlord); *Carroll v. City of Dunkirk*, 234 N.Y. 579, 138 N.E. 454 (1922) (city broke gas company's line; gas escaped into cellar injuring third person who recovered from company; company granted indemnification from city).

41. *Brown Hotel Co. v. Pittsburg Fuel Co.*, 311 Ky. 396, 224 S.W.2d 165 (1949) (pedestrian injured from falling through a coal hole in a public alley recovered from hotel which maintained it; hotel could recover over from fuel company whose employee negligently replaced the lid); *Gray v. Gas Light Co.*, *supra* note 40; *Carroll v. City of Dunkirk*, *supra* note 40.

42. *Barb v. Farmers Ins. Exch.*, 281 S.W.2d 297 (Mo. 1955).

43. *Id.* at 304. See generally RESTATEMENT, RESTITUTION § 95 (1937).

44. *Schwartz v. Merola Bros. Constr. Corp.*, 290 N.Y. 145, 48 N.E.2d 299 (1943); *Dalury v. Lutz*, 198 Misc. 1055, 100 N.Y.S.2d 57 (Queen's County Ct. 1950) (owner of amusement place sued by customer who fell over pinball machine cord allowed to implead party who owned and installed machines, on theory that the latter was actively negligent in respect to placement of cords).

45. *Schwartz v. Merola Bros. Constr. Co.*, *supra* note 44, at 159, 48 N.E.2d at 306.

46. *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 (Mo. 1959); *Burriss v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941).

a faulty condition of the owner's personal property or premises having caused the injury. The action is based upon the owner's negligence in causing the condition or allowing it to persist. A recent Missouri case in this area is *Kansas City Southern Ry. Co. v. Payway Feed Mills, Inc.*⁴⁷ A switchman recovered from the railroad for injuries sustained when he was caught between the side of a railroad car and a movable loading dock. The railroad's liability was based on its failure to provide a safe place to work. The railroad company sued and recovered from the owner of the loading dock upon the basis that the dock owner had been actively negligent in placing the dock, while the railroad had been only passively negligent in failing to discover the dangerous condition. Several years prior to the decision, a federal court ruling on Missouri law used a distinction between primary and secondary liability to determine the right of indemnification in a similar fact situation.⁴⁸ Indemnification has also been granted where railroad employees have been hurt because of objects placed negligently close to the tracks.⁴⁹ So also, where a landlord failed to repair fencing on a farm, which he had agreed to do, the tenant was able to recover over damages he was required to pay because of the defective fence.⁵⁰

In all the cases in this area it appears that the one obtaining indemnity was negligent only in failing to discover the dangerous condition. It is further apparent that most cases involve an employer seeking indemnity from a property owner whose property has caused injury to an employee, thus allowing the court to imply a contractual relationship between the parties.

3. Suppliers of Goods and Chattels

Suppliers and manufacturers of goods and chattels are often held to indemnify a retailer or third person who has been exposed to liability because of defects in the product which were unknown to the retailer or third person at the time of the sale.⁵¹ Such a holding may be rested either upon an implied warranty

47. *Kansas City Southern Ry. Co. v. Payway Feed Mills, Inc.*, 338 S.W.2d 1 (Mo. 1960); *Accord*, *Gulf, Mobile & Ohio Ry. Co. v. Arthur Dixon Transfer Co.*, 343 Ill. App. 148, 98 N.E.2d 783 (1951) (railroad switchman injured when caught between boxcar and truck trailer parked too close to track; railroad recovered over from trucker on theory of active-passive negligence). See also *Cohen v. Noel*, 165 Tenn. 600, 56 S.W.2d 744 (1933); *Humble Oil & Refining Co. v. Martin*, *supra* note 22.

48. *Terminal Ry. Ass'n v. United States*, 182 F.2d 149 (8th Cir. 1950) (railway liable to employee switchman, riding on side of car, when he was hit by iron post on loading dock at St. Louis Ordinance Plant; indemnity proper except for non-applicability of Federal Tort Claims Act).

