

Louisiana Law Review

Volume 34 | Number 1
Fall 1973

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Repository Citation

John C. Folkenroth, *The Employer's Indemnity Action*, 34 La. L. Rev. (1973)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol34/iss1/10>

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THE EMPLOYER'S INDEMNITY ACTION

Masters are liable to third persons for the torts of their servants acting within the scope of their employment.¹ However, the master has an action in indemnity against the tortious servant for losses paid to third parties, provided the master is without fault.² In the past, employers have rarely brought such actions against their negligent workers.³ Possible reasons for this reluctance include the adverse effect on employee morale, the inability of the employee to satisfy the judgment, and the opposition of labor unions.⁴ However, the employer's widespread use of liability insurance and the provision for insurer subrogation in such policies have encouraged the use of indemnity actions by the insurer-subrogee and have provided legal complications for the employer-employee relationship.

The Origin and Rationale of the Indemnity Action

Although early American common law cases did not use the term "indemnity," the master was allowed to recover against the tortious servant for the full amount of a third party claim.⁵ Subsequently, the right of indemnity was formally recognized in *Oceanic Steam Navigation Co. v. Compania Transatlantica Espanola*⁶ where it was reasoned:

[O]ne who has been held legally liable for the personal neglect of another is entitled to indemnity from the latter no matter whether contractual relations existed between them or not
The right to indemnity stands upon the principle that everyone is responsible for his own negligence, and if another person has been compelled . . . to pay damages which ought to have been

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1. LA. CIV. CODE art. 2320; RESTATEMENT (SECOND) OF AGENCY § 219 (1957).
 2. RESTATEMENT OF RESTITUTION § 96 (1937); RESTATEMENT (SECOND) OF AGENCY § 401, comment (d) at 239 (1957); W. PROSSER, TORTS § 51, at 311 (4th ed. 1971).
 3. James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958).
 4. Note, 63 YALE L.J. 570 (1954).
 5. *Smith v. Foran*, 43 Conn. 244 (1875) (common carrier granted an action in case to recover damages paid to a patron as a result of the servant's negligent smoking while transporting a piano); *Grand Truck Ry. Co. v. Latham*, 63 Me. 177 (1874) (railroad allowed an action in assumpsit to recover punitive damages paid as a result of the servant's severe insult to passenger).
 6. 134 N.Y. 461, 31 N.E. 987 (1892).

paid by the wrongdoer, they may be recovered from him.⁷ (Emphasis added.)

The British approach rests on a different ground. In *Lister v. Romford Ice and Cold Storage Co., Ltd.*,⁸ the House of Lords held that a "lorry" driver must indemnify his employer for damages paid to an injured pedestrian.⁹ The court found an implied obligation in the employment contract that the servant would perform his duties with reasonable skill and care.¹⁰ Thus, the master would have a right of action against his servant for breach of his employment contract when the master was forced to pay for a loss as a result of the servant's negligence.

Although it is settled that the British indemnity action rests upon an implied term of contract, the basis of the American action is, unfortunately, not so clear. Several American common law jurisdictions have adopted the British approach and rested the master's right upon implied contract.¹¹ Other courts have offered unjust enrichment as its foundation because the employee has been unduly benefited by the master's payment to the injured third party.¹² Still another theory is that the action's basis is tort because the servant has also committed a wrong against the master.¹³ This conflict becomes more than merely academic when one considers that the prescriptive period will vary depending upon which theory is adopted by

7. *Id.* at 467-68, 31 N.E. at 989.

8. [1957] A.C. 555 (1956).

9. In the original action, the trial court found the injured party one-third at fault and reduced the award accordingly under the British system of comparative negligence. In the indemnity action the defendant was required to pay this reduced sum with costs.

10. *Lister v. Romford Ice & Cold Stor. Co., Ltd.*, [1957] A.C. 555 (1956).

11. *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952); *Gadsden v. George H. Crafts & Co.*, 175 N.C. 358, 95 S.E. 610 (1918); *Ohio Cas. Ins. Co. v. Capolino*, 65 N.E.2d 287 (Ohio Ct. App. 1945).

