St. John's Law Review

Volume 24
Number 2 *Volume 24, April 1950, Number 2*

Article 6

Contribution Between Joint Tort-Feasors

Vincent L. Rosato

CONTRIBUTION BETWEEN JOINT TORT-FEASORS

Contribution, as understood at common law, is the sharing of loss or payment among several obligors.[1] The general rule is that one who is compelled to satisfy the whole or bear more than his just share of a common obligation, upon which several persons are equally liable, is entitled to contribution from the others.[2] The application of this rule is designed to effect a fair and just division of losses.[3] Although it is perhaps most frequently applied in the case of co-sureties, the doctrine is not confined to that relationship.[4] This note is concerned with the general exception to the doctrine of contribution as developed in the cases defining the liability of joint tort-feasors. The present discussion will be limited to: (1) the common law, (2) contribution under Section 211-a of the New York Civil Practice Act, (3) the effect of a release given to one joint tort-feasor, and (4) indemnity as distinguished from contribution where one is guilty of active negligence and the other is guilty of passive negligence.

I

Among the anomalies of the English common law is the rule that where one of several joint tort-feasors has been held responsible for an injury, he has no right of contribution against the other tort-feasors, notwithstanding their concurrent liability for the injury. Though the rule is of obscure and uncertain origin, *Merryweather v. Nixan* [5] is generally accepted as the basis of this doctrine. Although the decision has been occasionally condemned, the rule had its origin in an enlightened consideration of public policy.[6] A few years later the question arose in the New York courts for the first time and the principle laid down by the English courts was adopted.[7] In a few

---

[1] BLACK, LAW DICTIONARY 264 (2d ed. 1910).

[2] Asylum of St. Vincent de Paul v. McGuire, 239 N. Y. 375, 146 N. E. 632 (1925).

[3] Sexton v. American Trust Co., 45 F. 2d 372, 380 (8th Cir. 1930).

[4] Comstock v. Potter, 191 Mich. 629, 158 N. W. 102 (1916).

[5] 8 Term Rep. 186, 101 Eng. Rep. 1337 (1799).

[6] See Reath, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixon*, 12 HARV. L. REV. 176 (1898).

[7] Peck v. Ellis, 2 Johns. Ch. 131, 135 (N. Y. 1816). Contribution was denied in equity to one of two joint wrongdoers who had fraudulently cut and carried off timber and logs. The court said: "A court of law will now sustain an action for contribution between two debtors or sureties, under an implied assumpsit arising from the knowledge and operation of the general principle that equality is equity. But a court of law will not sustain an action between joint trespassers. . . . I am not apprised of any decision in Chancery to the contrary. . . . The law would not recognize any of the rights or obligations of copartnership in an association for mischief."

subsequent decisions the rule disallowing contribution was reiterated,[8] and remained the settled law of the state until the statutory modification of 1928.[9]

Although the authorities are not in complete accord concerning the reasons for the courts' reluctance in granting contribution between joint tort-feasors, one basic concept should be noted. In a number of well known fields, the law has manifested its unwillingness to come to the aid of persons whose conduct does not conform to legal standards. An example of this attitude is found in the illegal contract cases, where the law will generally refuse all relief unless one of the parties is innocent or for some reason peculiarly deserving of protection.[10] This viewpoint is also manifested in the equitable doctrine that one seeking relief must come into court with clean hands.[11] Similarly the rule refusing contribution between joint tort-feasors is rooted in the same unwillingness of courts to aid persons whose conduct has not measured up to legal standards.[12] Properly understood, however, it appears that in the field of torts, the doctrine is confined to those cases wherein the joint wrong was confessedly intentional or immoral, or to borderline offenses, where the wrong is of such a nature as to raise the presumption of wilfulness and malice.