49. *United States v. Chicago, R. I. & Pac. R.R. Co.*, 171 F.2d 377 (10th Cir. 1948) (pile of blacktop too close to tracks); *Meddlesboro Home Tel. Co. v. Louisville & N. R.R.*, 214 Ky. 822, 284 S.W. 104 (1926) (employee knocked from top of train by a low telephone line).

50. *Schenk v. Forrester*, 102 Mo. App. 124, 77 S.W. 322 (St. L. Ct. App. 1903).

51. RESTATEMENT, RESTITUTION § 93 (1937):

Where a person has supplied to another a chattel which because of the supplier's negligence or other fault is dangerously defective for the use for which it is supplied and both have become liable in tort to a third person injured by such use, the supplier is under a duty to indemnify

theory, or upon a distinction between types of negligence. Thus, a retailer who had been liable to a consumer for poisoned food was allowed to recover over from the one who supplied the food to him.⁵² The decision was based upon an implied warranty of fitness. Another decision in Missouri upheld the right of a retail shoe company to implead the manufacturer of a defective pair of shoes.⁵³ The retail company was being sued by a customer because of injuries resulting from a tack that protruded into the inside or wearing surface of a shoe. The basis of the holding was not upon the theory of an implied warranty, but upon a distinction between active and passive negligence. The retailer was considered only passively negligent in failing to discover the defect in the shoe.

Persons other than a retailer have the right to indemnification from a manufacturer. The usual situation leading to this result is where a manufacturer has directly furnished a defective chattel, the defect in the chattel having resulted in the user being exposed to liability. In *Busch & Lotta Paint Co. v. Woerman Constr. Co.*,⁵⁴ the construction company had designed and built a scaffold for workmen of the paint company to stand on while painting the interior of a building. Due to a defect in the scaffolding, a workman of the paint company was injured and recovered from his employer. In allowing the paint company-employer to recover over from the manufacturer, the court stated: "The evidence shows that [the plaintiff-employer] did not rely upon his own judgment as to the quality and fitness of the scaffold, but relied upon the expert knowledge of the defendant in furnishing a structure suitable for the purpose. . . ."

It follows that the defendant in this case was primarily liable for injuries caused by the defects in the scaffold.⁵⁵ The same would apply to defective brakes on an automobile⁵⁶ or defective construction of a railroad car.⁵⁷

the other for expenditures properly made in discharge of the claim of the third person, if the other used or disposed of the chattel in reliance upon the supplier's care and if, as between the two, such reliance was justifiable.

52. *Hughes Provision Co. v. LaMear Poultry & Egg Co.*, 242 S.W.2d 285 (St. L. Ct. App. 1951) (decided upon Ohio law; defendant supplied plaintiff with unwholesome and diseased rabbits; customer of plaintiff retailer had recovered for defective food).

53. *Woods v. Juvenile Shoe Corp. of America*, 361 S.W.2d 694 (Mo. 1962).

54. *Busch & Lotta Paint Co. v. Woermann Constr. Co.*, 310 Mo. 419, 276 S.W. 614 (1925). See *London Guarantee & Acc. Co. v. Straitscale Co.*, 322 Mo. 502, 15 S.W.2d 766 (1929), for the distinction that an implied warranty of fitness for the purpose designed exists under circumstances that entitle the buyer to rely upon the judgment of the manufacturer, but that an implied warranty does not exist where the manufacturer supplies a definite article *as ordered* by the purchaser.

55. 310 Mo. at 439, 276 S.W. at 619.

56. *Allied Mutual Cas. Corp. v. General Motors Corp.*, 279 F.2d 455 (10th Cir. 1960) (decided on Missouri law; where defective brakes of automobile resulted in injuries to pedestrians and store buildings, if driver's only negligence was failure to discover defective brakes, could recover over from manufacturer). See also *Pierce v. Ford Motor Co.*, 190 F.2d 910 (4th Cir. 1951); *Birdsong v. General Motors Corp.*, 99 F. Supp. 163 (E.D.Pa. 1951) (owner of auto sued manufacturer for injuries sustained as result of defective brakes; manufacturer could not obtain indemnity from dealer for failure to adjust brakes properly).

