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## CONTRIBUTION AND INDEMNITY BETWEEN TORTFEASORS\*

FRANCIS H. BOHLEN

### II. INDEMNITY

The writer has already stated his opinion that one of the unfortunate results of the denial of the right to contribution between joint and co-tortfeasors has been the overallowance of indemnity in cases in which there is no great disparity between their responsibility. There are of course certain situations in which it is obviously proper to allow indemnity. The first is where the person against whom recovery is had is without personal fault, his liability being based upon his purely vicarious responsibility for the conduct of the person who has conducted himself tortiously. The most salient instance of this vicarious responsibility is, of course, that which is attached to the relation of master and servant. No one has doubted that a master who has been forced to pay damages because of the misconduct of a carefully selected servant is entitled to indemnity from such servant.<sup>1</sup> This, however, is not the only situation in which vicarious responsibility is imposed upon a perfectly innocent defendant and wherever there is such responsibility the right of indemnity should follow.

The decisions in the English cases go so far as to make it practically impossible for one who has work to be done which can only be performed with safety to third persons by the exercise of positive care and competence to escape liability by trusting its performance to an independent contractor.<sup>2</sup> There are some American states,<sup>2a</sup> though unfortunately too few, which more

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<sup>1</sup>Among the numerous cases so holding are *Smith v. Foran*, 43 Conn. 244 (1875); *Va. So. & Fla. Ry. v. Jossey*, 105 Va. 271, 31 S. E. 179 (1898); *Grand Trunk Ry. v. Latham*, 63 Me. 177 (1874); *Fedden v. Brooklyn Eastern Dist. Terminal*, 204 App. Div. 741, 199 N. Y. Supp. 9 (2d Dept. 1923); see *Betcher v. McChesney*, 255 Pa. 394, 100 Atl. 124 (1917).

<sup>2</sup>See opinion by A. L. Smith, L. J., in *Holliday v. Nat. Tel. Co.*, L. R. [1899] 2 Q. B. 392 at 400.

<sup>2a</sup>For instance, *Covington Bridge Co. v. Steinbrock*, 61 Ohio St. 215 (1899), and *Boylhart v. DiMarco & Reimann*, 270 N. Y. 217, 200 N. E. 793 (1936), with which compare the earlier *Engle v. Eureka Club*, 137 N. Y. 100, 32 N. E. 1052 (1893).

or less closely approximate the English law.<sup>3</sup> In such jurisdictions one who becomes liable, because of the failure of the contractor to exercise that care and competence necessary for the performance of what perhaps may be properly called dangerous work, should be and is entitled to indemnity from the contractor through whose fault, or that of his servant, liability has been brought to the employer.<sup>4</sup> These, however, are not the only situations in which there is vicarious responsibility. A merchant who puts out under his own name a product made for him by a manufacturer is, in several jurisdictions, held liable under such conditions as would make the manufacturer liable if he sold under his own name. Statutes have been passed in many states which make the registered owner of a car responsible for the careless manner in which it is driven by anyone whom he permits to drive it. So far as the writer knows, no cases have been brought which have required the court to determine whether the merchant or registered owner could recover indemnity from the manufacturer or licensee. However, since the right to indemnity in the master-servant, employer-independent contractor relation is based upon the vicarious character of the master or employer's liability, it seems inevitable that a right of indemnity should be allowed.<sup>5</sup>

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<sup>3</sup>*Pfau v. Williamson*, 63 Ill. 16 (1872); *Eluyer v. Benevolent Ass'n Elks*, 152 La. 73, 92 So. 739 (1922) (where the contract contained a provision giving the employer the right to terminate in the event that the contractor failed to comply with the specifications and stipulations of the contract); *Hailfinger v. Meyer*, 215 App. Div. 35, 212 N. Y. Supp. 746 (4th Dept. 1925) (motion to join contractor as an additional defendant liable over to employer granted); *Maxwell, Saulspaw & Co. v. Louisville & N. R. R.*, 1 Tenn. Ch. 8 (1872); *Kampman v. Rothwell*, 101 Tex. 535, 109 S. W. 1089 (1908); *cf. Scott v. Curtis*, 195 N. Y. 424, 88 N. E. 794 (1909). In *Robbins v. Chicago*, 4 Wall. 657 (U. S. 1866), a municipality recovered indemnity from an owner who employed an independent contractor to make excavations in a sidewalk. And in *Phoenix Bridge Co. v. Creem*, 102 App. Div. 354, 92 N. Y. Supp. 855 (2d Dept. 1905), *aff'd*, *w.o. op.*, 185 N. Y. 580, 78 N. E. 1110 (1906), a general contractor recovered over from a subcontractor who negligently left unguarded on the sidewalk a heap of stones and dirt. The same reasons for permitting an owner to recover over from a general contractor for whose negligence he has been forced to pay damages avail where the general contractor is required to make compensation for harm caused by his independent subcontractor. *Cf. Geo. A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489, 38 Sup. Ct. 180 (1918).

<sup>4</sup>While in one state, at least, an automobile may not be operated without insurance against liability due to careless driving, in practically every other state every owner of a car who has sufficient assets reachable by an execution does, in fact, take out insurance.

<sup>5</sup>There is more than little reason to believe that the introduction of liability insurance has had a very real effect upon tort law, although in the writer's opinion too little effect has been given to it. For example, it is doubtful whether the extreme revulsion against holding an employer of an independent contractor liable for the manner in which his contractor does even such work as requires peculiar care and skill would have been greatly lessened had liability insurance been available when the original decisions were rendered. So long as the personal assets of the employer would necessarily be depleted by a judgment entered against him, there was perhaps reason to regard it as unfair to impose so possibly a ruinous burden upon him. Today, one who employs a contractor can assure himself of the latter's solvency and, therefore, that his right of indemnity will be effective by requiring the contractor to produce evidence that he carries

The effect and, it may be assumed, the object of such statutes is to make the insurance, which whether required by statute or not is almost universally taken out by those registered owners who have assets reachable by execution, available to those who are injured by the possibly irresponsible persons whom the owner permits to drive his car.<sup>6</sup> The claimant's right to indemnity in all of these cases depends upon the vicarious character of the responsibility and does not extend to cases in which his liability is based in whole or in part upon his personal fault. In such case, his right to indemnity, if any, must be placed upon grounds similar to those upon which one of two actual wrongdoers is permitted to recover against another if the other's misconduct is in kind, and not in degree only, more culpable than that of the plaintiff.

