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Recent Decisions

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IMPLIED INDEMNITY IN CALIFORNIA: *CAHILL BROS. v. CLEMENTINA CO.* (CAL. 1962)

A subcontractor working at a construction site is negligent in the performance of his duties, causing injury to a pedestrian. The pedestrian brings an action against the general contractor, and recovers on the theory that because of the relationship between the general contractor and the subcontractor the negligence of the latter is imputed to the former. Does the general contractor have any right to recover in full from the subcontractor for the judgment which he satisfied?

This hypothetical situation must be distinguished from two closely related situations which will not be discussed. First, since the general contractor seeks full, not partial, recovery from his subcontractor, his right, if any, depends on the principles of indemnity and not on the principles of contribution. Secondly, since there is no express agreement of indemnity between the contractors, the general contractor must depend on a right to indemnity which arises as a matter of law, that is, a right to implied indemnity.[1]

While California only recently recognized the right to implied indemnity, such right is now well established.[2] Nevertheless, recognition of the right to implied indemnity has presented many problems to the courts in determining what rules apply, and what circumstances give rise to a right to implied indemnity. Until *Cahill Brothers Inc. v. Clementina Co.*[3] no clear pattern appeared to be evolving. The purpose of this article is to examine *Cahill* in light of the decisions which preceded it.

THE PRIOR LAW

The four California cases in point decided before 1962[4] spoke in terms of two theories supporting the right to implied indemnity.

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[1] PROSSER, TORTS § 46 (2d ed. 1955).

[2] San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958). See also CAL. CODE CIV. PROC. 875 (f).

[3] 208 Cal. App. 2d 367, 25 Cal. Rptr. 301 (1962).

[4] City and County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958); Alisal Sanitary Dist. v. Kennedy, 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960); De La Forest v. Yandle, 171 Cal. App. 2d 59, 340 P.2d 52 (1959); San Francisco Unified School Dist. v. California Bldg. Maintenance Co., 162 Cal. App. 2d 434, 328 P.2d 785 (1958). For a detail analysis of these four cases and the theories of indemnity applied to sustain recovery see 13 HASTINGS L.J. 214 (1961-62). As this article aptly points out, the source of the problem is that the courts were not clear in those cases as to what theory they were applying.

The dominant theory is basically one in tort, derived from a Pennsylvania case,[5] which defined implied indemnity as follows:

> The right of indemnity rests upon a difference between the primary and the secondary liability of two persons each of whom is made responsible by the law to an injured party. It is a right which inures to a person who, without active fault on his own 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.[6]

The other theory to which the courts have alluded is one founded in contract which appears to have first been stated by the United States Supreme Court in *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*[7] There the Court said that where one who holds himself out as an expert in his field accepts a job, he is impliedly agreeing to perform his work in a safe and reasonable manner. It is this failure to perform his work with safety, resulting in injury to a third person, which may give rise to a right of indemnity.[8]

Three cases decided in 1962, before *Cahill,* illustrate the difficulty courts have had in determining which of these two theories should apply in a given case. In *Montgomery Ward & Co. v. KPIX Westinghouse Broadcasting Co.*[9] an employee of defendant television station was injured during a telecast originating from the plaintiff's building. Plaintiff sought indemnity from the television station for amounts paid to the employee in satisfaction of a judgment. The trial court sustained a demurrer but was reversed on the ground that there were California cases supporting such a cause of action. The court cited the *Ryan* case, and the four earlier California decisions, but failed to distinguish between the two theories, tort and contract. Instead, the court said simply:

> The complaint states a cause of action. It is based on the theory of implied indemnity and arises out of the relationship of the parties, their agreement, and the alleged negligent conduct on the part of the defendant.[10]

Apparently, the court approved both theories as concurrently giving rise to the right of recovery. However, the court failed to recognize

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[5] Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 368, 24 A.L.R.2d 319 (1951).

[6] 26 Cal. Jur. 2d Indemnity § 2 n.16 (1963 Supp.).

[7] 350 U.S. 124 (1956).

[8] This theory was also recently applied in Curtis v. A. Garcia y Cia, 85 A.L.R.2d 1186 (1959).

[9] 198 Cal. App. 2d 759, 18 Cal. Rptr. 341 (1962).

[10] *Id.* at 761, 18 Cal. Rptr. at 342.

the clear distinction between the fact situation of at least one of the cases cited[11] and the case before it.

