



1-1-1968

Tort Indemnity in California

John B. Molinari

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

John B. Molinari, *Tort Indemnity in California*, 8 SANTA CLARA LAWYER 159 (1968).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol8/iss2/2>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

TORT INDEMNITY IN CALIFORNIA

John B. Molinari*

Indemnity is generally defined as the obligation resting on one person to make good any loss or damage another has incurred.¹ The right to indemnity and the obligation to indemnify include indemnity for another's negligence or tortious act. Until recently, California recognized only the right to indemnity springing from an express contract; but concomitant with the enactment of the Contribution Statute of 1957² there has emerged in this state the doctrine of implied indemnity arising from implied contract or upon equitable considerations.³ This doctrine has opened up new sources of tort litigation and has already resulted in a substantial number of appellate decisions expounding the nature of the right and its application to given situations. It is also significant to note that since the right to indemnity has been expanded to situations to which it did not previously apply, attempts to counteract the application of implied indemnity have also resulted in expanding the collateral field of litigation dealing with provisions in express contracts providing for exculpation from and indemnity against tortious conduct. It is the purpose of this article to deal generally with tort indemnity, express and implied, but with particular emphasis on the development of implied indemnity.

EXPRESS INDEMNITY

The indemnity arising from express contract has been recognized in California by statute since 1872,⁴ and by early⁵ as well as recent decisions.⁶ Since parties may expressly contract with respect

* A.B. 1931, LL.B. 1933, University of San Francisco; LL.D. 1965, Lincoln University. Presiding Justice, California Court of Appeal, First Appellate District, Division One.

¹ 44 C.J.S. *Indemnity* § 1 (1944); RESTATEMENT OF RESTITUTION §§ 76-102 (1937).

² CAL. CODE CIV. PROC. §§ 875-80 (West Supp. 1967).

³ *Peters v. City & County of San Francisco*, 41 Cal. 2d 419, 431, 260 P.2d 55, 62 (1953); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962).

⁴ CAL. CIV. CODE § 2772 (West 1954).

⁵ *Somers v. United States Fidelity & Guar. Co.*, 191 Cal. 542, 217 P. 746 (1923); *Showers v. Wadsworth*, 81 Cal. 270, 22 P. 663 (1889); *Commercial Union Assurance Co. v. American Cent. Ins. Co.*, 68 Cal. 430, 9 P. 712 (1886); *Alberts v. American Cas. Co.*, 88 Cal. App. 2d 891, 200 P.2d 37 (1948); *Davis v. California Highway Indem. Exch.*, 118 Cal. App. 403, 5 P.2d 447 (1931).

⁶ *Markley v. Beagle*, 66 Cal. 2d 951, 59 Cal. Rptr. 809, 429 P.2d 129 (1967); *John E. Branagh & Sons v. Witcosky*, 242 Cal. App. 2d 835, 51 Cal. Rptr. 844 (1966).

to indemnity, the extent of their obligation is determined from the contract according to the rules governing the requisites and validity of contracts and not by reference to the independent doctrine of implied or equitable indemnity.⁷ Accordingly, the promise made in an indemnity contract is an original and not a collateral undertaking, and the liability assumed is a primary one.⁸

IMPLIED INDEMNITY

Although the parties do not expressly contract with respect to indemnity, the right of indemnification may nevertheless arise by implication as a matter of law either as a result of contract or as a result of equitable considerations.⁹ Such indemnity is referred to as implied indemnity or as equitable indemnity. The development of the doctrine of implied indemnity in tort and its application to factual situations will be discussed later in this article, but it should be here noted that the cases will disclose that implied indemnity partakes of two types, contractual and non-contractual. The former rests upon a contractual relationship between the person seeking and the one resisting indemnity; the latter rests upon the fault of another which has been imputed to or constructively fastened upon the person who seeks indemnity without regard to any contractual relationship.¹⁰

RIGHT OF CONTRIBUTION DISTINGUISHED

A proper understanding of the nature and application of the right of indemnity requires a conversance with the right of contribution. The right of contribution among tortfeasors, where it exists, presupposes that the parties are equal in legal fault, *i.e.*, in *pari delicto*, and that the common liability is shared by them on a pro rata basis.¹¹ Indemnity, on the other hand, imposes the entire loss on

⁷ Markley v. Beagle, 66 Cal. 2d 951, 961, 59 Cal. Rptr. 809, 816, 429 P.2d 129, 136 (1967); County of Los Angeles v. Cox Bros. Constr. Co., 195 Cal. App. 2d 836, 842, 16 Cal. Rptr. 250, 253 (1961). See also CAL. CIV. CODE § 2772 (West 1954).