57. *Pullman Co. v. Cincinnati, N.O. & T.P. R.R. Co.*, 147 Ky. 498, 144 S.W.

A federal court decision has held that the supplier of goods can be brought in by third party petition upon either implied warranty or passive negligence.⁵⁸ Missouri appears to allow the use of both theories.⁵⁹ However, any negligence on the part of the one supplied, other than failure to discover the defect, would seem to preclude indemnification.

B. *Legal Relations Between the Parties*

The most common situations giving rise to a right of indemnification are agency type relationships, which include master and servant, principal and agent, and independent contractors. Within this area, liability is imposed upon one of the parties because of his legal relationship (employment) to the person who has committed the tortious act.

*State ex rel. Algiere v. Russell*⁶⁰ states the general rule that a principal who has been compelled to pay damages to a third person, solely because of the negligence of his agent, can recover over from the agent. Reliance in that case was primarily upon the *Restatement of Agency*, Section 401.⁶¹ The principal had been held liable not because of any act or omission of its own, but because of the act of its agent and its contractual relations with the agent.

Before the principal can recover over it must be shown that the agent was not authorized or directed to act in the particular manner which caused the injury.⁶² The general rule quoted above is also applicable where a misrepresentation of an agent has brought about the principal's liability.⁶³

It is interesting to note that where an employee had his wife riding in a vehicle with him, injury being caused to her due to his negligence, the employer was allowed to implead the husband when the wife brought suit against the employer.⁶⁴

If the negligence of an independent contractor causes injury to a third person, the employer of the independent contractor can recover over from the latter any damages that he is required to pay. This principle was applied when vibrations from heavy equipment of an independent contractor caused injury to property

385 (1912) (manufacturer negligently constructed railroad car; railroad's negligence in failing to discover defective construction did not bar indemnification).

58. *Lane v. Celanese Corp. of America*, 94 F. Supp. 528 (N.D.N.Y. 1950).

59. *Busch & Lotta Paint Co. v. Woermann Constr. Co.*, *supra* note 54; *Woods v. Juvenile Shoe Corp. of America*, *supra* note 53.

60. *State ex rel. Algiere v. Russell*, 359 Mo. 800, 223 S.W.2d 481 (1949) (en banc).

61. *RESTATEMENT (SECOND), AGENCY* § 401, comment *d* (1958).

62. *Holbrook v. Nolan*, 105 Ind. App. 75, 10 N.E.2d 744 (1937).

63. *Elgea v. Hammack*, 241 Mo. App. 1070, 244 S.W.2d 594 (St. L. Ct. App. 1951) (company's liability based upon respondeat superior).

64. *Jones v. Kenney*, 113 F. Supp. 923 (W.D.Mo. 1953). See also *Schroeder v. Longenecker*, 7 F.R.D. 9 (E.D.Mo. 1947) (injured wife of driver of car involved in collision brought suit against driver of other car; court would not allow defendant to implead the husband, stating that under common law of Missouri wife could not sue husband).

adjoining that on which the equipment was operating.⁶⁵ The court found an implied contract of indemnity, since it was a situation where one party had created a condition which caused the injury and the other had not joined therein. However, where the negligence of the employer or one of his agents has entered into the result, the principal would be unable to recover over from an independent contractor.⁶⁶

An unusual case allowing indemnification from an independent contractor is *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*⁶⁷ An employee of the painting company was injured when he came in contact with a high-powered electric line which was located in the upper part of McDonnell's building. The painting company had been apprised of the danger of these wires prior to beginning work. When the paint company employee recovered from McDonnell for the injury, the latter was allowed to recover over from the paint company on the theory of an implied contract, it being held that the latter had assumed the duty in respect to the dangerous condition of the high-powered wires.

IV. RECENT TRENDS IN MISSOURI

Most decisions in Missouri have relied upon the use of the test of primary and secondary liability in determining the appropriateness of indemnification. The overwhelming majority of cases cited in this article were decided upon that basis. Within the last two years, however, the trend of the reported cases has been toward the use of the active and passive negligence theory. The decision in *Kansas City Southern Ry. v. Payway Feed Mills* rested squarely upon that theory.⁶⁸ In adopting the theory, it was pointed out that the growth of negligence law has markedly changed the characteristics of negligence actions, and because of the change the courts have had to find a way to do justice within the law, so that one guilty of an act of negligence—affirmative, active, or primary in its character—will not escape scot-free, leaving another whose fault was only technical or passive to assume complete liability.⁶⁹

65. *Hunter v. DeLuxe Drive-in Theaters, Inc.*, 257 S.W.2d 255 (K.C. Ct. App. 1953).