In *American Can Co. v. City and County of San Francisco*[12] plaintiff's employee had recovered against it in a previous action for injuries sustained when a vehicle owned by plaintiff struck an improperly parked city truck. In the case cited, plaintiff's claim for indemnity from defendant City and County was rejected. Plaintiff attempted to recover on the basis of the distinction between primary and secondary negligence, citing *City and County of San Francisco v. Ho Sing*[13] and *Alisal Sanitary Dist. v. Kennedy*[14] as support for its contention. The court answered that plaintiff had misread those cases, since both were decided on the basis of a special relationship between the parties; that even though *Alisal* speaks in terms of primary and secondary negligence, it was not decided on that basis. The distinction the court attempted to make goes to the heart of the problem: The difference between primary and secondary negligence is one in kind, arising out of the different duties owed, not one in degree, as in the doctrine of comparative negligence, where both parties owe the same duty to the injured party.[15] As the court correctly points out it is the principle of comparative negligence on which the plaintiff in *American Can Co.* would have to rely. Although the court's reasoning was correct, it drew such reasoning from the wrong case. As the court first said, the case before it was clearly distinguishable from *Alisal* because of the contractual relationship in the latter case. However, the confusion resulted because in *Alisal* the court spoke of both theories concurrently.[16] The court should have distinguished only the *Ho Sing* case by its analysis of primary and secondary liability, since in *Ho Sing* there was no contractual relationship between the parties.[17]

Pierce v. Diamond and Gardner Corp.[18] similarly adds to the

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11 City and County of San Francisco v. Ho Sing, 51 Cal. 2d 127, 330 P.2d 802 (1958).

12 202 Cal. App. 2d 520, 21 Cal. Rptr. 33 (1962).

13 51 Cal. 2d 127, 330 P.2d 802 (1958).

14 180 Cal. App. 2d 69, 4 Cal. Rptr. 379 (1960).

15 Builders Supply Co. v. McCabe, 366 Pa. 322, 77 A.2d 319 (1951).

16 The confusion arose because the *Alisal* case appears to adopt the rule of primary and secondary liability citing from *Builders Supply Co.* In *Builders Supply* the plaintiff sought indemnity on the basis that the defendants' auto caused plaintiff to swerve into the path of an oncoming auto. Recovery was denied because indemnity was said to rest upon the primary and secondary negligence of the two persons and doesn't exist in the case of tortfeasors owing the same duty to the injured party and having no legal relation to each other. The court however, in the principal case had already distinguished *Alisal* and *Ho Sing* on the basis of the legal relationships existing between the parties.

17 205 Cal. App. 2d 264, 23 Cal. Rptr. 115 (1962).

18 208 Cal. App. 2d 367 at 376, 25 Cal. Rptr. 301 at 306 (1962).

confusion. There the corporation employed one Turner to cut timber. Turner employed Pierce to do the work. Pierce negligently damaged a home. The homeowners joined the corporation, Turner and Pierce, recovered judgment from all three, but recovered payment only from Pierce. Pierce sought contribution from Turner, who resisted on the ground that he would have been entitled to indemnity from Pierce. Pierce was allowed to recover on the theory that even though he was primarily liable, Turner's negligent supervision negated his claim of a right to indemnity. The court's reasoning was internally consistent, but it considered the tort theory as the only possible basis of indemnity. In dealing with the right of contribution, the court seems erroneously to have failed to recognized the purely contractual relationship between the parties.

THE CAHILL CASE

Cahill was decided shortly after the above cases. Cahill hired Clementina to perform a demolition job at one of Cahill's construction sites. Because the controlling shareholder of the Clementina Co. was also the general superintendent for Cahill, both companies were being supervised by the same person. In keeping with prior practice, the contract between the parties was oral. As a result of Clementina's failure to properly barricade the job a pedestrian was injured when he fell into an excavation on the job site. A judgment was recovered from both parties in a previous action, and Cahill sought indemnification from Clementina. The court was faced with the same question as in the prior cases: Is there a right to implied indemnity here, and if so, on what principles is such a right based? Recognizing the confusion that had arisen from the prior cases, the court said:

> It appears that the general rule as evolved from previous cases is that the right of implied indemnity rests upon the difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party . . . . However, a close analysis of the cases discloses that where the right of implied indemnity rests upon a contractual relationship between the two parties *it is not necessary or appropriate to apply the theories of primary and secondary liability.*[19]

Cahill makes it clear that the right of implied indemnity in contractual cases is based upon a breach of contract by the person against whom indemnity is sought. The contract has been breached, and the resulting damages are subject to an agreement to indemnify implied in the contract. The reasoning is basically that of the

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[19] *Id.* at 376, 25 Cal. Rptr. 308.

Supreme Court in *Ryan*: Where the parties are bound by contract, this contract necessarily implies an obligation to perform with safety and to discharge foreseeable damages resulting from an improper performance.