⁸ See 42 C.J.S. *Indemnity* § 1 (1944).

⁹ City & County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 130, 330 P.2d 802, 803 (1958); Peters v. City & County of San Francisco, 41 Cal. 2d 419, 431, 260 P.2d 55, 62 (1953); Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 76, 4 Cal. Rptr. 379, 384 (1960).

¹⁰ See Cahill Bros. v. Clementina Co., 208 Cal. App. 2d 367, 376, 378-79, 25 Cal. Rptr. 301, 305, 307-08 (1962).

¹¹ Herrero v. Atkinson, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964); Mundt v. Alta Bates Hosp., 223 Cal. App. 2d 413, 417, 35 Cal. Rptr. 848, 850 (1963); American Can Co. v. City & County of San Francisco, 202 Cal. App. 2d 520, 524-26, 21 Cal. Rptr. 33, 35-36 (1962); Apodacca v. Hamilton, 189 Cal. App. 2d 78, 82, 10 Cal. Rptr. 885, 888 (1961); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960).

the party found to be primarily liable.¹² In noting the distinction between contribution and indemnity we observe that in California the former is mainly a creature of statute while the latter is essentially the progeny of judicial decisions.

In 1957 the California Legislature enacted the Contribution Statute¹³ providing for the right of contribution, but made it dependent upon the presence of specific statutory conditions.¹⁴ Where these specific conditions do not exist, the common law rule still prevails that there is no contribution between persons jointly or severally liable in tort.¹⁵ It should be here pointed out that the Contribution Statute expressly takes cognizance of the existence of the right of indemnity in tort by its provisions that "[t]his title shall not impair any right of indemnity under existing law, and where one tortfeasor judgment debtor is entitled to indemnity from another there shall be no right of contribution between them."¹⁶

In the light of the foregoing distinctions the onus is placed on the trial judge to determine in a given case whether the case is one of indemnity or contribution since the conduct of the trial will depend on the nature of the right. Thus, in a contribution case evidence of the amount received in settlement from a joint tortfeasor is admissible to prove an elimination of a portion of the damages claimed by the plaintiff and the jury shall be instructed that the amount of settlement should be deducted from the total amount of the damage found to have been sustained by the plaintiff.¹⁷ Accordingly, the determination, in each instance, depends upon the facts of the particular case.¹⁸

EMERGENCE OF THE DOCTRINE OF IMPLIED INDEMNITY

In 1953 the California Supreme Court had before it, in *Peters v. City & County of San Francisco*,¹⁹ a case involving an action

¹² *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 73, 38 Cal. Rptr. 490, 492 (1964); *Alisal Sanitary Dist. v. Kennedy*, 180 Cal. App. 2d 69, 75, 4 Cal. Rptr. 379, 383 (1960).

¹³ CAL. CODE CIV. PROC. §§ 875-80 (West Supp. 1967).

¹⁴ See CAL. CODE CIV. PROC. §§ 875-77 (West Supp. 1967).

¹⁵ *Guy F. Atkinson Co. v. Consani*, 223 Cal. App. 2d 342, 344, 35 Cal. Rptr. 750, 751 (1963); *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 523, 21 Cal. Rptr. 33, 34 (1962).

¹⁶ CAL. CODE CIV. PROC. § 375(f) (West Supp. 1967); see *County of Los Angeles v. Cox Bros. Constr. Co.*, 195 Cal. App. 2d 836, 842, 16 Cal. Rptr. 250, 253-54 (1961).

¹⁷ CAL. CODE CIV. PROC. §§ 877 (West Supp. 1967); *Turner v. Mannon*, 236 Cal. App. 2d 134, 139, 45 Cal. Rptr. 831, 835 (1965); *Cseri v. D'Amore*, 232 Cal. App. 2d 622, 625, 43 Cal. Rptr. 36, 38-39 (1965); *Watson v. McEwen*, 225 Cal. App. 2d 771, 775, 37 Cal. Rptr. 677, 680 (1964); *Steele v. Hash*, 212 Cal. App. 2d 1, 3, 27 Cal. Rptr. 853, 854 (1963).