12. *Gilman v. United States*, 206 F.2d 846 (9th Cir. 1953); *Oceanic Steam Navig. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 31 N.E. 987 (1892). *But see Schubert v. August Schubert Wag. Co.*, 249 N.Y. 253, 164 N.E. 42 (1928) (It was stated in dictum that indemnity would be allowed an employer for payment of a tort judgment to the employee's wife regardless of the husband-wife immunity in tort suits.); *Koontz v. Messer*, 320 Pa. 487, 181 A. 792 (1935) (An employer was granted indemnity for a judgment paid to the negligent employee's wife despite the employee's immunity from suit by his wife.).

13. This writer has not uncovered an American case which based the indemnity action on tort. However, in *Romford Ice & Cold Stor. Co. v. Lister*, [1955-3] All E.R. 460, 464 (C.A.), a dissenting opinion stated that the action was founded upon the servant's wrong against the master and not implied contract. One majority opinion suggested this as an alternative basis.

the court.¹⁴ Since the master-servant relationship arises out of contract,¹⁵ either express or implied, and the liability of the master for injuries caused by the servant to third parties is derived from this relationship, it would seem that the master's right to indemnity should also be based upon contract.

As a general rule, joint tortfeasors have no right to indemnity.¹⁶ The basis of this rule rests on public policy, in that no one should be able to "claim an advantage for his own wrong."¹⁷ Thus, if a master is concurrently liable with the servant for the wrong committed, an action for indemnity will not lie.¹⁸ However, there is no reason to bar indemnification when the master is held liable solely by imputation of law¹⁹ since he has committed no wrong.²⁰

Effect of the Original Suit Against the Master

The "New York" rule provides that a judgment against an employer in the original suit is conclusive evidence of the employee's negligence. However, the employee must be "vouched in", *i.e.*, noti-

14. *Ohio Cas. Ins. Co. v. Capolino*, 65 N.E.2d 287 (Ohio Ct. App. 1945). The failure of an employee to act with reasonable care in performing his duties was a breach of an implied condition of the employment contract, and thus subject to the six-year statute of limitations rather than the two-year tort statute.

15. *New Amsterdam Cas. Co. v. Soileau*, 167 F.2d 767 (5th Cir. 1948); *Hudson v. Allstate Ins. Co.*, 169 So. 2d 598 (La. App. 2d Cir. 1964); *Texas Co. v. Jackson*, 174 Miss. 737, 165 So. 546 (1936); *Ohio Cas. Ins. Co. v. Capolino*, 65 N.E.2d 287 (Ohio Ct. App. 1945); *Davis v. Fire Creek Fuel Co.*, 144 W. Va. 537, 109 S.E.2d 144 (1959).

16. *Penn v. Inferno Mfg. Corp.*, 199 So. 2d 210 (La. App. 1st Cir. 1967); *Hebert v. Blankenship*, 187 So. 2d 798 (La. App. 3d Cir. 1966); *Traveler's Ins. Co. v. Hardware Mut. Cas. Co.*, 186 So. 2d 185 (La. App. 3d Cir. 1966). See generally W. PROSSER, TORTS § 50, at 305 (4th ed. 1971).

17. *Appalachian Corp. v. Brooklyn Coop. Co.*, 151 La. 41, 46, 91 So. 539, 541 (1922).

18. However, the master would still have an action against the servant for contribution of the servant's pro rata share of the damage.

19. *Yuba Consol. v. Fidelity & Cas. Co.*, 338 F.2d 341 (5th Cir. 1964); *Ecuyer v. Benevolent Ass'n of Elks*, 152 La. 73, 92 So. 739 (1922); *Sutton v. Champagne*, 141 La. 469, 75 So. 209 (1917); *Am. Employers' Ins. Co. v. Gulf States Util. Co.*, 4 So. 2d 628 (La. App. 1st Cir. 1941). See generally W. PROSSER, TORTS § 51, at 311 (4th ed. 1971).