The court in *Cahill* classified that action as based on the theory of "implied contractual indemnity" and said: "we are therefore not concerned with the incidents of primary and secondary liability but rather with the question as to whether Clementina breached a contractual duty to Cahill."[20] The court in effect recognized the basis for distinguishing *Ho Sing* and *American Can Co.*, by stating that in the area of noncontractual indemnity the right rests upon the fault of another which has been imputed to or constructively fastened upon the one seeking indemnity. In such a case the proper theory of recovery is based on the "equitable considerations arising from the distinction between primary and secondary negligence,"[21] rather than on breach of contract.

CONCLUSION

The distinction made in *Cahill* between "contractual" and "noncontractual" implied indemnity is a valid one. The cases preceding *Cahill* make it clear that the courts which have chosen the tort theory have constantly been faced with the difficult task of determining what kind of imputed negligence will be called "secondary," and thus give rise to a right of indemnity against the real, or "primary" tortfeasor. It is with great difficulty that the courts distinguish between primary and secondary liabilty. Under the tort theory the court must evaluate the nature of the legal obligation owed by each party to the person injured.

Under the rule of the *Cahill* case, the court first determines whether the contractual relationship between the parties implies a term that the defendant, the party against whom indemnity is sought, will perform his part of the contract in a safe manner, and will hold the other harmless against any liability that may arise from his negligence. If this implied promise is breached, indemnity is available, unless, as in *Cahill,* the party seeking indemnity has actively participated in the negligent conduct.[22] The difference is that the court need not examine the nature of the legal obligation, or the reason for imputing liability to the party seeking indemnity. The

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[20] *Ibid.*

[21] *Id.* at 378, 25 Cal. Rptr. 307.

[22] Both *Cahill* and *Pierce* speak in terms of adequate supervision and control as the elements to be considered in deciding whether the neglignce of the party seeking indemnity is sufficient to deny him recovery.

court simply looks to that party's actions, to determine whether by his affirmative act he contributed to the injury. If he did, he is not entitled to indemnity; if he did not, he may recover for breach of the implied contract.

Of course, the tort theory of indemnity has not been invalidated by the *Cahill* decision. If the parties are unrelated in any way, or if their relationship is not such as to imply a contract of indemnity, the tort theory may be relied upon. However, if there is such a relationship, *Cahill* has cleared the way to a much simpler action for indemnity: the plaintiff must merely prove the relationship, that it is the type from which a contract of indemnity will be inferred, and that plaintiff did not by his affirmative act contribute to injury. Under *Cahill*, there is no longer a need to explore the murky area of "primary" and "secondary" negligence.

Edward M. Alvarez

TORTS: BUILDER'S LIABILITY TO THIRD PARTY: *SABELLA v. WISLER* (CAL. 1963)

Wisler, an experienced home builder, constructed upon an inadequately filled lot a house he intended to offer for sale to the public. He negligently failed to inspect the soil upon which the house was being built. Three years after the house was sold a connecting sewer pipe began leaking, and within three months the house began settling unevenly, causing substantial damage. The leak was caused by either the settling of the inadequately filled earth, improper installation of the sewer pipe by a subcontractor, or a combination of both. The buyer of the house (Sabella) chose to ignore the vendor-purchaser relationship whereby Wisler's liability would have been based upon implied warranty with its attendant defense of *caveat emptor*, and predicated Wisler's liability solely upon negligence in construction of the house.[1]

The problem presented finds its basis in *Winterbottom v. Wright*[2] which held that an action in contract for breach of a duty arising from a contract could only be maintained by a party thereto.

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[1] Sabella v. Wisler, 59 A.C. 29, 377 P.2d 889, 27 Cal. Rptr. 689 (1963). Although there was privity of contract between Wisler and Sabella it is not mentioned in the decision because the privity existed only by considering Wisler in his capacity as vendor. In effect, as a builder Wisler was in privity of contract with himself as a vendor, and the court proceeded as if Wisler the Builder and Wisler the Vendor were separate and distinct persons.

[2] 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842).

This was interpreted to mean that an action in tort by a third party was precluded. The flaw in this reasoning was recognized by some courts, but it was not until *MacPherson v. Buick Motor Co.*[3] that the break-through came. This decision excepted from the *Winterbottom* doctrine products which, if defective, would be inherently dangerous not only to the party in privity of contract with the manufacturer, but also to other foreseeable users. The duty of reasonable care in manufacturing such a product therefore ran to all foreseeable users, and a breach thereof was actionable regardless of the absence of privity of contract.[4] This latter rule was being followed in California at least as early as 1932[5] and had been extended to suppliers and repairers[6] of chattels.