¹⁸ *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

¹⁹ 41 Cal. 2d 419, 260 P.2d 55 (1953).

against the city and the owners of an apartment house for damages for injuries to a pedestrian as a result of a fall on the sidewalk in front of the apartment house. While the right of indemnity was not directly involved, it was suggested in *Peters* that a right of indemnification as between joint tortfeasors may arise as a result of contract or equitable considerations and as an exception to the rule against contribution between joint tortfeasors.²⁰ The first clear recognition, however, came in *San Francisco Unified School District v. California Building Maintenance Co.*²¹ decided in July 1958. In that case it was held that a prima facie case for indemnity had been made by the school district plaintiff against the defendant maintenance company for damages that the district was compelled to pay to an employee of the maintenance company who had been injured while washing the windows of a high school. The company had agreed to wash the windows from the inside with stepladders but failed to furnish such ladders to its employees. The court held that the contract was breached, and that the damages flowing to the district from such breach were subject to indemnification under an agreement necessarily implied in the contract.

The *San Francisco Unified School District* case relied upon the rationale in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*²² and *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*²³ where it was held that a shipowner could claim indemnity against a stevedoring company whose employee had recovered a judgment against the shipowner for injuries sustained in the course of his employment connected with the unsafe manner in which cargo was unloaded from a vessel. Liability was there predicated upon the breach of the stevedoring contract, notwithstanding the absence of an express agreement of indemnity, the rationale being that such contract necessarily implied an obligation to perform the stevedoring services contracted for with reasonable safety, and to discharge foreseeable damages resulting to the shipowner from the contractor's improper performance and not flowing from the shipowner's negligence.

A few months later, in October 1958, the California Supreme Court decided *City & County of San Francisco v. Ho Sing*,²⁴ the first non-contractual implied indemnity case. In that case it was held that a city had the right to recover by way of indemnity the amount of damages it was compelled to pay a member of the public injured

²⁰ *Id.* at 430-31, 260 P.2d at 62.

²¹ 162 Cal. App. 2d 434, 328 P.2d 785 (1958).

²² 350 U.S. 124, 133 (1955).

²³ 355 U.S. 563, 569 (1958).

²⁴ 51 Cal. 2d 127, 330 P.2d 802 (1958).

by an artificial structure placed on the sidewalk by an abutting landowner for the exclusive benefit of his own property. The reviewing court, although noting that other jurisdictions drew a distinction between "active" and "passive" negligence in holding that a municipality is entitled to indemnity from the landowner in such a situation, preferred to predicate liability upon the equitable considerations of a "primary" duty on the part of the landowner and a "secondary" duty on the part of the municipality arising out of the special relationship existing between them. The rationale of *Ho Sing* is that the city's duty was secondary to that of the landowner in that the city was liable solely because it failed or neglected to keep the sidewalk safe, while the landowner was primarily liable because it was his wrongful act or conduct that rendered the sidewalk unsafe.²⁵

The first case to come to grips with the question of primary and secondary liability in a tort action not involving a special relationship as exists in the case of a municipality and an abutting landowner is *American Can Co. v. City & County of San Francisco*²⁶ decided in April 1962. There the vehicle owned by the plaintiff, who was seeking indemnity, struck the defendant's improperly parked truck injuring two of the latter's employees who were on the truck and who thereafter had recovered damages from the plaintiff. The appellate court held that the complaint did not state a cause of action for indemnity because under the facts pleaded it appeared that the plaintiff was actively negligent and, therefore, primarily liable, notwithstanding the defendant may have been more negligent. The *American Can* case, recognizing that the distinction between "active" and "passive" negligence is not of itself a sufficient basis for an implied duty to indemnify, adopted, as the better rule, the rule of primary and secondary liability announced in *Builders Supply Co. v. McCabe*,²⁷ and the rationale supporting it, as follows:

The right of *indemnity* rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which enures to a person who, without active fault on his part, has been compelled by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable. The difference between primary and secondary liability is not based on a difference in *degrees* of negligence or on any doctrine of *comparative* negligence—a doctrine which, indeed, is not recognized by the common law; . . . It depends on a difference in the *character* or *kind* of the wrongs which cause the injury and in the nature of the legal obligation owed by each

²⁵ *Id.* at 133-34, 330 P.2d at 805-06.

²⁶ 202 Cal. App. 2d 520, 21 Cal. Rptr. 33 (1962).