There is another situation in which there is every reason for the universal recognition of the right to indemnity. That is where the defendant has directed or commanded the claimant to deal on his behalf with lands or chattels in such a manner as to constitute an unlawful invasion of the possessory or proprietary interest of a third person therein or, to put it in the conventional legal terms, to constitute a trespass or conversion. If the claimant obeys the direction or command, justifiably relying upon it as an assurance that the defendant has a right or privilege which will make his, the claimant's, conduct lawful, he is entitled to indemnity from the defendant for such damages as he lawfully may be required to pay together with the cost of defending any action brought against him.

One of the usual instances of this allowance of indemnity is where the defendant directs his servant or employs an independent contractor to cut timber or erect a building on a third person's land or otherwise to deal with it in a way justifiable only if done by its possessor or with his consent. In such case, the servant or contractor, in the absence of very good reason to know the contrary, is entitled to assume that the defendant is the owner or has some authority from the owner which gives him the privilege to have the act done and to delegate the exercise of that privilege to the claimant.<sup>7</sup> Not only is the claimant entitled to treat the direction as such an assurance, but as between himself and the defendant he is not required to make a care-

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adequate insurance. Similarly, before liability insurance was available, to make the employer substantially a guarantor of the solvency of his contractor, as would be the case if vicarious responsibility were imposed, would work hardship upon the small and lightly financed contractor. Employers would naturally select those contractors whose assets were sufficient to afford them reasonable security through indemnity. Here again a small contractor can at a fairly moderate cost take out insurance which makes his employment entirely safe.

<sup>6</sup>*Infra* note 41.

<sup>7</sup>*Horrabin v. City Des Moines*, 198 Iowa 549, 199 N. W. 988 (1924); *Drummond v. Humphreys*, 39 Me. 347 (1855); *Avery v. Halsey*, 14 Pick. 174 (Mass. 1833); see *Little v. Robert G. Lassiter & Co.*, 156 S. C. 286, 153 S. E. 128 (1930).

ful examination of the facts or to form a competent judgment upon such facts as are known to him. He is not deprived of his right of indemnity unless *he knows* that the defendant has no right or privilege, or at the most that the facts so clearly indicate their absence that no man of even the most ordinary intelligence would misinterpret them. Indeed, mere notice of the third person's claim does not require him to investigate its validity.<sup>8</sup>

So, too, indemnity is allowed to a claimant who similarly relies upon the defendant's direction as an assurance of a right or privilege which would justify such dealings with a chattel as otherwise would clearly be an invasion of any outstanding interest which a third person might have to its immediate possession and which, therefore, toward such person would amount to a conversion. If, in pursuance of such a direction, he becomes a converter, he is entitled to indemnity.<sup>9</sup> Here again there is no reason to investigate or form a reasonably competent judgment upon facts known. Only the knowledge of the absence of a privilege in the defendant or facts which would make such absence obvious to the meanest intelligence can deprive him of his right to indemnity. Thus, if the defendant has a writ which authorizes him to take the property of another and directs an officer serving it to take specified goods of a third person as the goods of him against whom the writ is directed, the officer is entitled to indemnity.<sup>10</sup> This is so even though the claimant knows that the third person has laid claim to the goods in question.<sup>11</sup>

No case has been found in which a claimant who has made himself liable to a third person by following directions or commands of the defendant or acting upon his permission has been allowed indemnity except where the claimant's belief in the lawfulness of his act was due to his justifiable reliance upon the authority of the defendant to give the direction or grant the permission; in other words, the justifiable belief that the defendant had a delegable privilege to do that which he commanded or permitted the claimant to do. In all but a very few cases<sup>12</sup> in which the right of indemnity

<sup>8</sup>*Avery v. Halsey*, 14 Pick. 174 (Mass. 1833); *cf.* *Cox v. Cameron Lumber Co.*, 39 Wash. 562, 82 Pac. 116 (1905).

<sup>9</sup>*Higgins v. Russo*, 72 Conn. 238, 43 Atl. 1050 (1899); *Selz, Schwab & Co. v. Guthman*, 62 Ill. App. 624 (1896); *Gower v. Emery*, 18 Me. 79 (1841); *Hoggan v. Cahoon*, 26 Utah 444, 73 Pac. 512 (1903).

<sup>10</sup>*Higgins v. Russo*, 72 Conn. 238, 43 Atl. 1050 (1899); *Selz, Schwab & Co. v. Guthman*, 62 Ill. App. 624 (1896); *Gower v. Emery*, 18 Me. 79 (1841). However, where the officer is not directed to levy on specific goods he is not entitled to indemnity if he executes the writ on the wrong goods and thereby subjects himself to liability. *Nelson v. Cook*, 17 Ill. 443 (1856); *Russell v. Walker*, 150 Mass. 531, 23 N. E. 383 (1890); *Wilson v. Milner*, 2 Camp. 452 (Eng. 1810).

<sup>11</sup>*Higgins v. Russo*, 72 Conn. 238, 43 Atl. 1050 (1899).

<sup>12</sup>In *Fletcher v. Harcot*, Hutton 55 (1622), it was held that an innkeeper who made himself liable to a third person by detaining him at the command of a sheriff, who falsely asserted that he had a writ against such third person, could recover on an express

has been sustained under these circumstances, the claimant had invaded a third person's possessory or proprietary interest in lands or chattels with which the claimant dealt, and it is in these cases in which the reliance of the claimant is most obviously justifiable. The actions of trespass *quare clausum fregit* and *de bonis asportatis*, and trover, by which the liability for such invasions was enforced under strict common law pleading, though in form actions of tort, are in substance actions to vindicate the possessory or proprietary interest of which the plaintiff therein is deprived by giving him the money equivalent of the interests in the land or goods which he has lost. This is admirably brought out in Lord Mansfield's classical description of the action of trover: "The action of trover [is] in form a fiction and in substance founded on property for the equitable purpose of recovering the value of the plaintiff's specific property used and enjoyed by the defendant."<sup>13</sup> One dealing in a manner derogatory to any possible proprietary interest does so at the risk that his honest and well-founded belief in the lawfulness of his conduct may prove erroneous. The extreme severity of this liability makes it essential that those who take such risk at the direction of another may look to the other for protection if they thereby incur liability.<sup>14</sup>