66. *Standard Brands, Inc. v. Bateman*, 184 F.2d 1002 (8th Cir. 1950).

67. *McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co.*, 323 S.W.2d 788 (Mo. 1959); *Burris v. American Chicle Co.*, 120 F.2d 218 (2d Cir. 1941). In the latter case, a New York statute prescribed safety devices to be used by window cleaners. A building owner, who was held liable to an injured employee of a window cleaning contractor who had not complied with statute, was allowed to obtain indemnification from the contractor. A building owner's duty to comply with the statute could not be delegated so as to relieve the owner from liability to the contractor's employee, but this did not make them joint tortfeasors. It was held that the building owner had not actively participated in the wrongful acts or omissions of the contractor. See also *Schwartz v. Merola Bros. Constr. Corp.* 290 N.Y. 145, 48 N.E.2d 299 (1943) (infant injured when bags of pebble stacked on sidewalk fell on him; in suit against building owner, contractor, and sub-contractor, respective rights of indemnification between defendants were based upon distinction of active and passive negligence).

68. *Supra* note 48.

69. *Supra* note 48, at 5. See also *Gulf, M. & O. Ry. Co. v. Arthur Dixon Transfer Co.*, *supra* note 48, at 787.

Active negligence is considered to be the negligence of the party responsible for the dangerous condition. This is the same as the use of the primary liability test where one party has created a dangerous condition and the other has merely failed to discover it. The instructions given to the jury in *Payway Feed* were drawn in language sounding like the basic test of primary and secondary liability that has been applied by the courts for years.⁷⁰ This being so, it appears that the active negligence test is simply another manner of expressing the rule of primary liability, and does not mean that a joint tort-feasor whose negligence is the lesser can have indemnity⁷¹ when the concurring negligence of both created the damages.

*Crouch v. Tourtelot*⁷² was concerned with an automobile collision. Prior to that decision, very few cases had been reported on this subject, the possible answer for such paucity being found in the following quotation:

In this case the defendant incurs no liability unless he was at fault. If, as the defendant asserts, the entire fault of the accident lies in the third party and the defendant proves this at trial, the verdict will be in his favor. If the defendant is in any way at fault he is liable for all of the plaintiff's injury. Therefore any effort to bring in the third party is an attempt to secure contribution of a joint tort-feasor which is not allowable under Missouri law.⁷³

In the *Crouch* case the plaintiff was a passenger in an automobile which had come to rest on the wrong side of the road following a minor accident. The plaintiff's husband left the auto on the wrong side of the highway; the defendant came over a hill and collided with it. The court did not allow the defendant to implead the plaintiff's husband because both parties were negligent and joint tort-feasors in *pari delicto*. It was stated:

We do not believe that indemnity should be required as between joint tort-feasors involved in a two car automobile collision on a highway because of supposedly different degrees of negligence.⁷⁴

The defendant attempted to use the theory of active and passive negligence which had been earlier adopted in the *Payway Feed* case. The court did not specifically

70. *Supra* note 48, at 9:

The jury is instructed that the terms passive or secondary negligence mean a failure or fault that is imputed because a duty is imposed based on some legal relation between the parties or because the duty involved arises from some positive rule of statutory law or because the duty imposed is neglected by reason of a failure to discover or correct a defect or to remedy a dangerous condition caused by the act of another who is primarily responsible. The jury is further instructed that the terms active and primary negligence mean the act of creating a dangerous condition which under all the other facts and circumstances present is likely to cause injury to others.

71. *Fidelity & Cas. Co. v. Federal Express, Inc.*, 136 F.2d 35, 41 (6th Cir. 1943).