²⁷ 366 Pa. 322, 325-26, 77 A.2d 368, 370-71 (1951).

of the wrongdoers to the injured person. . . . 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 relation 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 the one primarily responsible.²⁸

The foregoing decisions, and others, were analyzed, discussed, distinguished and reconciled in *Cahill Bros. v. Clementina Co.*²⁹ decided in October 1962. *Cahill* pointed out the significance of the distinction between contractual and non-contractual implied indemnity and noted that in the former the courts are not concerned with the incidents of primary and secondary liability but rather with the question as to whether the defendant has breached a contractual duty owing to the plaintiff seeking indemnity.³⁰ In each instance, however, the crux of the inquiry is whether the person seeking indemnity *participated in some manner* in the conduct or omission that caused the injury beyond the mere failure to perform the duty imposed on him by law.³¹ Accordingly, if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or if he fails to perform some duty in connection with the omission which he may have undertaken by agreement, he is deprived of the right of indemnity.³²

CONTRACTUAL IMPLIED INDEMNITY

As pointed out in *Cahill*, contractual implied indemnity rests upon a contractual relationship between the person seeking and the one resisting indemnity and is based upon the breach of the contract by the person against whom indemnity is sought. Thus implicit in a written agreement to perform services is the implied duty to perform the work in a safe manner and to discharge foreseeable damages from negligent performance.³³ Accordingly, the right of contractual

²⁸ *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 525, 21 Cal. Rptr. 33, 36 (1962).

²⁹ 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

³⁰ *Id.* at 379-80, 25 Cal. Rptr. at 308.

³¹ *Id.* at 381, 25 Cal. Rptr. at 309.

³² *Id.* at 382, 25 Cal. Rptr. at 309.

³³ *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 569 (1958); *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 133 (1955); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 376, 25 Cal. Rptr. 301, 305 (1962); *Montgomery Ward & Co. v. KPIX Westinghouse Broadcasting Co.*, 198 Cal. App. 2d 759, 761-62, 18 Cal. Rptr. 341, 342-43 (1962); *De La Forest v. Yandle*, 171 Cal. App. 2d 59, 61, 340 P.2d 52, 53-54 (1959); *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 447, 328 P.2d 785, 793 (1958).

implied indemnity has been found to exist in a variety of situations where implicit in the contract to perform work is the duty to perform it in a skillful, expert or careful manner.³⁴

NON-CONTRACTUAL IMPLIED INDEMNITY

Non-contractual implied indemnity arises where the person who seeks indemnity is required to rely upon equitable considerations because he cannot predicate his right upon a contractual relationship between him and the one resisting indemnity. In California, as indicated by the rationale and trend of the decisions, these equitable considerations are those which recognize the difference between primary and secondary liability. These cases recognize the right of a claimant to shift the entire loss to another where the claimant who is without active fault or negligence on his part is compelled by reason of some legal obligation to pay damages occasioned by the negligence of the other.³⁵

The case of *Herrero v. Atkinson*³⁶ presents an interesting example of the operation on non-contractual implied indemnity. There the plaintiff was allowed indemnity against certain doctors whose malpractice resulted in the death of a woman in the treatment of injuries resulting from the plaintiff's operation of his motor vehicle. The holding in *Herrero* was predicated upon the basis that, since the plaintiff had no part in the selection of the doctors and no control or direction over their conduct, he was entitled to recover the portion of the damages caused by the doctors' negligence even though, as to the heirs of the decedent, plaintiff was liable for all of the damages because his original negligence was the proximate cause of the subsequent malpractice.³⁷

³⁴ *Ferrel v. Vegetable Oil Prods. Co.*, 247 Cal. App. 2d 117, 55 Cal. Rptr. 589 (1966); *Vegetable Oil Prods. Co. v. Superior Court*, 213 Cal. App. 2d 252, 28 Cal. Rptr. 555 (1963) (both the foregoing cases involving claim of property owner against employer whose employee sued owner for injuries sustained on owner's premises resulting from employer's failure to provide for employee's safety); *Great Western Furniture Co. v. Porter Corp.*, 238 Cal. App. 2d 502, 48 Cal. Rptr. 76 (1965) (assault by employee of one corporation but under exclusive control of another corporation); *Montgomery Ward & Co. v. KPIX Westinghouse Broadcasting Co.*, 198 Cal. App. 2d 759, 18 Cal. Rptr. 341 (1962) (telecast); *Alisal Sanitary Dist. v. Kennedy*, 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960) (engineering work); *De La Forest v. Yandle*, 171 Cal. App. 2d 59, 340 P.2d 52 (1950) (axle repair).

³⁵ *City & County of San Francisco v. Ho Sing*, 51 Cal. 2d 127, 138, 330 P.2d 802, 808 (1958); *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 607, 57 Cal. Rptr. 701, 703 (1967); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 378-79, 25 Cal. Rptr. 301, 307 (1962); *Pierce v. Turner*, 205 Cal. App. 2d 264, 267-68, 23 Cal. Rptr. 115, 117-18 (1962); *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 525, 21 Cal. Rptr. 33, 36 (1962); *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325-26, 77 A.2d 368, 370-71 (1951).