Both where the claimant deals with land at the direction or command of the defendant and where he similarly deals with chattels, it is entirely immaterial that the defendant himself honestly believed that he had the power to confer a privilege which would make the claimant's dealing with the land or chattel lawful. The right to indemnity is not based upon the defendant's fault, either of conscious misrepresentation or unreasonable ignorance of

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promise of indemnity, for the reason that "he which doth a thing which may be lawfull, and the illegality thereof appear not to him, he which employs the party and assume to save him harmlesse, shall be charged." It is probable that even without the promise indemnity might be allowed in such case. In another case, *Howe v. Buffalo etc. R. R.*, 37 N. Y. 297 (1867), the claimant, a conductor employed by the defendant railway company, put a passenger off the train in compliance with the instruction of the company to receive no ticket issued more than six days before the transportation. In such case it seems entirely proper that a subordinate should not be required to inquire into the legality of the rules which his superior asserts he has been permitted to make. Cf. *Culmer v. Wilson*, 13 Utah 129, 44 Pac. 833 (1896).

<sup>13</sup>*Hambly v. Trott*, Cowper 371 (1776) at p. 374.

<sup>14</sup>Curiously enough, no case has been found in which the right to indemnity has been asserted where the claimant relied upon the permission of an apparent owner or possessor of land or chattels as an assurance that he may on his own behalf deal with it in the permitted way. There seems to be, however, no good reason why indemnity should not be allowed in such case. It would seem that the claimant should be as much entitled to rely upon the defendant's consent as an assurance of his power to give it as he is customarily held entitled to rely upon the defendant's direction or command. The request for permission shows that the claimant believed that the defendant, by ownership or consent of the possessor, had authority to give it. The defendant knows that the effect of giving such consent will lead the claimant into action which if the defendant's authority is lacking will subject the claimant to liability. The mere fact that the act is not done for the purpose or benefit of the defendant ought not to be sufficient to bar indemnity.

the extent of his rights and privileges, but upon the claimant's justifiable belief in the power of the defendant to give a lawful command or permission. There is a strong social justification for the claimant's right to rely, as between himself and the defendant, on the defendant's command or even permission as assurance that his act will be legal. Title to land or goods is often exceedingly obscure. Nonetheless, one who has a bona fide belief in the validity of his title would be gravely hampered in his use of his land or chattel if those whom he commands or permits to deal with it could not look to him for protection.

These considerations, which make it proper to hold one dealing with land or chattels at the command or permission of another is entitled to rely upon the command or permission as an assurance that the dealings will not subject him to liability, do not apply to conduct which is tortious because, under circumstances as to which the defendant has not misled the claimant, it threatens harm to interests other than those which are possessory or proprietary as, for example, the interest which every man has in his bodily security.

The interest in bodily security has not the sacrosanct character which the law ascribes to possessory or proprietary interests in lands or goods. There is no element such as title which is often substantially unknowable, save by an investigation which, indeed, might prove futile. There is, therefore, no danger that, unless indemnity were granted, proper commands or directions would be disregarded through fear of liability. Therefore, unless the claimant has been misled by the defendant as to some fact upon which the propriety of his conduct depends, he cannot rely upon the judgment of the defendant as a justification for believing that the commanded act can lawfully be done.<sup>15</sup> The circumstances being known, every man must judge for himself as to what is necessary for him to do or to leave undone in order to avoid injury to the physical safety of others. He is, therefore, not entitled to assume that an act recognizable by reasonable men as dangerous to the physical security of another may lawfully be done because a third person has directed him to do it. It is not impossible to imagine a case in which the defendant has by word or other conduct misrepresented to the claimant that circumstances exist which would give the defendant a privilege to act

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<sup>15</sup>In *Plasikowski v. Arbus*, 92 Conn. 556, 103 Atl. 642 (1918), the claimant, as chauffeur, at the defendant's instructions operated his automobile knowing that the brakes were in a defective condition. He was held not entitled to indemnity from his master for expenses incurred in defending himself in a prosecution for reckless driving arising out of his striking and injuring a third person. Cf. *Percy v. Clary*, 32 Md. 245 (1869) (claimant forced to pay damages for forcible ejection); *Attain v. Johnson*, 43 Vt. 78 (1870) (claimant published article libelous on its face at the request of defendant. The court denied indemnity though there was an express promise by the defendant to save the plaintiff harmless).

in a manner which, but for them, would be unreasonably dangerous. A claimant who is thus misled into a course of action, tortious because the circumstances do not exist, may well be entitled to indemnity. For example, it is generally held that a police officer is privileged when in pursuit of a criminal to drive in a manner which otherwise would be negligent or even reckless.<sup>16</sup> This privilege has been held to be delegable to a motorist whose car is commandeered for such a purpose by a police officer.<sup>17</sup> The difficulty, however, is in finding any liability which would attach to the car owner who reasonably believes that the police officer is in pursuit of a bandit. His privilege to accede to the police officer's request is like the majority of privileges based not upon the actual facts but upon the facts which he reasonably believes to exist. In both these situations it seems obviously proper that the claimant should be permitted to transfer to the defendant the entire burden of the liability into which his vicarious responsibility for the defendant's misconduct has imposed upon him or which he had incurred in reasonable reliance upon the defendant's power to authorize his actions.

There is another situation in which the indemnity is allowed because the claimant is regarded as being justified between himself and the defendant in relying upon the safe condition of the thing which the defendant has supplied to him. Here, however, the claimant's liability is itself based upon a proof of duty owed to the person who is injured. The defendant may be the greater sinner, but the claimant is not without fault. Under an intelligent contribution system it might well be that justice should require no more than that the defendant should bear the greater part of the loss, the claimant bearing only a minor proportion of it. However, contribution being generally impossible, indemnity in toto has been allowed.

The situation in question is where the defendant has sold or otherwise supplied to a claimant a tool or instrumentality which is either to be turned over by him to third persons for their use or to be used by him in a manner in which the safety of third persons is involved.<sup>18</sup> The most usual instance of this is where the tool or appliance is sold to the claimant who has bought

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<sup>16</sup>*Heimer v. Salisbury*, 108 Conn. 180, 142 Atl. 749 (1928); *Edberg v. Johnson*, 149 Minn. 395, 184 N. W. 12 (1921); see *Lineberger v. City of Greenville*, 178 S. C. 47, 182 S. E. 101, 103 (1935). *Contra*: *Swoboda v. Brown*, 129 Ohio St. 512, 196 N. E. 274 (1935).