But *Winterbottom* had yet to be qualified or repudiated when applied to building contractors. Thus in *Kolburn v. P. J. Walker Co.*[7] the court held untenable the argument that a builder was liable for personal injuries[8] to a person not in privity resulting from defective construction of a building which had been accepted by the owner.[9] However, such an argument began to receive recognition as an exception. If the builder's work was so defective as to be imminently dangerous to third persons, and he knew of the defect whereas the owner did not and could not discover it by a reasonable inspection, then the builder would be liable.[10] Next, the "imminently dangerous" requirement was abrogated, and reasonable certainty of endangering third persons by the defect became the test.[11] This was the test in California up to 1957.[12] In 1955, however, a federal case had taken the lead and abolished the privity rule,[13] thereby providing support for the final blow to the privity doctrine in California which came in *Dow v. Holly Mfg. Co.*[14] This case changed the standard to that of reasonable care for the protection of anyone who may foreseeably be endangered by the builder's negligence.

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[3] 217 N.Y. 382, 111 N.E. 1050 (1916).

[4] For a complete discussion, see PROSSER, TORTS § 84 (2d ed. 1955).

[5] Dahms v. General Elevator Co., 214 Cal. 733, 7 P.2d 1013 (1932).

[6] *Ibid.*

[7] 38 Cal. App. 2d 545, 549-50, 101 P.2d 747, 748-49 (1940).

[8] The builder's liability for other than a personal injury did not even have the status of being untenable.

[9] This discussion is limited to situations where the owner has accepted the building and the party seeking recovery from the builder is not in privity of contract with him (be it the owner himself or a third party).

[10] Johnston v. Long, 56 Cal. App. 2d 834, 133 P.2d 409 (1943). See RESTATEMENT, TORTS § 385 (1934).

[11] Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948).

[12] Freeman v. Mazzera, 150 Cal. App. 2d 61, 309 P.2d 510 (1957).

[13] Hanna v. Fletcher, 231 F.2d 469 (D.C. Cir. 1955). (Builder held liable to tenant after landlord accepted the work.)

[14] 49 Cal. 2d 720, 321 P.2d 736 (1958).

Sabella could not recover from the negligent builder for the damage to his house under the law at this point. The cases thus far have talked about *personal injuries* to persons not in privity with the builder. Insofar as recovery for damage to such person's property is concerned, whether it be the thing defectively built or other property, the privity doctrine is still the law.[15] To trace the evolution of case law by which the negligent builder came to be held liable for damage to property, other streams of law must be examined.

The California construction of the *MacPherson* rule in its native habitat (automobile cases) allowed recovery for personal injury or damage to other property but not for damage to the defective car itself.[16] The reasoning was that the manufacturer's tort duty extended to exercising reasonable care to see that his product was free from defects which would produce bodily injury or damage to other property. On the other hand, his duty with respect to his product is based on warranty, and any action taken for breach thereof would necessarily sound in contract. Then a notary drafted a defective will which deprived the intended beneficiary of most of her inheritance.[17] The California Supreme Court issued a sweeping policy statement which enabled the beneficiary to recover from the notary although there was no privity:

> Liability to a third party not in privity is a matter of policy and depends on the extent to which the transaction was intended to affect Plaintiff; foreseeability of harm to him; the degree of certainty that he was harmed; close causal connection between Defendant's act and the harm; moral blame attached to Defendant's conduct; policy of preventing future harm.[18]

Furthermore, the risk involved and the damage incurred may be to intangible property only.[19]

Fourteen days after this decision it was recognized in *Fentress v. Van Etta Motors*[20] that an automobile manufacturer could be held liable in tort for damage to the automobile caused by a defect but only if the defect arising from his negligence involved the automobile in some violent accident or a collision with an external object.

In view of these extraneous developments it would seem that

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15 Of course, if the damage is as to the thing defectively built and there is privity an action lies in contract for breach of warranty.

16 Wyatt v. Cadillac Motor Car Div., 145 Cal. App. 2d 423, 302 P.2d 665 (1956).

17 Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).

18 *Id.* at 650, 320 P.2d at 19.

19 *Ibid.*

20 157 Cal. App. 2d 863, 323 P.2d 227 (1958).

Sabella might be able to recover under *Biakanja v. Irving*[21] by arguing that allowing recovery for damage to intangible property necessarily implies allowing recovery for damage to tangible property. Sabella certainly could not recover under *Fentress*, since his house was not involved in a violent accident or a collision with an external object.