20. This principle was illustrated in *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 107 N.E.2d 463 (1952), in which the court stated: "Where several tortfeasors are involved . . . indemnity arises in favor of the wrongdoer who has been guilty of passive negligence . . . against the one who has been actively negligent. The actively negligent tortfeasor is considered the primary or principle wrongdoer and held responsible for his negligent act not only to the person directly injured thereby, but also to any other person indirectly harmed by being cast in damages by operation of law for the wrongful act."

fied of the original action and given an opportunity to defend against the third party's allegations of negligence.²¹

Other jurisdictions employ a more lenient rule;²² even if notice is given, the judgment finding negligence in the original suit is not conclusive, but is given significant weight in the indemnity action.²³ The burden is then on the employee to show that either he was not negligent, or that the master was at fault.²⁴

Effect of Settlement—Extent of Employee's Liability

In most jurisdictions, the master's right to indemnification is not prejudiced when he compromises the action rather than contests liability.²⁵ In that situation, however, the issue of the servant's negligence would be litigated in the indemnity action.²⁶ In relation to settlement between the servant and the third party, this compromise inures to the benefit of the master so as to release him from further liability.²⁷ It is reasoned that the plaintiff has only one cause of action which is extinguished by settlement with the employee. Any attempt by the third party to reserve rights against the master will be disregarded by the court, for such a reservation would ultimately place liability upon the servant. This result would be inequitable, since the servant has already repaired his wrong.²⁸

The employee is liable to his employer for only the actual dam-

21. *Fedden v. Brooklyn E. Dist. Term.*, 204 App. Div. 741, 199 N.Y.S. 9 (1923); *accord*, *Buhl v. Viera*, 328 Mass. 201, 102 N.E.2d 774 (1952).

22. It is difficult to determine which is the majority view since there are few cases dealing with this issue.

23. In *Costa v. Yoachim*, 104 La. 170, 172, 28 So. 992, 993 (1900), it was stated that: "[T]he judgment in question was not conclusive evidence of negligence, it was evidence to which it was proper to give some weight. When a judgment . . . is not attacked as fraudulent, and no error is made to appear, it is binding on the employé who was notified, who was a witness, and whose negligence was the only cause of damage which was found against the employer It devolved upon the employé. The onus was with him to show the judgment was in any particular erroneous." (Emphasis added.)

24. *Cf. Gillingham v. Charleston Tow-boat & Transp. Co.*, 40 F. 649 (D.S.C. 1889) (Prior judgment against the master did not estop the servant from denying his liability, but constituted a *prima facie* case for the master.).

25. *Smith v. Foran*, 43 Conn. 244 (1875). The employer was a common carrier and liable for the third party's damage regardless of any wrongful act committed by the employee.

26. *Id.* at 245; *Grannan, Patterson, and Holliday v. Hoel*, 15 La. Ann. 308 (1860).

27. *Williams v. Marionneax*, 240 La. 713, 124 So. 2d 919 (1960); *Caldwell v. Montgomery Ward*, 271 So. 2d 363 (La. App. 2d Cir. 1972); *Smith v. South & W. Ry. Co.*, 151 N.C. 479, 66 S.E. 435 (1909).

28. *Williams v. Marionneax*, 240 La. 713, 124 So. 2d 919 (1960).

age sustained by the third party.²⁹ Thus, when the employer has settled the claim for more than the actual damage, he can only recover the amount of the actual damage. Similarly, if the employer has paid less than the actual damage he can recover only the amount paid to the third party.³⁰ However, where the original cause of action has been litigated rather than settled, the employee's liability may be expanded to include the employer's court costs and attorney's fees.³¹

Recognition and Application of the Indemnity Action in Louisiana

Although the Louisiana Civil Code specifically states that masters are liable for the torts of their servants,³² no provision is made for indemnification.³³ However, indemnity has been recognized jurisprudentially since the 1860 case of *Brannan, Patterson, and Holliday v. Hoel*³⁴ where steamboat owners were allowed to recover from their pilot amounts paid to another boat owner as a result of a collision occasioned by the pilot and other officers' negligence. In holding that recovery was not precluded by the fact that others besides the defendant were culpable for the wrongful act, the court, by implication, recognized the right of indemnity in Louisiana.