<sup>17</sup>*Matter of Babington v. Yellow Taxi Corp.*, 250 N. Y. 14, 164 N. E. 726 (1928) *semble* per Cardozo, C.J.; and see *Vandell v. Sanders*, 85 N. H. 143, 155 Atl. 193 (1931) per Branch, J.

<sup>18</sup>In *Aberdeen Construction Co. v. Aberdeen*, 84 Wash. 429, 147 P. 2 (1915), indemnity was allowed in a case in which a contractor was held liable in following the plans which the engineer of the defendant had directed him to follow. The court properly recognized no difference between the supplying of a tool which, though defective, the claimant, as between himself and the supplier, was justified in believing safe and the provision of plans which by the claimant's contract he had bound himself to follow and which he followed in reliance upon the competence of the defendant's engineer.

it for the purpose of supplying it to his employees for their use in the course of his business. If, through the negligence of the vendor as maker or of the supplier as such, the tool or appliance is dangerous for the use for which it is sold or supplied, the master, who in reliance upon the care or competence of the maker or supplier fails to make an inspection which it is his duty to his employees to make and thus renders himself liable for his employee's injury, is entitled to indemnity.<sup>19</sup> If the tool or appliance is sold to the master, there is usually an express or implied warranty which entitles him, as vendee, to rely upon its fitness and, where such warranty exists, the right of indemnity is usually asserted in an action upon it.

In the leading case in this particular situation, the defendant argued that the claimant was precluded from recovery upon a warranty because his liability to his servant was based upon his negligent failure to make an inspection which would have disclosed the dangerous character of the appliance and thus prevented the injury. Here, as in all similar cases, it was held that, whatever might be the duty that the claimant owed to his servant, the plaintiff was under no duty as between himself and defendant as vendor to show his distrust in the warranty by making the investigation.<sup>20</sup> There are, however, many cases, of which *Mowbray v. Merryweather*<sup>21</sup> is typical, in which indemnity has been allowed, although the defendant was not a vendor and, therefore, there could be no warranty in the strict technical sense. In that case, the defendant in pursuance of his contract to afford facilities for the unloading of a particular vessel supplied a chain for the temporary use of the stevedores employed by the plaintiff. The contract expressly provided that the facilities should be safe. It was held that the plaintiff, though required by the Employers' Liability Act then in force to inspect the appliance before allowing his stevedores to use it, was entitled to recover against the defendant the amount which he had paid in satisfaction of a claim of an employee injured because of the dangerously defective character of the appliance. As in other similar cases<sup>22</sup> in which the defendant was not a vendor and where, therefore, there could be no true implied warranty of fitness, the court speaks

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<sup>19</sup>*Mallory S.S. Co. v. Druhan*, 17 Ala. App. 365, 84 So. 874 (1920); *Pa. Co. v. Roberts & Schaefer Co.*, 250 Ill. App. 330 (1928); *The Pullman Co. v. Cincinnati etc. R.R.*, 147 Ky. 498, 144 S. W. 385 (1912); *Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657 (1901); *Busch & Latta Painting Co. v. Woermann Const. Co.*, 310 Mo. 419, 276 S. W. 614 (1925); *Lord & Taylor v. Yale & Towne Mfg. Co.*, 230 N. Y. 132, 129 N. E. 346 (1920); *cf. Pa. Steel Co. v. Wash. etc. Bridge Co.*, 194 Fed. 1011 (D. C. N. D. 1912); *Miller v. N. Y. Oil Co.*, 34 Wyo. 272, 243 Pac. 118 (1926) (claimant, apartment-house owner, held entitled to indemnity for sum paid to administrator of tenant asphyxiated in the bathroom of the apartment house as a result of a gas heater defectively installed by the defendant).

<sup>20</sup>*Boston Woven Hose Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657 (1901), per Holmes, C.J.

<sup>21</sup>L. R. [1895] 1 Q. B. 857.

<sup>22</sup>See, for example, *Mallory S.S. Co. v. Druhan*, 17 Ala. App. 365, 84 So. 874 (1920).

in terms of warranty. It is obvious, however, that the word "warranty" is used, not as connoting a technical or "true" warranty, but only as indicating that the plaintiff because of the contract was as fully entitled to rely upon the safety of the appliance as though it had been procured by a sale and, therefore, by implication had been warranted as fit.

While in *Mowbray v. Merryweather*<sup>23</sup> the contract expressly provided for the supplying of a safe appliance, there are cases in which it does not appear that there was anything in the contract or other arrangement in pursuance of which the appliance was supplied which specifically called for safety. Even here, the tendency is to speak of the mere supplying of instrumentalities for a particular use as carrying with it an implied warranty that they were safe for the employee's use.<sup>24</sup> Here again, the so-called implication of this warranty is merely a convenient way of saying, in a form which appears to justify the granting of indemnity, that the claimant, as between himself and the defendant, is entitled to rely upon the latter's care and competence and that he, therefore, cannot complain that no inspection was made, even though as between the claimant and his employees his failure to inspect was actionable negligence.

It has been suggested that the allowance of indemnity in such cases may be accounted for on the ground upon which the right of indemnity is sometimes said to be determined, namely, a distinction between active and passive misconduct.<sup>25</sup> The creation of the instrumentality is active. Its negligent creator, therefore, is an active wrongdoer. The defendant's negligence lies merely in not doing what he should and is, therefore, passive. Apart from all else, this is not entirely satisfactory. The claimant's negligence does not consist in his failing to inspect, but in supplying the tool to his workmen without inspection, and giving the tool to his workmen is as much active conduct as the creation of a defective machine. There are, however, cases in which the defendant's fault was identical with that of the plaintiff, i.e., failure to discover by inspection the defect in an article which the defendant had procured from a third person or which deterioration had caused in a properly made article.<sup>26</sup> It is certain that the right to indemnity cannot be based upon any analogy to the doctrines of last clear chance or

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<sup>23</sup>L. R. [1895] 1 Q. B. 857.

<sup>24</sup>*Boston Rubber Co. v. Kendall*, 178 Mass. 232, 59 N. E. 657 (1901); *Busch & Latta Painting Co. v. Woermann Const. Co.*, 310 Mo. 419, 276 S. W. 614 (1925); *cf. Wanamaker Inc. v. Otis El. Co.*, 228 N. Y. 192, 126 N. E. 718 (1920); *Otis El. Co. v. Cameron*, 205 S. W. 852 (Tex. Civ. App. 1918).