³⁶ 227 Cal. App. 2d 69, 38 Cal. Rptr. 490 (1964).

³⁷ *Id.* See also *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967).

Until the recent case of *City of Sausalito v. Ryan*³⁸ two prerequisites were necessary for the operation of the doctrine of non-contractual implied indemnity in California. These were: (1) that the damages which the claimant sought to shift were imposed upon him initially as the result of some legal obligation to the injured party; and (2) that the claimant did not actively or affirmatively participate in the wrong.

The *City of Sausalito* case appears to enlarge upon the rule as declared by the cases which preceded it. There a passenger in a motor vehicle was drowned in San Francisco Bay following a collision between that vehicle and another vehicle. A wrongful death action was brought against the drivers of the two vehicles based upon the intoxication of the host driver and the negligence of the other, and against the city for negligence in violation of a statute in maintaining a dangerous road without a barrier between it and the bay.³⁹ The appellate court held that the city could cross-complain against the two individual defendants for indemnity in the event that it was found liable to the plaintiff. The rationale of the court's holding was that the right of indemnity can be predicated upon breaches of different qualities of duties and, accordingly, upon different planes of fault.

The court in *City of Sausalito* relied upon the rationale of *United Airlines, Inc. v. Wiener*,⁴⁰ where the federal appellate court expanded upon the theoretical basis of the doctrine of non-contractual implied indemnity in holding that its doctrinal basis is unjust enrichment. The court there took cognizance of the situations in which indemnity is permitted where the indemnitee is not actively negligent, but rejected the concepts of primary and secondary liability and held that one tortfeasor, although actively negligent, may recover damages by way of indemnity against another where there is a disparity of the gravity of fault or a difference in the contrasted character of the established fault. The court's rationale was that "where the offense is merely *malum prohibitum*, and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."⁴¹

A hearing has been granted in the *City of Sausalito* case by the California Supreme Court and it remains to be seen whether the rationale of that case will be upheld. It would appear that the

³⁸ 258 A.C.A. 92, 65 Cal. Rptr. 391 (1968).

³⁹ CAL. Gov. CODE § 835 (West Supp. 1967).

⁴⁰ 335 F.2d 379 (9th Cir. 1964).

⁴¹ *Id.* at 398-99.

appellate court was on firm ground when it held that the absence of a special relationship between the drivers of the two cars and the city did not prevent the application of the doctrine of equitable indemnity since it is clear that the right can be invoked even in the absence of a special relationship between the tortfeasors.⁴² The thrust of the decision appears to be, however, that in California, indemnity may be predicated upon the basis of the disparity in the contrasted gravity of fault. Such a rule is clearly an expansion of the doctrine of implied indemnity as heretofore recognized by the California cases. In light of the principles hereinafter discussed with respect to the claimant's fault, those cases would appear to hold that the crux of the inquiry is whether under the circumstances the city *participated* in the conduct or omission which caused the injury beyond the mere failure to perform the duty imposed upon it by law. It seems that in California there is no room for a contrast between the different planes of fault because if there is such participation then the claimant's fault suffices to preclude indemnity; if there is no such participation there is no fault and indemnity is permitted.

It should be pointed out here that there is no right of indemnity if the party seeking and the party resisting indemnity are both secondarily liable. Thus in *Horn & Barker, Inc. v. Macco Corp.*⁴³ the plaintiff was denied recovery by way of indemnity from the defendant where a workman, who was the general employee of the plaintiff and the special employee of the defendant, was negligent in the operation of a machine leased by the plaintiff to the defendant. The basis of the decision was that both employers were secondarily liable since there was "only one character or kind of wrong in issue, *i.e.*, the imputed liability resulting from the application of the doctrine of respondeat superior."⁴⁴

CLAIMANT AT FAULT

Whether a claimant can sustain a right of indemnity premised upon implied contractual or equitable indemnity, depends upon whether he has *participated* in some manner in the conduct or omission which caused the injury beyond the mere failure to perform the duty imposed upon him by law.⁴⁵ Accordingly, in each instance

⁴² See *Cobb v. Southern Pac. Co.*, 251 A.C.A. 1073, 1077, 59 Cal. Rptr. 916, 918 (1967); *Lewis Ave. Parent Teachers' Assn. v. Hussey*, 250 A.C.A. 297, 300, 58 Cal. Rptr. 499, 501-02 (1967); *Herrero v. Atkinson*, 227 Cal. App. 2d 69, 74, 38 Cal. Rptr. 490, 493 (1964).