Despite the fact that the courts of both England and the United States have recognized the inequities of denying contribution to tort-feasors in negligence cases, they have generally followed precedent and have cast the burden of altering the rule upon the legislature.[13] However, the courts of three states, Wisconsin,[14] Pennsylvania,[15] and Minnesota [16]—and perhaps a fourth, Oregon [17]—have formulated a common-law doctrine permitting contribution among negligent wrongdoers.

---

[8] Wehle v. Haviland, 42 How. Pr. 399 (N. Y., 1872); Miller v. Fenton, 11 Paige 18 (N. Y. 1844); Pierson v. Thompson, 1 Edw. Ch. 212 (N. Y. 1832).

[9] N. Y. Civ. Prac. Act § 211-a.

[10] 5 Williston, Contracts §§ 1631-32; 6 Williston, Contracts §§ 1789-91 (rev. ed. 1938).

[11] 1 Pomeroy, Equity Jurisprudence §§ 397-404 (4th ed. 1918).

[12] See Lefar, *Contribution and Indemnity Between Tort-feasors,* 81 U. of Pa. L. Rev. 131 (1932).

[13] For a discussion of the statutory treatment of the problem of contribution, see Legis., 45 Harv. L. Rev. 369 (1931).

[14] Haines v. Duffy, 206 Wis. 193, 240 N. W. 152 (1931); Roeber v. Pandl, 200 Wis. 420, 228 N. W. 512 (1930); Wait v. Pierce, 191 Wis. 202, 210 N. W. 822 (1926); Sattler v. Neiderkorn, 190 Wis. 464, 209 N. W. 607 (1926); Mitchell v. Raymond, 181 Wis. 591, 195 N. W. 855 (1923); Ellis v. Chicago and N. W. Ry., 167 Wis. 392, 167 N. W. 1048 (1918).

[15] Goldman v. Mitchell-Fletcher Co., 292 Pa. 354, 141 Atl. 231 (1928).

[16] Duluth, M. & N. Ry. v. McCarthy, 183 Minn. 414, 236 N. W. 766 (1931); Underwriters at Lloyd's of Minneapolis v. Smith, 166 Minn. 388, 208 N. W. 13 (1926).

[17] *See* Furbeck v. I. Gevurtz & Son, 72 Ore. 12, 22, 143 Pac. 654, 657 (1914).

II

In 1928, the Legislature of the State of New York enacted Section 211-a of the Civil Practice Act.[18] The purpose of the section was to modify the ancient rule of law which allowed no contribution between joint tort-feasors who were *in pari delicto*.[19] The Act does not limit the right of contribution to negligent tort-feasors, but allows it generally "when a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage . . . ." Construing the statute literally, however, its application is of little practical utility. The Civil Practice Act, in furnishing to one joint tort-feasor a remedy for the recovery of contribution from the other, expressly confines the remedy to cases where a money judgment has been recovered against both.[20] The section provides that if the plaintiff collects the full amount of the judgment from one joint tort-feasor, such joint tort-feasor may recover a pro rata share from the other.

The conditions imposed by the section must exist before the right to contribution accrues. The person injured must have a cause of action against the person from whom contribution is sought.[21] The several defendants must be parties-defendant to the action brought by the plaintiff and a money judgment must have been recovered jointly against them.[22] Under these circumstances the payment of the entire amount of the judgment by one of the judgment-debtors gives him the right to collect from the other defendant or defendants[23] their pro rata share. The section gives to the paying

---

[18] The section reads: *"Action by one joint tort-feasor against another.* Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payment; provided, however, that no defendant shall be compelled to pay any other such defendant an amount greater than his own pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice."

[19] Haines v. Bero Engineering Const. Corp., 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dep't 1930).

[20] Price v. Ryan, 255 N. Y. 16, 173 N. E. 907 (1930).

[21] Ackeson v. Kibler, 232 App. Div. 306, 249 N. Y. Supp. 629 (4th Dep't 1931).

[22] Davis v. Hauk and Schmidt, Inc., 232 App. Div. 556, 250 N. Y. Supp. 537 (1st Dep't 1931); Schenck v. Bradshaw, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931).