<sup>25</sup>This was also advanced as a reason for allowing indemnity in *Mallory S.S. Co. v. Druhan*, 17 Ala. App. 365, 84 So. 874 (1920). And *cf. Ga. Power Co. v. Banning Cotton Mills*, 42 Ga. App. 671, 157 S. E. 523 (1931). See cases cited in Leflar, *Contribution and Indemnity between Tortfeasors* (1932) 81 U. OF PA. L. REV. 130, 155.

<sup>26</sup>This was so in *Mowbray v. Merryweather*, *supra* note 23, and in *Mallory S.S. Co. v. Druhan*, *supra* note 25.

contributory negligence. It is obvious that the claimant and not the defendant had the last clear chance to avoid the accident by inspecting the article after it had come into his hands and before it had been turned over to his employees. Justifiable reliance is left as the soundest ground upon which the right to indemnity can be placed.

In many situations duties are imposed the purpose of which is to provide an additional protection against the known foreseeable misconduct of third persons. These duties have at least some analogy to the liability of an endorser upon commercial paper.<sup>27</sup> Often the purpose is not merely to give protection against injury but also to give a reasonable assurance of compensation in the event that injury is not prevented.<sup>28</sup>

In the most usual of these situations, the claimant's liability, upon which the injured third person has recovered judgment against him, is based upon his failure to remove a dangerous condition of which he knows or which he should have discovered. The cases are of two types. In the first, the defendant has made a structure, abutting upon a public highway or contiguous to the land of third persons, so dangerous as to require the claimant as its owner or possessor to exercise care to put it in safe repair or, if this cannot be done, to demolish it. In such case the possessor, whose fault lies in not discovering or removing the dangerous condition created or permitted to continue by the defendant, may recover indemnity against him for any damages which his negligent failure to make the necessary repairs has forced him to pay.<sup>29</sup> The second case arises where a municipality has made itself liable to the injured person by failing to repair a dangerous condition in a highway of which it knows or which it should have discovered, the dangerous condition having been created by the defendant or having been allowed to continue by reason of the defendant's failure to perform his duty of removing it or otherwise making it safe.<sup>30</sup> In the great majority of cases of this

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<sup>27</sup>The analogy is not complete since one injured by their breach is not required to pursue his remedy against the third person who had created the dangerous condition before seeking redress from him whose duty it was to give protection against injury from such misconducts. *Brookville Boro v. Arthurs*, 152 Pa. 334, 340 (1893).

<sup>28</sup>In several of the cases which impose liability upon municipalities for their failure to remove dangerous defects in highways created by third persons, one of the reasons given for imposing liability is the superiority of their financial responsibility to that of those who are responsible for the creation or the persistence of the dangerous conditions. *Albrittin v. Mayor and Alderman of Huntsville*, 60 Ala. 486 (1877); *Clarke v. City of Richmond*, 83 Va. 355, 5 S. E. 369 (1888); *Sutton v. City of Snohomish*, 11 Wash. 24, 39 Pac. 273 (1895).

<sup>29</sup>*The Westfield Gas & Mill. Co. v. The Noblesville & E. Gravel Rd. Co.*, 13 Ind. App. 481, 41 N. E. 955 (1895); *Gray v. Boston Gas Light Co.*, 114 Mass. 149 (1873); *Churchill et al. v. Holt*, 127 Mass. 165 (1879); *Scott v. Curtis*, 195 N. Y. 424, 88 N. E. 794 (1909); *Orth v. Consumers Gas Co.*, 280 Pa. 118, 124 Atl. 296 (1924); *cf. Derry El. Co. v. N. E. Tel. & Tel. Co.*, 31 F. (2d) 51 (C. C. A. 1st 1929); *Phila Co. v. Traction Co.*, 165 Pa. 456, 30 Atl. 934 (1894).

<sup>30</sup>*Washington Gaslight Co. v. D. of C.*, 161 U. S. 316, 16 Sup. Ct. 564 (1895); *City of Des Moines v. Des Moines Water Co.*, 188 Conn. 24, 175 N. W. 821 (1920); *City of*

sort, the defendant has created the dangerous condition which the claimant has been negligent in failing to make safe. In such cases the right to indemnity might, and sometimes is, explained on the ground that the claimant's negligence is "passive," and that of the defendant "active."<sup>31</sup>

There are, however, exceptional cases in which the negligence of both is equally "passive," both having failed to observe and remedy a defect created by the innocent or guilty act of some third person, or even by some force, such as a force of nature, for whose operation no one can be held legally responsible. The most salient exhibition of this arises out of the peculiar Pennsylvania doctrine which puts upon a possessor of land abutting upon a public highway the duty to exercise care to discover and repair defects in the sidewalk, though not in the driveway, no matter how created.<sup>32</sup> In such case, the delinquent possessor, if forced to pay damages, can in Pennsylvania recover indemnity against the creator of the dangerous condition,<sup>33</sup> and the municipality may recover over any damages which it has been forced to pay, either from the possessor<sup>34</sup> or the creator of the danger.<sup>35</sup> Here, the negligence of both municipality and possessor is "passive." Neither has created the dangerous condition; both have failed to perform their duty of removal. Recovery, therefore, cannot be put upon any pre-eminence of liability of the "active" over the "passive" wrongdoer. Recourse must be had to the idea of primary and secondary obligation and, therefore, primary and secondary liability.<sup>36</sup>

Another field in which indemnity may be properly allowed on the ground that the liability of the claimant is secondary, that of the defendant primary, is where the claimant stands in some relation to the injured third person

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*Topeka v. Central Sash & Door Co.*, 47 Kan. 219, 154 Pac. 232 (1916); *Danzelmier v. Union Light, Heat, & Power Co.*, 217 Ky. 186, 289 S. W. 378 (1926); *Inhabitants of Woburn v. Henshaw*, 101 Mass. 193 (1869); *Bruder v. Phila.*, 302 Pa. 378, 153 Atl. 725 (1931).

<sup>31</sup>See, for example, *City of Astoria v. Astoria & Col. R.R.*, 67 Ore. 538, 136 Pac. 645 (1913); *City of Spokane v. Crane Co.*, 98 Wash. 49, 167 Pac. 63 (1917); and similar language may be found in *S. W. Bell Tel. Co. v. East Texas Pub. Ser. Co.*, 48 F. (2d) 23, 26 (C. C. A. 5th 1931).