⁴³ 228 Cal. App. 2d 96, 39 Cal. Rptr. 320 (1964).

⁴⁴ *Id.* at 101, 102-06, 39 Cal. Rptr. 323-26. See also *Progressive Transp. Co. v. Southern California Gas Co.*, 241 Cal. App. 2d 738, 51 Cal. Rptr. 116 (1966).

⁴⁵ *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 381, 25 Cal. Rptr. 301,

the important determination (which is not always an easy one) is whether the claimant's participation went beyond non-action and the mere failure to perform a duty imposed by law.

In striving for a practical and workable rule to assist in determining whether the claimant's participation precludes recovery, the California courts have formulated the rule "that if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement," he cannot obtain indemnification.⁴⁶ In some cases this principle is succinctly stated in terms of nonrecovery where there is "active fault" on the claimant's part,⁴⁷ in others in terms of "active" and "passive" negligence, recovery being denied where the claimant is "actively negligent" or "affirmatively negligent."⁴⁸ Thus, a claimant has been deprived of the right of indemnity in the following situations: where he was concurrently negligent in the operation of a truck which collided with another vehicle;⁴⁹ where he failed to supervise the negligent tree-cutting operation by an employee;⁵⁰ and where the plaintiff's superintendent who acted as defendant's manager took part in the construction of a defective barricade by the defendant.⁵¹ On the other hand, the right of indemnity was held to exist in favor of a general contractor against a subcontractor who failed to take precautionary measures for which the general contractor was also made responsible by opera-

309 (1962); *Alisal Sanitary Dist. v. Kennedy*, 180 Cal. App. 2d 69, 79, 4 Cal. Rptr. 379, 385-86 (1960); *San Francisco Unified School Dist. v. California Bldg. Maintenance Co.*, 162 Cal. App. 2d 434, 445, 328 P.2d 785, 792 (1958).

⁴⁶ *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 44, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964); *Harvey Mach. Co. v. Hatzel & Buehler, Inc.*, 54 Cal. 2d 445, 449, 353 P.2d 924, 927, 6 Cal. Rptr. 284, 287 (1960); *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 608, 57 Cal. Rptr. 701, 703-04 (1967); *Progressive Transp. Co. v. Southern California Gas Co.*, 241 Cal. App. 2d 738, 741, 51 Cal. Rptr. 116, 118-19 (1966); *Kwikset Locks v. Steward Commissaries*, 225 Cal. App. 2d 146, 151, 37 Cal. Rptr. 248, 251 (1964); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962); *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.*, 202 Cal. App. 2d 99, 111-13, 20 Cal. Rptr. 820, 826-27 (1962).

⁴⁷ *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 607, 57 Cal. Rptr. 701, 703 (1967); *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 525, 21 Cal. Rptr. 33, 36 (1962).

⁴⁸ *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 182, 49 Cal. Rptr. 414, 417 (1966); *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 382, 25 Cal. Rptr. 301, 309 (1962).

⁴⁹ *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 21 Cal. Rptr. 33 (1962).

⁵⁰ *Pierce v. Turner*, 205 Cal. App. 2d 264, 23 Cal. Rptr. 115 (1962).

⁵¹ *Cahill Bros. v. Clementina Co.*, 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

tion of law,⁵² and in favor of the owner of property where an independent contractor's employee was injured while performing duties in connection with a repair contract between the owner and the contractor and where the owner assumed no affirmative duties with respect to the work.⁵³

LABOR CODE SECTION 3864

As a result of the holding in the *San Francisco Unified School District* case, a third person who had been held liable for damages for injuries sustained by an employee of another could, where the doctrine of implied indemnity was applicable, seek indemnification against the employee's own employer where the latter's negligence proximately contributed to the injury. Accordingly, the effect of the doctrine in this situation was to make the employer not only liable for the injured employee's workmen's compensation, but for the additional damages awarded to him in common law as well.⁵⁴ To obviate this situation the legislature in 1959 enacted Labor Code section 3864,⁵⁵ the effect of which was to abolish the right of indemnity by the third person against the injured employee's employer on the theory of implied contract.⁵⁶ The 1959 statute does not, however, apply retroactively.⁵⁷

WITT V. JACKSON

Although under Labor Code section 3864 a third person cannot invoke implied indemnity against an injured employee's employer,

⁵² *Baldwin Contracting Co. v. Winston Steel Works*, 236 Cal. App. 2d 565, 46 Cal. Rptr. 421 (1965).