[23] Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 178 N. E. 289 (1931); Muller v. Green, 176 Misc. 303, 26 N. Y. S. 2d 54 (Sup. Ct. 1941); Mongiovi v. Olna Realty Corp., 170 Misc. 403, 10 N. Y. S. 2d 528 (N. Y. City Ct. 1939).

defendant the plaintiff's rights of execution against the other defendant up to his aliquot share of the judgment.[24] The paying defendant thus recovers on the theory of subrogation partially enforcing a right which heretofore belonged solely to the plaintiff.[25]

Section 211-a benefits the defendant by limiting his liability to his pro rata share. However, taken objectively, the benefits accruing to the defendant are narrowly restricted. His right to contribution depends entirely upon the action taken by the plaintiff. Where a joint tort has been committed a plaintiff may sue the defendants jointly or he may sue either one individually. Where he names all parties as joint defendants he may discontinue or settle with any one of them at any stage of the proceedings without consulting the other joint tort-feasor.[26] Here the remaining defendants lose their right of contribution from this party because as a condition precedent to the accrual of that right a joint judgment must be obtained against all sought to be held for contribution. Where a plaintiff sues only one of several joint tort-feasors, the unsuccessful defendant has no right of contribution for the same reason. Contribution is essentially a remedy for the benefit of defendants. That a defendant may be deprived of this remedy at the whim of the plaintiff is obviously a gross injustice.

Any defendant in a tort action is anxious to secure the benefit of the New York statute by making certain that if he is held liable at all, it will be under a joint judgment recovered against himself and the other joint tort-feasors.[27] The Court of Appeals has rendered nugatory all attempts to secure this statutory benefit in any other way. Thus in an action against two tort-feasors jointly, where one defendant was held liable and his co-defendant was not, the court has held that the unsuccessful defendant does not have the right of appeal against the decision in favor of the other defendant.[28]

In a subsequent case,[29] the Court of Appeals followed this same

---

[24] Neehan v. Woodside Astoria Transportation Co., 261 N. Y. 159, 184 N. E. 744 (1933).

[25] *Ibid.*

[26] Piratensky v. Wallach, 162 Misc. 749, 295 N. Y. Supp. 581 (N. Y. City Ct. 1935).

[27] See Gregory, *Tort Contribution Practice in New York,* 20 CORNELL L. Q. 271 (1935).

[28] Price v. Ryan, 255 N. Y. 16, 173 N. E. 907 (1930). The court held that the claimant had failed to state a cause of action for tort contribution under the statute since such claim could be filed and litigated only when a joint judgment had already been procured by the injured plaintiff against both tort-feasors.

[29] Ward v. Iroquois Gas Corp., 258 N. Y. 124, 170 N. E. 317 (1932) (where the injured plaintiff had secured a joint judgment against two joint tort-feasors, which was reversed as to one and affirmed as to the other by the Appellate Division; the unsuccessful co-defendant appealed to the Court of Appeals on his cross claim for contribution from his co-defendant's favorable judgment, asking for a reversal thereof or for a new trial on the cross claim in order to effect a joint judgment in plaintiff's favor as a foundation for his claim for contribution under the statute).

line of reasoning in denying an appeal to a defendant against his co-defendant and declared that the unsuccessful defendant can acquire no rights under the contribution statute until he has also discharged more than his proportionate share of the joint judgment, a requirement which had not been met.