<sup>32</sup>Thus, in *Schlippert v. Orth*, 75 Pa. Super. 572 (1921), the court sustained a verdict and judgment against the abutting owner in favor of a pedestrian injured by the collapse of a sidewalk. The owner, who had paid the judgment, then recovered over against the gas company whose negligent explosion caused the sidewalk to subside.

<sup>33</sup>*Orth v. Consumers Gas Co.*, 280 Pa. 118, 124 Atl. 296 (1924); *Wise Shoe Co. v. Blatt*, 107 Pa. Super. 473, 64 Atl. 89 (1933).

<sup>34</sup>*Phila v. Reading Co.*, 295 Pa. 183, 145 Atl. 65 (1929).

<sup>35</sup>See *Homestead Boro. v. Lumber Co.*, 47 Pa. Super. 500, 502 (1911).

<sup>36</sup>The secondary character of the municipality's liability (in Pennsylvania it might be called the tertiary, the liability of the creator of the dangerous condition being primary, that of the possessor of the land abutting upon the sidewalk being secondary) may possibly be explained on some more or less undefined idea of public policy intended to relieve the city of the financial burden of maintaining its sidewalks free from defects for the existence of which others are legally responsible.

which imposes upon him a duty of protection against the wrongful conduct of the defendant. Where, as is often the case, the claimant's duty is to protect the third person from harm which the defendant knows or should know is then threatened by the conduct of the defendant, the analogy to the situation last discussed is obvious. In most instances, misconduct against which it is the claimant's duty to protect the third person is intentionally aggressive. The right to indemnity in such situations rarely, if ever, comes before courts for decision. Those who commit intentional acts of aggression upon persons entitled to another's protection are seldom in such a financial position as to make it worthwhile to claim indemnity against them. However, cases may be imagined in which this would not be so. Assume that the Pullman Company is held liable to a female passenger whom its conductor has not protected against the indignities of a drunken, but wealthy, fellow passenger. Is it conceivable that the company having paid the damages claimed by the female passenger would not be given indemnity from the drunken ruffian who had insulted her?<sup>37</sup>

A somewhat different and more difficult situation is presented where the claimant's duty is not to afford an opportunity for the commission of merely probable and injurious misconduct. While in this field there is very little authority, it seems reasonably safe to assume that the right to indemnity will depend principally upon the following factors: First, the gravity of the misconduct of the plaintiff in affording the opportunity, as compared with that of the defendant who has intentionally utilized or negligently abused it to the third person's injury; second, and this also has some relation to the gravity of the misconduct of the two, the extent of likelihood that the opportunity, if given, will be utilized or abused. The decisions under the workman's compensation acts, which are in force in the majority of American jurisdictions, are fairly unanimous in holding that an employee injured by a work accident is entitled to compensation from his employer for any increase in his disability which results from the negligent manner in which his injuries are treated by a physician or surgeon, even though employed by the workman himself and not by his employer.<sup>38</sup> In such case, the employer is generally held entitled to indemnity from the physician or surgeon to the extent that his compensation liability is increased by their negligence.<sup>39</sup> It

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<sup>37</sup>*Cf.* Grand Trunk Ry. v. Latham, 63 Me. 177 (1874), where the claimant railroad was held entitled to indemnity from the defendant, its conductor, who abused a passenger.

<sup>38</sup>*Dringwitz v. Lincoln Park Coal & Brick Co.*, 317 Ill. 302, 148 N. E. 79 (1925); *Oleszek v. Ford Motor Co.*, 217 Mich. 318, 186 N. W. 319 (1922); see *Matter of Parchevsky v. Kroll Bros., Inc.*, 267 N. Y. 410, 196 N. E. 308 (1935); Leidy, *Malpractice Actions and Compensation Acts* (1931) 29 MICH. L. R. 568, 570.

<sup>39</sup>*Overbeck v. Nex*, 261 Mich. 156, 246 N. W. 196 (1933); *Fisher v. Milwaukee El. Ry. & Light Co.*, 173 Wis. 57, 180 N. W. 269 (1920); see *Revell v. McCaughan*, 162 Tenn. 532 (1930); *Williams v. Dale*, 139 Ore. 105, 8 P. (2d) 578 (1932).

would seem that the same should be true in those jurisdictions<sup>40</sup> in which a negligent defendant is held (and, it is submitted, properly so) liable for a similar aggravation of the plaintiff's injuries. It may be just and proper to hold that the defendant, whose negligence has forced the plaintiff to take the risk of medical or surgical treatment, should answer for any aggravation caused by negligence therein. However, the risk is slight. It is not the risk, or even one of the risks, which makes the conduct which causes the injury negligent. The fault of the physician or surgeon is, as between the two, by far the more culpable. Here, imparity of delict should be enough to give the right to indemnity.

In the absence of authority, it is submitted that the same considerations may well determine the right of an owner of an automobile to recover indemnity from one to whom he lends his car and who by his careless driving has brought liability upon the owner, even though that liability is not based upon a statute,<sup>41</sup> but solely upon the impropriety of the owner's entrusting his car to a driver who to his knowledge may drive it dangerously. If the reason which makes it improper for the owner to permit the particular driver to drive his car is one which makes an accident highly likely, as where the car is lent to an already drunken driver, it may well be that his giving permission should be held so wrongful and so substantial a factor in bringing about the resulting accident that the owner should not be permitted to shift the burden of his liability to the drunken driver. So too, it may well be that indemnity should be denied where the impropriety of entrusting the car to the driver in question lies in his known tendency to drive recklessly, particularly where his reckless character has been officially declared by the revocation of his license. On the other hand, where the impropriety of permitting the other to drive a car is merely technical, and not due to any particular likelihood that he will drive it dangerously, it may well be that indemnity should be permitted. There seems no reason to deny indemnity where the car is lent to a person who has carelessly failed to have his license renewed, or who has a license valid in the state of his domicile but not valid in the state in which he is permitted to drive, or where the driver, though experienced and careful, falls a few days or weeks short of the age at which he would become eligible for a license.

