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Indemnification Between Tort-Feasors

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construction of which was necessary for the determination of the rights and liabilities of the parties. The court stated that it was the nature of the cause of action, rather than the form of the pleadings or the use of interpleader procedure, which determines whether a cause is legal or equitable, and correspondingly, whether a jury trial is available.[92]

In a vigorous dissent, Mr. Justice Breitel concluded that "proceedings in the nature of interpleader, because of their origin in equity, do not permit of a right to a jury trial. . . ."[93] Also, the statutory provision for trial by jury[94] applies, in his opinion, only to cases where execution may be obtained against the assets of the judgment debtor. He indicated that this case involved a definite fund and that general execution thus would not issue against the escrowee.

The majority opinion appears consonant with the modern theory of practice and pleadings in a merged system. The basic reason remaining for distinguishing between legal and equitable causes of action is to determine whether a trial by jury is available. In the *Geddes* decision, a complete contractual default by the interpleaded defendant would have provided plaintiff with a strictly legal remedy, *i.e.,* damages for breach of contract. Neither a mere demand for equitable relief[95] nor the use of a purely equitable procedural device such as interpleader, should serve to deny a defendant, where otherwise available, the fundamental right to a jury trial.[96]

Indemnification between tort-feasors.

It is well established that there can be no indemnification between active joint tort-feasors, and that where a plaintiff chooses to sue fewer than all tort-feasors, the defendant against whom judgment is rendered has no right to recover against the others unless his negligence was such as will be labeled passive by the

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[92] See Matter of Garfield, 14 N.Y.2d 251, 200 N.E.2d 196, 251 N.Y.S.2d 7 (1964) discussed in 39 ST. JOHN'S L. REV. 150 (1964); Pass v. Kramer, 160 N.Y.S.2d 414 (Sup. Ct. 1954). *But see, e.g.,* Spiro v. Einzinger, 182 Misc. 120, 50 N.Y.S.2d 85 (Sup. Ct. 1944); Levy v. Niklad, 259 App. Div. 54, 18 N.Y.S.2d 105 (2d Dep't 1940); Clearview Gardens First Corp. v. Weisman, 206 Misc. 526, 134 N.Y.S.2d 288 (Sup. Ct. 1954).

[93] Geddes v. Rosen, 22 App. Div. 2d 394, 401, 255 N.Y.S.2d 585, 592 (1st Dep't 1965) (dissenting opinion).

[94] CPLR 4101(1).

[95] See Syracuse v. Hogan, 234 N.Y. 457, 138 N.E. 406 (1923).

[96] "The fact that the genesis . . . was in equity does not affect the right to a trial by jury when . . . used in actions that involve claims that are legal." 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4101.02 (1964).

courts.[97] Passive negligence consists in the *omission* or *failure* to perform a non-delegable duty and thus, any fault *of commission* cannot be merely passive negligence.[98]

CPLR 1007 allows a defendant to implead a third party "who *is or may be* liable to him for all or part of the plaintiff's claim against him. . . ." Since the intent of this section was to allow a liberalization of third-party pleadings,[99] 1007 should be construed to mean that any time there is a possible allegation of passive negligence in the original complaint (and therefore a possibility that a third party "may be" liable over to the defendant) a motion to implead should be granted.[100] The third party can then be brought to trial where, with all the evidence presented, the line between active and passive negligence may be drawn. But if the plaintiff alleges direct and active negligence by the defendant, and if the original complaint cannot reasonably be interpreted as including an allegation of passive negligence on the part of the defendant, impleader should not be allowed.[101]

In *Musco v. Conte*,[102] the pleadings asserted that defendant negligently injured the hand of plaintiff's intestate, and that on removal to a hospital an anesthetic was so negligently administered as to cause death. The defendant filed a third-party complaint for indemnification against the hospital and the attendant who treated the plaintiff's intestate. The trial court dismissed this complaint for patent insufficiency, but the appellate division reinstated the third-party complaint, finding that the third-party plaintiff and defendant were not joint tort-feasors, their wrongs being independent and their culpability unequal.