Soon thereafter *Stewart v. Cox*[22] provided a factual situation which put all the foregoing developments to the test. A subcontractor negligently installed gunite material in a swimming pool causing water to escape which damaged the pool, the surrounding yard, and the nearby house. Involved were all the factors which would have prevented recovery at one time or another. First, Cox was a subcontractor not in privity of contract with the owners, and his work had been accepted by the general contractor and the owners.[23] Second, the pool, even if defectively built, was not imminently dangerous to third persons to the knowledge of Cox; nor was it known to be so by the non-negligent general contractor and the owners;[24] nor was it reasonably certain to place life or limb in peril.[25] Third, even by analogy to the automobile cases, still there was no violent accident or collision with an external object.[26] The court met the challenge and adopted the sweeping policy statement in *Biakanja*, took cognizance of all the cases mentioned (with the notable exception of the automobile cases), and found the subcontractor liable for damage to the pool, yard, and house. This left open the objection that *Fentress*, by analogy, would require a violent accident or collision with an external object when recovery was sought for damage to the thing defectively built.

With this background Sabella recovered a judgment from Wisler for the decrease in the market value of the house due to Wisler's negligence. On appeal the court presented a decisive synthesis of the preceding cases and clarified the state of the law in this field with welcome precision. First, it reiterated the policy statement made in *Biakanja* and applied in *Stewart*, adding that "the prevention of future negligent construction of buildings upon insufficiently supportive material would not be furthered by exempting defendant Wisler from liability for his negligence."[27] Then it referred to *Dow*[28] to hold Wisler liable as a general contractor for

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21 49 Cal. 2d 647, 320 P. 2d 16 (1958).
22 55 Cal. 2d 857, 362 P.2d 345, 13 Cal. Rptr. 521 (1961).
23 Kolburn v. P. J. Walker Co., 38 Cal. App. 2d 545, 101 P.2d 747 (1940).
24 Johnston v. Long, 56 Cal. App. 2d 834, 133 P.2d 409 (1943).
25 Hale v. Depaoli, 33 Cal. 2d 228, 201 P.2d 1 (1948).
26 Fentress v. Van Etta Motors, 157 Cal. App. 2d 863, 323 P.2d 227 (1958).
27 59 A.C. at 41, 377 P.2d at 893, 27 Cal. Rptr. at 693.
28 In addition to the standard of care *Dow* is credited with imposing upon

the possible[29] negligence of the subcontractor in installing the sewer pipe. Next, *Stewart* was employed to hold Wisler liable for damage to the house itself, in spite of Wisler's contention that this was the only foreseeable harm, whereas in *Stewart* damage to other property was foreseeable (and when it was damaged this established the breach of duty owed). The court pointed out, however, that recovery in *Stewart* was allowed for damage to the pool as well.[30] Finally Wisler objected that the liability imposed upon him was contrary to the holding in *Wyatt v. Cadillac Motor Car Div.*[31] This was met by holding both *Wyatt* and *Fentress* inconsistent with *Stewart* and disapproved to the extent that they might be applied to builders as distinguished from conventional manufacturers of goods.[32] The court emphasized that all these problems had been resolved in *Stewart* and made it clear that this was the law. The court concluded its decision by indicating that liability will not be imposed in such a case for other than substantial damage, as distinguished from a petty grievance concerning, for example, a leaky faucet.

The rule imposing liability upon a builder in favor of a third person not in privity, for the negligent performance of the builder's contract, now can be clearly stated.[33] The builder owes a duty of reasonable care to anyone who may foreseeably be injured in his person or property, whether such property be the thing negligently built or merely within the scope of the risk created.

William H. Carney

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builders (*supra* note 14) it was also held therein that a builder is in control of construction and knows or should know what is being done and is primarily responsible to subsequent owners for a negligently created condition and the consequences that flow therefrom even though such conditions are created by a subcontractor.

29 Recall that this *or* the inadequately filled earth *or* a combination of both caused the damage, so that Wisler would be liable in any event.

30 Sabella v. Wisler, 59 A.C. at 41, 377 P. 2d at 893, 27 Cal. Rptr. at 693.

31 145 Cal. App. 2d 423, 302 P.2d 665 (1956).

32 Sabella v. Wisler, 59 A.C. at 42, 377 P.2d at 894, 27 Cal. Rptr. at 694.

33 *But see* Montijo v. Swift, 219 A.C.A. 416, 418 (August 14, 1963), wherein an architect planned and supervised construction work as an independent contractor and the court stated the rule governing his liability to a third person who was injured from a defect in terms of a duty "to exercise reasonable care for the protection of any person who foreseeably *and with reasonable certainty* may be injured," reverting back to the rule (in part, at least) of *Hale v. Depaoli*, see note 11 *supra*.