Another line of cases arising under the statute involved the attempt of an individually sued tort-feasor to implead the alleged joint tort-feasor or a party defendant, under Section 193-a(1) of the Civil Practice Act,[30] for the purpose of producing a joint judgment and thus establishing a basis for contribution. In one of the most outstanding of these cases the Fourth Department of the Appellate Division permitted such an impleader,[31] but the Court of Appeals overruled the decision,[32] concluding that the impleader provision is not available as between joint tort-feasors. Under the impleader statutes, the impleaded party must be liable to the party sought to be held liable (defendant) for the claim made against him by the plaintiff. Such is not the case between joint tort-feasors.[33]

The decisions thus far emphasize the fact that the courts have followed the general rule that where a statute is in derogation of the common law it must be strictly construed.[34] The application of the Act has been limited to those cases which fulfill the conditions pre-

---

[30] The subdivision reads as follows: "1. After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving as a third-party plaintiff upon such person a summons and copy of a verified complaint. The claim against such person, hereinafter called the third-party defendant, must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same cause of action or the same ground as the claim asserted against the third-party plaintiff."

[31] Haines v. Bero Engineering Const. Corp., 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dep't 1930).

[32] Fox v. Western New York Motor Lines, Inc., 257 N. Y. 305, 308, 178 N. E. 289, 290 (1931), where the court observed: "Section 211-a has in no way modified or extended Section 193, subdivision 2 of the Civil Practice Act (now C. P. A. § 193-a(1)), or the limitations placed upon it by the courts. The practice under the latter section is the same now as it has been since 1923. Section 211-a sought to remedy one glaring defect in the law. Where a judgment had been recovered against two joint tort-feasors, the payment by one relieved the other of all liability, either to the plaintiff, or to the paying defendant. This was changed by requiring the joint defendant to pay his share of the judgment. This is the only change that has been made. A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The Legislature has not yet given the same choice to the defendants to bring in other parties whom they think should be liable either in place of or jointly with those whom the plaintiff has selected. If Section 193 is to be extended it must be by act of the Legislature and not by the fiat of the courts."

[33] *Accord,* Kloppenberg v. Brooklyn Union Gas Co., 82 N. Y. S. 2d 687 (Sup. Ct. 1948); Triglianos v. Henry Moss & Co., Inc., 189 Misc. 157, 71 N. Y. S. 2d 618 (Sup. Ct. 1947).

[34] Aberdeen Bindery v. Eastern States Printing & Publishing Co., 166 Misc. 904, 3 N. Y. S. 2d 419 (Sup. Ct. 1938).

scribed by the legislature and the result has been that the availability of the remedy of contribution between joint wrongdoers lies in the exclusive control of the injured plaintiff.

III

A further problem which arises in considering the doctrine of contribution between joint tort-feasors under Section 211-a concerns the effect of a release given by the injured plaintiff to one of joint tort-feasors. The statute is silent concerning the effect of such a release on the liability of the other defendants. At common law in New York the release of one released all unless there was an express reservation to the contrary.[35] This rule was based on the theory that since each was liable for the whole amount, the judgment was an indivisible unit and the release of one waived the entire claim.

By an amendment to the New York Debtor and Creditor Law passed in 1928 [36] the legislature attempted to modify the common law rule by providing that the discharge of one without reservation satisfies the obligee's claim against the co-obligors only up to the amount that he knew the released obligor was bound to pay. Where there is an express reservation against the non-released wrongdoers the instrument is not considered a release in the technical sense, but merely a covenant not to sue. In such a case the other tort-feasors are not discharged from liability to the plaintiff.[37] Although the statute ex-

---

[35] McNamara v. Eastman Kodak Co., 232 N. Y. 18, 133 N. E. 113 (1921); Gilbert v. Finch, 173 N. Y. 455, 66 N. E. 133 (1903).

[36] N. Y. DEBTOR-CREDITOR LAW § 234:

"Discharge of one obligor, with reservations:

"Subject to the provisions of section two hundred and thirty-three, the obligee's release or discharge of one or more of several obligors, or of one or more of joint, or of joint and several obligors shall not discharge co-obligors, against whom the obligee in writing and as part of the same transaction as the release or discharge, expressly reserves his rights; and in the absence of such a reservation of rights shall discharge co-obligors only to the extent provided in section two hundred and thirty-five.