Forty years later, the question of indemnity arose again in *Costa v. Yoachim*.³⁵ The court, drawing from early English jurisprudence,³⁶ permitted a wagon owner to recover from his negligent driver the amount of a judgment paid to a third party. The *Costa* decision is the first clearly expressed acknowledgement of the employer's right to indemnity by the Louisiana supreme court.³⁷

29. *Smith v. Foran*, 43 Conn. 244 (1875); RESTATEMENT OF RESTITUTION § 96 (1937); RESTATEMENT (SECOND) OF AGENCY § 401, comment (d) at 239 (1957).

30. *Id.*

31. *Grand Trunk Ry. Co. v. Latham*, 63 Me. 177 (1874); *Fireman's Fund Am. Ins. Co. v. Turner*, 260 Ore. 30, 488 P.2d 429 (1971).

32. LA. CIV. CODE art. 2320.

33. See Comment, 44 TUL. L. REV. 119, 156 (1970) (offering a suggested draft of a code article which provides indemnity for persons held vicariously liable for the torts of others).

34. 15 La. Ann. 308 (1860).

35. 104 La. 170, 28 So. 992 (1900).

36. *Id.* at 173, 28 So. at 993: "While the master is liable to third persons for injury arising from his servant's negligence within the scope of his employment, if the master is free from fault as to the negligence in question he may have his remedy against his servant for damages to which he is thereby subjected . . ." The source of the quotation was cited incorrectly by the court and is therefore unavailable.

37. In *Rumpf v. Callo*, 132 So. 763 (La. App. Orl. Cir. 1931), the indemnity action was recognized in dictum. Upon dismissal of the employer as co-defendant, the negligent employee objected. The court stated that if liability could be placed on the employer, he

The most recent litigation involving indemnity to reach the supreme court is the case of *Williams v. Marionneaux*.³⁸ The court stated that the master whose liability rests on *respondeat superior* is not a joint tortfeasor;³⁹ his liability is based solely upon the master-servant relationship.⁴⁰

In Louisiana, the judgment in the original tort action is not considered conclusive but only evidence of the servant's liability to his employer.⁴¹ Also, the master may compromise with the third party without prejudicing his right against the servant.⁴² Similarly, settlement by the servant with the third party will operate to release the master regardless of any reservation of rights by the third party.⁴³

Although not previously litigated it would seem reasonable that the Louisiana courts would follow common law jurisdictions in situations where the master settles with the third party and consider the servant liable only for the actual damage sustained or the amount paid by the master, whichever is lower.⁴⁴ If there is no settlement, the courts would likely hold the servant liable for the costs of the original action since such costs result from the servant's conduct.⁴⁵

It should be noted that the Louisiana courts have yet to decide whether the employer's indemnity action is based upon implied contract, unjust enrichment, or tort.⁴⁶ Therefore, it is still an open question as to which prescriptive rules are applicable to the master.⁴⁷

could maintain an action to recover any amount paid to the injured party, but the employee could not recover from the employer amounts that he was required to pay.

38. 240 La. 713, 124 So. 2d 919 (1960).

39. In *Little v. State Farm Mutual Insurance Co.*, 177 So. 2d 784 (La. App. 1st Cir. 1965), it was held that since the master and servant are not joint tortfeasors, they are not bound *in solido*. Therefore, suit against the servant will not interrupt prescription as to the master; *accord*, *Wooten v. Wimberly*, 272 So. 2d 303 (La. 1973).

40. The Hoel and Costa cases were cited as authority for the master's right to indemnity.

41. *Costa v. Yoachim*, 104 La. 170, 28 So. 992 (1900).

42. *Brannan, Patterson, and Holliday v. Hoel*, 15 La. Ann. 308 (1860).

43. *Williams v. Marionneaux*, 240 La. 713, 124 So. 2d 919 (1960).

44. See notes 29-30 and accompanying text *supra*.

45. See note 31 and accompanying text *supra*.

46. See notes 14-16 and accompanying text *supra*. An action for unjust enrichment is provided for in Louisiana under Civil Code article 1965 or the civil law action *de in rem verso*. *Minyard v. Curtis Products, Inc.*, 251 La. 624, 205 So. 2d 422 (1968).