⁵³ *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 57 Cal. Rptr. 701 (1967); *Ferrell v. Vegetable Oil Prods. Co.*, 247 Cal. App. 2d 117, 55 Cal. Rptr. 589 (1966).

⁵⁴ *City of Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 404-05, 23 Cal. Rptr. 43, 47 (1962); see *Conley & Sayre, Rights of Indemnity As They Affect Liability Insurance*, 13 HASTINGS L.J. 214, 219 (1961).

⁵⁵ CAL. LABOR CODE § 3864 (West Supp. 1967) provides: "If an action as provided in this chapter prosecuted by the employee, the employer, or both jointly against the third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold harmless on such judgment or settlement in the absence of a written agreement to do so executed prior to the injury."

⁵⁶ *San Francisco Examiner Div. v. Sweat*, 248 Cal. App. 2d 493, 496-97, 56 Cal. Rptr. 711, 713-14 (1967); *Progressive Transp. Co. v. Southern California Gas Co.*, 241 Cal. App. 2d 738, 742, 51 Cal. Rptr. 116, 119 (1966); *Western Gulf Oil Co. v. Oilwell Serv. Co.*, 219 Cal. App. 2d 235, 241, 33 Cal. Rptr. 20, 24 (1963); *City of Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 405, 23 Cal. Rptr. 43, 47 (1962); *American Can Co. v. City & County of San Francisco*, 202 Cal. App. 2d 520, 524, 21 Cal. Rptr. 33, 35 (1962).

⁵⁷ *Aerojet Gen. Corp. v. D. Zelinsky & Sons*, 249 Cal. App. 2d 604, 608, 57 Cal. Rptr. 701, 704 (1967).

the third party tortfeasor may invoke the concurrent negligence of the employer for the purpose of reducing any judgment awarded the injured employee by the amount of workmen's compensation benefits paid under the rule of *Witt v. Jackson*.⁵⁸ "That rule provides that a third party tortfeasor may invoke the concurrent negligence of the employer to defeat the latter's right to reimbursement for workmen's compensation benefits paid to an employee proximately injured as a result of the negligence of such third party, whether an action against said third party is brought by an employer who has already paid workmen's compensation or by the employee who has received compensation."⁵⁹

HOLD HARMLESS CLAUSES

As already pointed out, parties may expressly contract with respect to indemnity. An indemnification agreement is one in which the indemnitor agrees to indemnify the indemnitee if and when a claim is asserted against the latter. Another device, frequently used in contractual dealings, to limit one's liability is the exculpatory clause. The party relying on an exculpatory provision generally seeks to avoid liability for his own negligence.⁶⁰ Since an exculpatory provision will be upheld only if it does not affect the "public interest"⁶¹ it is important to distinguish it from a situation where indemnification is contemplated.

One may provide for exculpation from or indemnification against his own negligence provided the agreement is clear and explicit.⁶² Although it has been held that such agreements are strictly construed against the party seeking exculpation or the indemnitee,⁶³

⁵⁸ 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). See also *Benwell v. Dean*, 249 Cal. App. 2d 345, 357-62, 57 Cal. Rptr. 394, 403-06 (1967); *City of Sacramento v. Superior Court*, 205 Cal. App. 2d 398, 405, 23 Cal. Rptr. 43, 47 (1962).

⁵⁹ *Benwell v. Dean*, 249 Cal. App. 2d 345, 358, 57 Cal. Rptr. 394, 403 (1967). See also *Witt v. Jackson*, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961).

⁶⁰ *John E. Branagh & Sons v. Witcosky*, 242 Cal. App. 2d 835, 838, 51 Cal. Rptr. 844, 846 (1966). See also CAL. CIV. CODE § 1668 (West 1954); *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 48-49, 396 P.2d 377, 382, 41 Cal. Rptr. 73, 78 (1964).

⁶¹ *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 48-49, 396 P.2d 377, 382, 41 Cal. Rptr. 73, 78 (1964); *John E. Branagh & Sons v. Witcosky*, 242 Cal. App. 2d 835, 838-39, 51 Cal. Rptr. 844, 846 (1966); see *Tunkl v. Regents of Univ. of California*, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (defining "public interest").