"§ 235. Discharge of one obligor, without reservations:

"(a) If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay.

"(b) If an obligee so releasing or discharging an obligor has not then such knowledge or reason to know, the obligee's claim against the co-obligor shall be satisfied to the extent of the lesser of the two amounts, namely (1) the amount of the fractional share of the obligor released or discharged, or (2) the amount that such obligor was bound by his contract or relation with the co-obligor to pay."

[37] Walsh v. Hanan, 93 App. Div. 580, 87 N. Y. Supp. 930 (2d Dep't 1904); Shaw v. Cressey, 182 Misc. 27, 43 N. Y. S. 2d 237 (Sup. Ct. 1943); Armieri v. St. Joseph's Hospital, 159 Misc. 563, 288 N. Y. Supp. 483 (Sup. Ct. 1936); Hirschfield v. Alsberg, 47 Misc. 141, 93 N. Y. Supp. 617 (Sup. Ct. 1905).

pressly provides that the term "obligor" as used in Sections 234 and 235, includes one who is liable in tort,[38] it is difficult to see how the Act applies to joint tort-feasors. It is well settled that the obligation of joint tort-feasors is joint and several,[39] and an injured party may recover against either or all of several persons through whose joint wrong he was injured.[40] Under Section 211-a each defendant is still primarily liable to the plaintiff for the full amount which the plaintiff knew the released obligor had been bound to pay. It is difficult to see how Section 235 can limit this liability where one joint tort-feasor is released.[41] Thus the problem would seem to be limited to the case where the release given to one tort-feasor contained an express reservation against the others. Can the unreleased tort-feasor, who has been held liable to the injured plaintiff for the full amount of the claim, secure contribution under Section 211-a from the "released" tort-feasor? Though the cases are not clear on this point [42] an answer to the question might be found in the contribution

---

[38] N. Y. DEBTOR AND CREDITOR LAW § 231.

[39] Goldstein v. Tunick, 59 Misc. 516, 110 N. Y. Supp. 905 (Sup. Ct. 1908).

[40] Walsh v. New York Cent. & H. R. R. R., 204 N. Y. 58, 97 N. E. 408 (1912); Tanzer v. Breen, 131 App. Div. 654, 116 N. Y. Supp. 110 (1st Dept. 1909).

[41] Rector, Church Wardens and Vestrymen of St. James Church in City of Brooklyn v. City of New York, 261 App. Div. 614, 26 N. Y. S. 2d 762 (2d Dep't 1941) (where damages arising out of the tort are unliquidated and a release given a joint obligor contains no reservations, the provisions of Sections 231-235 of this article, relating to discharge of the obligations of joint obligors, are not applicable).

[42] Fox v. Western New York Motor Lines, Inc., 232 App. Div. 308, 249 N. Y. Supp. 623 (4th Dep't 1931), *rev'd on other grounds*, 257 N. Y. 305, 178 N. E. 289 (1931) (where the court stated that a release given to one of several joint tort-feasors with reservations against the others, relieves the released party from a direct enforcement of the obligee's cause of action, but like the release of one of several joint and several obligors under a contract with reservations against the others, the released party is still liable for his proportionate responsibility enforceable by his joint obligors); La Lone v. Carlin, 139 Misc. 553, 247 N. Y. Supp. 665 (Sup. Ct. 1931) (where it was held that the right to contribution granted by the New York statute cannot be defeated by an agreement by the injured party not to sue one of the joint tort-feasors if the other tort-feasor was not a party to the agreement); Blauvelt v. Village of Nyack, 141 Misc. 730, 252 N. Y. Supp. 746 (Sup. Ct. 1931) (here a plaintiff, after joining issue, discontinued as against the named tort-feasor in consideration of its paying him a substantial sum and gave it a general release reserving the cause of action against the other joint tort-feasor. The remaining defendants moved to set aside the stipulation of discontinuance as to the other and for a direction that the action proceed against all the defendants, on the ground that the defendant had a right of contribution against the other tort-feasor in case a joint verdict was rendered against both. The court held that the settlement did not defeat the right of defendant to contribution from the other tort-feasor in case of a joint judgment, and that the amount which plaintiff had received from the other joint tort-feasor might be proven in mitigation of damages). But in Piratensky v. Walloch, 162 Misc. 749, 295 N. Y. Supp. 581 (N. Y. City Ct. 1931), the court refused to follow the decision in *Blauvelt v. Nyack*. Here an injured party sued two defendants for injuries growing out of an automobile collision and one of the