It is safe to assume that where the sole misconduct of the plaintiff was his failure to take precautions against the possible misconduct, the fact that the defendant has deliberately and criminally abused the opportunity thus afforded him would be enough to require the claimant to indemnify him. Such

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<sup>40</sup>*Cray v. Boston El. Ry.*, 215 Mass. 143, 102 N. E. 71 (1913); and see cases collected in BOHLEN, *CASES ON TORTS* (3d ed. 1930) p. 283.

<sup>41</sup>*Supra* note 40.

cases rarely come before the courts for decision. Persons who criminally abuse an opportunity, negligently given, are rarely worth suit. Here, again, it is possible to imagine a situation in which the justice of allowing compensation seems obvious. If a collector of Chinese *objets d'art* were to lend a valuable collection of jade to a loan exhibition, is it conceivable that the company giving the exhibition, if forced to pay the collector the cost of its carelessness in guarding the treasures entrusted to it, should not recover indemnity from an unscrupulous rival collector who had stolen the jade while in its custody?

The principal authority for the view that the negligence of the defendant against whom indemnity is sought must be different in kind from that of the claimant and not merely prior in time of commission is the case of *Union Stockyards Co. v. Chicago etc. R. R.*<sup>42</sup> The great authority of the Court has led to an undue acceptance of the view that "active" negligence in creation of the dangerous condition on the part of the defendant and "passive" negligence on the part of the claimant in failing to discover the danger are essential to indemnity.<sup>43</sup> The case is a peculiar one in that the point principally argued was whether the defendant in the indemnity proceedings was under any liability to the person whose valid claim the claimant had satisfied. The defendant was an initial carrier which had routed a carload of freight for through transportation over its own and the claimant's line. Through lack of that careful inspection, which it is admittedly the defendant's duty to make for the protection of its own employees and which it was contended that it should have made for the protection of the train men of the connecting carrier, the car was turned over to the connecting carrier in a condition which made it dangerous for its train crew to handle. The claimant, the connecting carrier, failed to inspect the car, and while the car was being transported on its line, the dangerous defect, which an adequate inspection would have discovered, took effect in injury to one of the train men whose claim the claimant satisfied. In support and denial of the defendant's liability to the injured train man, two cases were cited on each side.<sup>44</sup> The Court avoided the necessity of deciding between these two conflicting lines of decision by holding that there could be no

<sup>42</sup>196 U. S. 217, 25 Sup. Ct. 226 (1904).

<sup>43</sup>See cases cited in Leflar, *Contribution and Indemnity between Tortfeasors* (1932) 81 U. OF PA. L. REV. 130, 155.

<sup>44</sup>*Moon v. N. Pac. R. R.*, 46 Minn. 106, 48 N. W. 679 (1891), and *Pa. R. R. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559 (1896), holding the forwarding company liable to receiving company's employee; and *Glynn v. Central R. R.*, 175 Mass. 510, 56 N. E. 698 (1900), and *M. K. & T. R. R. v. Merrill*, 65 Kan. 436, 70 Pac. 358 (1902), holding that, since the car after coming into the hands of the receiving company and before it had reached the place of the accident had crossed a point at which it should have been inspected, the liability of the delivering company for the defect in the car, which ought to have been discovered upon inspection by the receiving company, was at an end.

right to indemnity unless the liability of the defendant was primary and that of the claimant secondary and that since the fault of the two was of the same general character, namely, a failure to make an inspection, the mere fact that the negligence of the defendant preceded that of the plaintiff gave the defendant's liability no primacy over that of the plaintiff.<sup>45</sup> If there is any explanation for this case and it is not to be taken merely as a decision out of line with the prevailing current of authority, it must rest upon some peculiar custom in the railroad world or upon the fact that connecting carriers do not feel entitled to assume that the cars received by them from other carriers are in a safe condition. Perhaps the two reasons may be said to coalesce and form part of a larger whole. The invariable practice of connecting carriers to subject the rolling stock turned over to them by other roads to an intensive inspection before forwarding them would indicate that they do not feel entitled to rely upon such inspections as are made en route to a connecting point or immediately before the cars are turned over to them.

In a few isolated cases, of which *Nashua Iron and Steel Co. v. The R. R. Co.*,<sup>46</sup> is the most conspicuous instance, indemnity is given where one of two negligent tortfeasors had the last clear chance to avert the accident which caused injury to third person. Justice Carpenter, who delivered the opinion of the court in the New Hampshire case, justified the last clear chance doctrine on the ground that the negligence of the plaintiff which had put him in helpless peril, while it might have been regarded as wrongful as between him and the person injured, was innocent as between him and the defendant who, after knowledge of his helpless peril, might have averted the accident and on the further ground that the negligence of the defendant who had the last clear chance to avert the accident was, as between himself and the plaintiff, to be regarded as its sole cause. If these were the actual reasons for that doctrine, there would be logic in the court's position that if the claimant suing for his own injury can recover against the defendant he should also recover indemnity for any sum which he has been forced to pay

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<sup>45</sup>The car in question was not owned by the defendant. It appears to have been owned by the consignor. In a sense, therefore, the defendant was a bailee of the car in question, and it has been suggested that the decision indicates that a distinction is to be drawn between those persons who are bailees of the tools which they supply to a master for the use of his servants and those suppliers who own the tools in question. This point was not discussed in the Stockyards case nor in the cases allowing indemnity from the suppliers of dangerously defective instrumentalities. The reason given is quite different and equally applicable to originally well-constructed cars owned by the defendant which fall into bad condition while in the course of the transportation to the connecting point. Since the liability rests upon the reasonable reliance of the master upon the safe condition of the tool supplied to him, there seems no good reason to make the justification for reliance depend upon the supplier's ownership of the tool.

<sup>46</sup>62 N. H. 159 (1882).

to a third person. If, on the other hand, the last clear chance doctrine is recognized as a device by which the rigor of the doctrine, which denies recovery to a plaintiff himself guilty of negligence contributing to his injury, can be modified so as to give a right of recovery where the plaintiff's helplessness and the defendant's misconduct after its discovery so appeals to the sympathies of the court as to lead it to find a semblance of difference in fault, the right of indemnity ceases to be a logical deduction from the last clear chance doctrine. This is particularly true where that doctrine is extended to cases where the defendant does not know of the plaintiff's helpless peril, but could have discovered it in time to avert the accident had he exercised that vigilance which his duty to the plaintiff required. It is even less possible to regard the defendant as so much the greater sinner as to require him to indemnify the plaintiff for any sum which he has been forced to pay to the injured third person, where the humanitarian doctrine is in vogue and an inattentive plaintiff is entitled to recover from the no more inattentive defendant, or where the defendant's lack of careful preparation makes him liable to an inattentive plaintiff whom he has done all in his power to save from injury. Whatever may be said for the logical propriety of the decision in the *Nashua Iron and Steel Company* case, one thing is certain. It is absolutely inconsistent with the allowance of indemnity in two of the situations in which it is most commonly granted.