⁶² *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 44, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964); *Harvey Mach. Co. v. Hatzel & Buehler, Inc.*, 54 Cal. 2d 445, 353 P.2d 924, 6 Cal. Rptr. 284 (1960); *Vinnel Co. v. Pacific Elec. Ry.*, 52 Cal. 2d 411, 415, 340 P.2d 604, 607 (1959); *John E. Branagh & Sons v. Witcosky*, 242 Cal. App. 2d 835, 839, 51 Cal. Rptr. 844, 847 (1966); *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 181, 49 Cal. Rptr. 414, 417 (1966).

⁶³ *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 44, 396 P.2d 377, 379,

this rule has certain limitations. Thus, in interpreting a hold harmless clause phrased in general terms the courts in California look to the nature of the negligence or misconduct in determining whether the clause provides exculpation or indemnity.⁶⁴ If the breach of conduct is active or affirmative the indemnity or exculpatory clause will not be upheld.⁶⁵ Accordingly, the indemnity or exculpatory clause must clearly express that it affords protection against affirmative acts of negligence.⁶⁶ On the other hand, where the breach of duty amounts to no more than passive negligence or nonfeasance such as a negligent failure to discover a dangerous condition, a general clause will suffice.⁶⁷

CONCLUSION

In the light of the foregoing it is clear that in California indemnity may arise from an express contract, an implied contract, or as a result of equitable considerations. A party may expressly contract with respect to indemnity by providing for exculpation from or indemnification against his own negligence provided the agreement is clear and explicit, and provided further, that an agreement which is purely exculpatory is not against the public interest. Where the exculpatory or indemnification clause is phrased in general terms it will be interpreted not to avoid liability if the breach of conduct is active or affirmative; but where conduct is passive or amounts to no more than nonfeasance, the general clause will be upheld.

The right of indemnification may also arise by implication as a matter of law either as a result of contract or equitable considerations. Contractual implied indemnity rests upon a contractual relationship between the person seeking and the person resisting

41 Cal. Rptr. 73, 75 (1964); *Pacific Indem. Co. v. California Elec. Works*, 29 Cal. App. 2d 260, 271, 84 P.2d 313, 319 (1938).

⁶⁴ *Markley v. Beagle*, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967); *Harvey Mach. Co. v. Hatzel & Buehler, Inc.*, 54 Cal. 2d 445, 448-49, 353 P.2d 924, 927, 6 Cal. Rptr. 284, 287 (1960); *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.*, 202 Cal. App. 2d 99, 111-13, 20 Cal. Rptr. 820, 826-27 (1962).

⁶⁵ *Markley v. Beagle*, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967); *Goldman v. Ecco-Phoenix Elec. Corp.*, 62 Cal. 2d 40, 44-45, 396 P.2d 377, 379, 41 Cal. Rptr. 73, 75 (1964); *Vinnel Co. v. Pacific Elec. Ry.*, 52 Cal. 2d 411, 415, 340 P.2d 604, 607 (1959); *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 181-82, 49 Cal. Rptr. 414, 417 (1966).

⁶⁶ *Harvey Mach. Co. v. Hatzel & Buehler, Inc.*, 54 Cal. 2d 445, 353 P.2d 924, 926-27, 6 Cal. Rptr. 284, 286-87 (1960); *King v. Timber Structures, Inc.*, 240 Cal. App. 2d 178, 181-82, 49 Cal. Rptr. 414, 417 (1966); *Safeway Stores, Inc. v. Massachusetts Bonding & Ins. Co.*, 202 Cal. App. 2d 99, 111-13, 20 Cal. Rptr. 820, 826-27 (1962).

⁶⁷ *Markley v. Beagle*, 66 Cal. 2d 951, 962, 429 P.2d 129, 136, 59 Cal. Rptr. 809, 816 (1967); *Harvey Mach. Co. v. Hatzel & Buehler, Inc.*, 54 Cal. 2d 445, 448-49, 353 P.2d 924, 926-27, 6 Cal. Rptr. 284, 286-87 (1960).

indemnity and is based upon the breach of an agreement to indemnify necessarily implied in the contract. Non-contractual implied indemnity, on the other hand, depends upon equitable considerations and upon the difference between primary and secondary liability. Unless the *City of Sausalito* case represents the future law, there is no right of implied indemnity in California if the person seeking indemnity has participated in some manner in the conduct or omission which caused the injury beyond the mere failure to perform the duty which the law imposed on the claimant. By "participation" is meant active negligence or personal participation in an affirmative act of negligence, or physical connection with an act or omission by knowledge or acquiescence, or the failure to perform some duty in connection with the omission which the claimant may have undertaken by virtue of his agreement.