statute itself. The Act expressly confines the remedy to cases where a money judgment has been rendered against both wrongdoers. The right to contribution arises only after one of the judgment debtors has paid the judgment. A release given by the plaintiff to one joint tort-feasor, reserving his right of action against the others, is an expression of the plaintiff's intent to seek satisfaction only from the wrongdoers against whom his rights have been expressly so reserved. To allow a defendant who has been compelled to pay a judgment to recover contribution from a joint-tort-feasor who was not a party to the action would be contrary to the express provisions of Section 211-a especially in the light of the strict construction which the courts have applied to the statute.

IV

The general principles of contribution between joint tort-feasors heretofore discussed do not apply where the party compelled to answer in damages was not, as between the wrongdoers themselves, a wrongdoer at all. Although either of two or more parties may be liable to third persons jointly, they may not be in pari delicto as to each other. The rule is well settled that where a person, without fault on his part has been compelled to pay damages occasioned by the negligence of another, he is entitled to indemnity from the latter, whether contractual relations exist between them or not.[43] Under such circumstances the law implies an obligation on the part of the one actually responsible for the accident to pay the damages resulting from his own negligence. Such situations arise in cases where a master, himself not at fault, has been compelled to pay damages for injuries sustained by a third person by reason of the negligence of his servant [44] and where an agent is held liable for damages for a tort committed in compliance with his principal's instructions.[45] The right to indemnity, as distinguished from contribution, stands upon the principle that every one is responsible for his own negligence, and if another person has been compelled to pay the damages which

---

defendants settled with the plaintiff. When the jury returned a verdict against the other defendant alone, the defendant moved to amend the judgment by including both defendants. The court denied the motion stating that the right of contribution depends upon the plaintiff having a cause of action against the defendant from whom contribution is sought and that the defendant seeking contribution must first pay the judgment before the right to contribution arises. In view of these principles, held the court, no right may be executed to compel the defendant who had made the settlement to be joined in the judgment.

[43] Colonial Motor Coach Corp. v. New York Central R. R., 131 Misc. 891, 228 N. Y. Supp. 508 (Sup. Ct. 1928).

[44] Opper v. Tripp Lake Estates, 274 App. Div. 422, 84 N. Y. S. 2d 461 (1st Dep't 1948); Fedden v. Brooklyn Eastern Dist. Terminal, 204 App. Div. 741, 199 N. Y. Supp. 9 (2d Dep't 1923).

[45] Howe v. Buffalo, N. Y. & E. R. R., 37 N. Y. 297 (1867).

ought to have been paid by the wrongdoer, they may be recovered from that wrongdoer.[46]

An interesting variation of this rule exists in those cases where both parties are negligent but as between themselves the negligence of one was merely *passive* and the negligence of the other was the *active* cause of the wrong. In such a case the former may recover over against the latter. The terms active [47] and passive [48] as used in these cases are elusive in their meaning and uncertainty results in an attempt to define them.