It has been held that even though one causing personal injuries is liable for their aggravation by a physician,[103] he is *not* a joint tort-feasor with the physician.[104] The courts have found

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[97] Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952). For an extended discussion of the theory of indemnification see Meriam & Thornton, *Indemnity Between Tort-Feasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. REV. 845 (1950); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932); Note, 28 FORDHAM L. REV. 782 (1960).

[98] Putvin v. Buffalo Elec. Co., *supra* note 97, at 456, 158 N.E.2d at 696, 186 N.Y.S.2d at 22.

[99] 12 N.Y. JUD. COUNCIL REP. 203 (1946).

[100] See Franklin E. Tyrell, Inc. v. Vahlsing, 193 Misc. 454, 69 N.Y.S.2d 602 (Sup. Ct. 1947). *But see* Anderson v. Liberty Fast Freight Co., 285 App. Div. 44, 135 N.Y.S.2d 559 (3d Dep't 1954).

[101] Putvin v. Buffalo Elec. Co., *supra* note 97, at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21.

[102] 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

[103] Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

[104] Derby v. Prewitt, 12 N.Y.2d 100, 105, 187 N.E.2d 556, 559, 236 N.Y.S.2d 953, 958 (1962).

two independent wrongs in such a case, and indemnification has been allowed against the negligent physician.[105]

The allowance of impleader in the instant case was proper because it was certainly possible (in fact, quite probable) that the defendant would be found only "passively" negligent as to the wrongful death action. Even though the complaint did charge the defendant with *actively* injuring plaintiff's intestate's hand, it was reasonable to infer an allegation of "passive" negligence on the part of the defendant as to the fatal injury. It has been held that where a defendant "is alleged to be guilty of both active and passive negligence, impleader of the person claimed to be guilty of active negligence is proper. . . ." [106]

The decision in *Musco* is also in accord with the purpose of third-party practice in that it avoids circuity and multiplicity of actions by furnishing a method of trial of all issues between the parties without seriously prejudicing the rights of any party.

Intervention allowed to defend constitutionality of statute granting partial tax exemption.

Representatives of thirteen railroads sought to intervene [107] as defendants in an action [108] brought to contest the constitutionality of a statute granting partial real property tax exemptions to railroads.[109] Movant-intervenors urged that they had a substantial economic interest in the outcome of the action since they had already realized a substantial tax reduction under the statute. Plaintiff contested the motion, claiming that the intervenors' interest was not such a "real interest" as would justify the granting of the motion. The court, exercising the discretionary power given it by CPLR 1013, granted the motion to intervene. Stressing the disastrous economic effect on all the railroads in the state if plaintiff were successful in invalidating the statute, the court concluded that the railroads had a "real and substantial interest in the outcome of this proceeding." It was further indicated that plaintiff would nowise be prejudiced by the granting of the motion; nor would there be any unusual delay occasioned by the intervention. To ensure that there would be no delay, the court conditioned its order by stating that the intervenor could not reopen any

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[105] See Rizzo v. Steiner, 36 Misc. 2d 701, 233 N.Y.S.2d 647 (Sup. Ct. 1962); Rezza v. Isaacson, 13 Misc. 2d 794, 178 N.Y.S.2d 481 (Sup. Ct. 1958).

[106] Putvin v. Buffalo Elec. Co., *supra* note 97, at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21.

[107] CPLR 1012 (intervention as of right); CPLR 1013 (intervention by permission).

[108] City of Buffalo v. State Bd. of Equalization & Assessment, 44 Misc. 2d 716, 254 N.Y.S.2d 699 (Sup. Ct. 1964).

[109] N.Y. REAL PROP. TAX LAW § 489 a-v; N.Y. STATE FIN. LAW § 54(b).