72. *Crouch v. Tourtelot*, 350 S.W.2d 799 (Mo. 1961) (en banc).

73. *Kuhn v. Yellow Transit Freight Lines, Inc.*, 12 F.R.D. 252, 255 (E.D.Mo. 1952).

74. *Supra* note 72, at 807.

overrule the use of the active-passive test in this state, but did point out that it was not controlling because the result in the *Payway Feed* case could have been reached without its use. It was stated that that case did not constitute a departure from the underlying theory of prior cases because there existed a contractual or quasi-contractual relationship between the parties which might well be held to support a claim of indemnity.

It was pointed out that the negligence alleged in the *Crouch* case was not merely the failure to discover a dangerous condition, but rather negligence in driving at excessive speeds, failure to stop, and failure to have the car under control. As to the failure to discover a dangerous condition, the case can be distinguished from municipality and property owner cases on the grounds that in Missouri one must use the highest degree of care in operating a vehicle upon the roads. It would appear that highest degree of care would encompass the failure to discover a dangerous condition.

It was thought that the *Crouch* decision would be construed as overruling the use of the active-passive distinction. However, two later decisions have made specific use of it. In *Woods v. Juvenile Shoe Corp.*,⁷⁵ a retailer was allowed to implead the manufacturer of a pair of shoes upon the theory that the latter was actively negligent in creating a dangerous condition, namely a tack protruding in the inner surface of a shoe. The retailer was considered only passively negligent in failing to discover the alleged defect. Much of the court's language in the opinion sounded of earlier decisions, wherein primary and secondary liability had been the test. It would seem that the same result could have been reached by use of an implied warranty of fitness.

The most recent decision on non-contractual indemnification is *Johnson v. California Spray Chemical Co. v. Byers Trans. Co.*,⁷⁶ involving an action by a motor carrier's employee against the shipper, California Spray, for an eye injury allegedly sustained as a result of the shipper's failure to package an insecticide adequately. The shipper filed a third party petition against the carrier, Byers, on the ground that the package complied with the requirements of the tariff filed by the carrier. The third party petition was disallowed because the allegations showed that both parties were guilty of active negligence which combined to cause the injury, and were thus in *pari delicto*. However, since the rule is that one guilty of active negligence cannot recover over from one who was either actively or passively negligent, the determination that the carrier was also actively negligent was unnecessary. The court pointed out that there was no basis for implying an agreement that the carrier had accepted the articles with the understanding to transport them in such a manner that no one would sustain injury.⁷⁷ It appears that with no implied agreement and the fact that the one seeking indemnity had brought about the dangerous condition, the same result could have been reached by use of the primary and secondary liability test.

75. *Woods v. Juvenile Shoe Corp. of America*, 361 S.W.2d 694 (Mo. 1962).

76. *Johnson v. California Spray-Chem. Co. v. Byers Trans. Co.*, 362 S.W.2d 630 (Mo. 1962).

77. *Id.* at 634.

These recent decisions do not appear to be a departure from the well established principles which the Missouri courts have earlier laid down. They utilize the terms "active" and "passive" negligence, but seem to give them the same meaning as that kind of negligence found under tests as to primary and secondary liability. If this is correct, use of the terms serves no useful purpose, and conceivably could lead to confusion. Furthermore, if a clear distinction between active and passive negligence is not possible, then the test will leave much to personal interpretation, which in turn can lead to inconsistent results.⁷⁸ Finally, in using active and passive negligence, it is quite easy to forget that it is a distinction in character of negligence with which one must be concerned, and not a distinction in degree. If one of the parties was not negligent, he will have a good defense.

Third party practice is a very useful tool to both the attorney and the court. Persons who should be eligible to use it in Missouri are those whose liability arises from one of three situations: (1) where someone else has created a dangerous condition which exposes the third party plaintiff to liability; (2) where liability arises from some positive rule of common or statutory law; or (3) where liability is based upon the legal relations of the parties.

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78. *Davis v. Broad Street Garage*, 191 Tenn. 320, 232 S.W.2d 355 (1950); Meriam and Thorton, *Indemnity Between Tort Feasors; An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.L.Q. REV. 845, 846 (1950).