A number of cases have granted indemnity to one who has been held liable in tort for his own negligence in failing to discover and remedy a dangerous condition created by the negligence or wrongful act of another. These cases are usually of two types. The first group usually involves a defendant who has constructed an abutment on a public highway or contiguous to the land of a third person, so dangerous as to require its owner or possessor to exercise care to put it in safe repair. In such case, if the possessor, who is merely guilty of passive negligence in not eliminating the dangerous condition, is held liable in damages, he may recover indemnity against the defendant who was responsible for creating the peril.[49] The second type of case arises where a municipality is held liable to the injured person by failing to repair a dangerous condition in a highway. Again, the municipality is charged with knowledge of the dangerous

---

[46] Oceanic Steam Nav. Co., Ltd. v. Compania Transatlantic Espanola, 134 N. Y. 461, 31 N. E. 987 (1892).

[47] Cohen v. Noel, 104 S. W. 2d 1001, 1005 (1937) (the term "active negligence" is one of extensive meaning obviously embracing many occurrences that would fall short of wilful wrongdoing, or of gross negligence).

[48] Employer's Liability Assur. Corp. v. Post & McCord, 261 App. Div. 242, 25 N. Y. S. 2d 52 (1st Dep't 1941) (passive negligence is the failure to do something that should have been done).

[49] Scott v. Curtis, 195 N. Y. 424, 428, 88 N. E. 794, 795 (1909). The court here said: "The liability of the owner of real property for injury to a passerby for negligence in covering or in failing to cover or guard such a hole in a sidewalk does not relieve the active or actual wrongdoer from the consequences of their acts. The liability to the passerby is joint. As between themselves the active wrongdoer stands in the relation of an indemnitor to the person who has been held legally liable thereon"; Schwartz v. Merola Bros. Construction Corp., 263 App. Div. 631, 34 N. Y. S. 2d 220 (1st Dep't 1942), *motion denied*, 289 N. Y. 756, 46 N. E. 2d 357 (1942), *aff'd*, 290 N. Y. 145, 48 N. E. 2d 299 (1943); Wellington v. Jones Estates Corp., 29 N Y. S. 2d 433 (Sup. Ct. 1941). Here the jury found that both the tenant, whose duty it was to repair leased premises in its possession and control, and the landlord, which by the terms of the lease was to be indemnified by the tenant for damages arising out of active negligence, were liable for injuries sustained by a pedestrian who was struck by glass window ventilator which fell from the leased floor of the building. The court held that the jury necessarily must have found that the accident was caused by the negligence of the tenant, its servants, or licensees, and hence the tenant was primarily liable, and the landlord was entitled to judgment over against the tenant on a cross complaint because the landlord and tenant were not in "pari delicto." The tenant's negligence was "active negligence," and that of the landlord was "passive negligence."

condition that the defendant has created. In such cases the right of the municipality to indemnity is based on the ground that its negligence was passive in failing to remedy the dangerous situation, while the defendant's negligence was active in the creation of the nuisance.[50]

It should be noted that in both instances the active negligence preceded the passive negligence. Another situation arises where the passive negligence precedes the active negligence. In New York this situation has most often arisen in actions by a general contractor against a sub-contractor on an indemnity contract, express or implied, where the plaintiff has been held liable for injuries to a third person caused by the active negligence of the defendant. The distinction here between active and passive negligence is defined in the leading case of *Dudar v. Milef Realty Corp.*,[51] where the court stated that the rule denying indemnity between joint tort-feasors did not apply where the two parties had not participated in the wrong but the wrongful act of one exposed the other to liability and damages. "The contractor's obligation," said the court, "plainly covers injuries caused by the contractor's negligence in which the owner did not participate, and where the owner's negligence, if any, was passive and in the performance of a duty owed not to the contractor but to