Where a dangerously defective tool is supplied to a master who, in reliance upon the care and competence of the supplier, turns it over to his employees for their use without making that inspection which, as between himself and them, he should make, the very fact that the tool has passed into the possession of the master makes the supplier incapable of curing the defect.<sup>47</sup> On the other hand, the master's performance of his duty of inspection would have discovered the defective character of the article and thus prevented its injurious use. It is obvious that here the master has the last clear chance to avert the injury under any variant of the last clear chance doctrine, including that pseudo-variant which is called the humanitarian doctrine. The same is true in the innumerable cases in which a municipality has been permitted to recover from one who has created a dangerous defect in a public highway or who has wrongfully permitted its continuance.<sup>48</sup> The municipality often has the sole ability lawfully to remove the obstruction. Even where the person creating the defect is able to discover and remedy it, the ability of the municipality coexists. The creator of the danger has not that exclusive capacity to avert the harmful effects of

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<sup>47</sup>*Supra* note 45.

<sup>48</sup>*Supra* note 45.

the defective condition which, except under the humanitarian rule, is the very hallmark of the liability under the last clear chance doctrine.

It is not surprising to find that, outside of New Hampshire, the *Nashua Iron and Steel Company* case has no substantial following. The only case in which it is expressly followed under circumstances which require its application to justify indemnity is the Colorado case of *C. & S. R. R. Co. v. W. L. & P. Co.*<sup>49</sup> A careful reading of that case, however, leads one to wonder how the court could have regarded the defendant as having the last clear chance even under the most liberal extension of that doctrine.<sup>50</sup>

There is one situation in which the right to indemnity has been occasionally recognized. That is where the claimant has turned over a structure or appliance to the defendant in a dangerous condition under circumstances which would make him liable for any harm which its use by the defendant in ignorance of its condition might cause to third persons, but where the defective condition is disclosed to the defendant or otherwise known to him and the injury is, therefore, due to his use of it with knowledge of the danger involved therein. These cases are rare since the fact that the person to whom the structure or chattel is supplied knows of its dangerous condition in the majority of jurisdictions is sufficient to relieve the supplier of liability.<sup>51</sup> Assuming that the claimant was liable and, therefore, his payment was made under the compulsion of a liability in which the defendant shared, there seems no good reason to deny indemnity. The defendant's conduct is something more than negligent. He does not, perhaps, expect that a third person will be injured, but he deliberately creates a grave risk of causing serious injury which could be removed by disclosing the danger of which he, the defendant,

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<sup>49</sup>73 Colo. 107, 214 Pac. 30 (1923).

<sup>50</sup>Two other cases are cited by Leflar in *Contribution and Indemnity between Tortfeasors* (1932) 31 U. or P.A. L. Rev. 153, in support of his argument that indemnity should be granted against a defendant who had the last clear chance of averting the accident in which the third person was injured. *Austin Elec. Ry. v. Faust*, 63 Tex. Civ. App. 91, 133 S. W. 449 (1911), and *Weatherford Water, Light, etc. Co. v. Veit*, 196 S. W. 98 (Tex. Civ. App. 1917). In both of these cases, the indemnity was granted solely because the negligence of the defendant was "active" and that of the plaintiff "passive." It may be that Professor Leflar is right in thinking that "the distinction between passivity and activity is a wholly indistinct one," but nonetheless the distinction is one which has become firmly established as controlling in the Texas cases. Therefore, the fact that the same result might have been reached by applying the analogy of the last clear chance doctrine is not enough to make these cases authority for the adoption of this analogy.

<sup>51</sup>The difficulty in such case is to find a rule of law under which such a claimant would be liable to the third person. In the great majority of jurisdictions such conduct on the defendant's part would ordinarily be regarded as so extraordinary that under one theory or another it would relieve the defendant from liability. Since there can be no right to indemnity except for such sums as were paid to relieve the claimant from a liability to which he was, in fact, subject, the claimant's payment would be unnecessary and, therefore, he could not recover indemnity for it, although every other condition was satisfied.

himself knows. His conduct approaches, if it does not attain, the quality of recklessness. While mere imparity of delict may not be sufficient, and certainly no distinction should be drawn between "active" and "passive" misconduct, the fault of the defendant is so close to one of intention that it may be well regarded as different in kind, and not only in degree, from that of the plaintiff, and so make it proper to make the defendant bear the entire loss which his recklessness has brought upon the third person. This may seem to have some analogy to an attenuation of the last clear chance doctrine. However, the analogy, if any, is to those cases in which contributory negligence is held to be no bar where the conduct of the defendant is the deliberate subjection of the plaintiff to a risk of serious injury and, as such, is in customary legal parlance said to constitute "wanton", "wilful", or "reckless" misconduct, to recovery for which contributory negligence is not a bar.

In all of the cases, setting aside the cases where a claimant himself innocent is vicariously liable for the defendant's misconduct, and where the claimant relies upon the defendant's power to give him a privilege which protects him from liability for intentional conduct otherwise unlawful and a few other sporadic situations, the allowance of indemnity, by which the whole of the burden of answering for the harm caused to a third person by tortious conduct of the two is placed upon the defendant-company, is justified only by the traditional denial of contribution between joint or co-tortfeasors. Had this taboo not existed, justice would have been satisfied by a proper apportionment of the burden in accordance with the respective responsibility, of which culpability is only one element, of the claimant and defendant. It is perhaps too much to hope that the jurisdictions which, without the aid of statute have recognized a right to contribution and those, in which statutes now permit it<sup>52</sup> or in which future statutes will permit it, should re-examine the whole matter of indemnity in the light of their present or future power to make an equitable adjustment of the burden of answering for a third person's injury for which two tortfeasors are responsible. An express provision requiring such treatment will be necessary; and in view of the immense number of cases which have allowed indemnity, the securing of the enactment of such a provision seems unattainable.

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<sup>52</sup>See Bohlen, *Contribution and Indemnity between Tortfeasors* (1936) 21 CORNELL L. Q. 552.