---

[50] Kaplan v. City of New York, 269 App. Div. 856, 56 N. Y. S. 2d 934 (2d Dep't 1945). In this case judgment against the City for personal injuries rested entirely upon the maintenance of a public nuisance by the property owner. As between the City and the property owner the City was guilty merely of passive negligence while the property owner was guilty of affirmative negligence in the maintenance of a dangerous encroachment upon the public sidewalk. The City was entitled to judgment on its cross-complaint against the property owner; Lobello v. City of New York, 268 App. Div. 880, 51 N. Y. S. 2d 7 (2d Dep't 1944), *appeal denied*, 268 App. Div. 999, 52 N. Y. S. 2d 790 (2d Dep't 1944), *aff'd without opinion*, 294 N. Y. 816, 62 N. E. 2d 243 (1945). The proximate cause of the injury to a pedestrian falling on a sidewalk was the contractor's negligent failure to put lights on a barricade. The City was entitled to judgment on its cross-complaint against the contractor in the pedestrian's action for damages against the City, the owner of the abutting premises, and the contractor. The contractor was the active wrong-doer and the City was guilty of passive negligence only; Spirgatis v. Gross Morton Corp., 263 App. Div. 962, 32 N. Y. S. 2d 959 (2d Dep't 1942); Branch v. Town of Eastchester, 258 App. Div. 727, 14 N. Y. S. 2d 863 (2d Dep't 1939).

[51] 258 N. Y. 415, 180 N. E. 102 (1932). Here a laborer working on a building was injured by the negligence of the engineer of the brickwork contractor in operating a hod hoist. The general contractor's superintendent failed to direct the engineer not to operate the hoist above a certain floor or to take any other steps to protect laborers. The brickwork contractor had expressly assumed the sole responsibility for injuries caused by him or his employee and had agreed to indemnify the owner from all damages therefrom. He was held liable to indemnify the general contractor for the amount recovered by the laborer against the general contractor. The court based its decision on the finding that the general contractor's negligence was merely passive in failing to take more precautions against the risk of injury through the operation of the hoist in which he did not participate.

the injured party." [52] The liability which results from the mere omission of a legal duty is to be distinguished in these cases from that which results from participation or acquiescence in an affirmative act of negligence on the part of the original contractor.[53] Though the plaintiff and defendant are equally culpable and equally liable to third persons for the omission which resulted in injury, as between themselves the plaintiff's mere passive omission should not bar indemnity from a defendant who directly and actively participated in the negligent injury. The rule bars indemnity only when the indemnitee has been guilty of active wrongdoing, *i.e.*, that he did in fact participate in some manner beyond his mere failure to perform the duty imposed on both by law.[54] Thus, viewed objectively, it appears that whether the active negligence precedes the passive negligence, or the passive precedes the active, the right of indemnity arises from the fact that the parties are not equally at fault and the party whose active wrong caused the injury is liable as indemnitor to one whose breach of duty is merely passive.

Strictly speaking the doctrine of active and passive negligence is related to the doctrine of indemnification, and not contribution. It is based on the principle that where the parties are not equally at fault, the primary wrongdoer is bound to indemnify the one who is merely subsidiarily liable as against the co-wrongdoer. The doctrine of contribution between joint tort-feasors under Section 211-a is applied only where the parties are in pari delicto. Thus where the balance of fault weighs heavier on one side, the remedy is in indemnity and it is only where, as between themselves, the parties are in pari delicto that the doctrine of contribution between joint tort-feasors under Section 211-a is properly invoked.

VINCENT L. ROSATO.

---

[52] *Accord,* Tipaldi v. Riverside Memorial Chapel, Inc., 273 App. Div. 414, 78 N. Y. S. 2d 12 (1st Dep't 1948). Evidence that the owner of a building under construction omitted to see that travellers on a public highway were not injured established a passive negligence rather than that type of active negligence which would preclude indemnity from the general contractor in the event that the owner was held in damages for injuries to a passerby. Employer's Liability Assur. Corp. v. Post & McCord, 261 App. Div. 242, 25 N. Y. S. 2d 52 (1st Dep't 1941), *rev'd on other grounds,* 286 N. Y. 254, 36 N. E. 2d 135 (1941).

[53] Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N. Y. Supp. 855 (2d Dep't 1905).

[54] Schwartz v. Merola Bros. Construction Corp., 290 N. Y. 145, 48 N. E. 2d 299 (1943).