47. Civil Code article 3536 provides a one-year prescriptive period on tort actions whereas an action for breach of contract or unjust enrichment prescribes in ten years under article 3544.

The Basis for Respondeat Superior and the Indemnity Action—An Apparent Conflict

It has been stated that the master's vicarious liability is simply a means of providing the injured party with a "deep pocket" in cases where the servant wrongdoer is financially unable to answer for the consequences of his acts.⁴⁸ But, in relation to moral considerations, rather than those of economics, liability is imposed upon one "not at fault" because the injury is a by-product of an activity which benefits the employer.⁴⁹

The right of indemnity rests on the proposition that the servant is solely at fault, whereas the master's liability is merely derivative.⁵⁰ However, indemnity is clearly inconsistent with modern practices of risk distribution. Today, an employer commonly insures himself against the foreseeable risks involved in maintaining a work force and spreads the cost among the purchasers of his goods and services.⁵¹ Indemnity takes losses out of the channels of distribution and places them back upon the individual employee. The indemnity rule seems particularly harsh when one considers that in the original action the jury makes its decision under an assumption that the loss would be borne by insurance.⁵²

One argument for the indemnity right is that it serves as a deterrent to employee negligence.⁵³ Although potential liability may have a deterrent effect with regard to gross negligence or intentional torts,⁵⁴ it does not seem that a possible money judgment could reduce the inadvertent errors of employees.⁵⁵ Our country's experience with workmen's compensation has established that the way to reduce industrial injuries is to put the principal sanction on the employer.⁵⁶

48. T. BATY, VICARIOUS LIABILITY 154 (1916).

49. James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958).

50. Steffan, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465 (1958).

51. *Fireman's Fund Am. Ins. Co. v. Turner*, 260 Ore. 30, 488 P.2d 429 (1971); Note, 63 YALE L.J. 570 (1954).

52. James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958).

53. *Lister v. Romford Ice & Cold Stor. Co., Ltd.*, [1957] A.C. 555 (1956).

54. *United States v. Gilman*, 347 U.S. 507 (1954). It was held that the Federal Tort Claims Act did not provide the government a right of indemnity for the *negligent* acts of their employees. *But see Gahagan v. State Farm Mut. Auto Ins. Co.*, 233 F. Supp. 171 (W.D. La. 1964) (The United States was allowed to recover from the employee's insurer as a "person or organization" legally responsible under the terms of the policy.).

55. See Note, 63 YALE L.J. 570 (1954).

56. A. REEDE, ADEQUACY OF WORKMEN'S COMPENSATION 324 (1947).

He, rather than the employee, can take more effective steps to reduce accidents.⁵⁷

Insurer Subrogation—the Real Problem

Despite its inequities, the master's right of indemnity is strongly entrenched in American and British jurisprudence. Although the wise employer has exercised his right infrequently,⁵⁸ the employer's insurer holding the right of indemnity through subrogation, is not hampered by such considerations as employee morale. Subrogation provides for inequities to the employer and ultimately to consumers who bear the cost of insurance. As the insured, the employer pays premiums to protect against the risk of his servants causing harm to third persons. With subrogation rights, however, the actual coverage afforded the employer is decreased to the extent that the insurer recovers from the employee.

Recently, the Oregon supreme court rejected an opportunity to overrule the indemnity action.⁵⁹ The court acknowledged merit in the defendant's contention that considerations of public policy were more important than an outdated rule of law exercised without regard to its results. However, the court also recognized that there were no cases where the indemnity rule had been judicially abolished and therefore the primary responsibility for change must be legislative.

With legislative action doubtful,⁶⁰ it seems that employers and employees must take measures to prevent the use of subrogation by insurers. One suggestion has been to insure the master and servant under the same policy⁶¹ thereby defeating the subrogation rights of the insurer.⁶² There should be little or no increase in the employer's premium since it need only cover the loss of the insurer's right to recover from the servant.⁶³ Another remedy would be a provision in collective bargaining agreements excluding any indemnity right

57. Steffen, *The Employer's "Indemnity" Action*, 25 U. CHI. L. REV. 465 (1958).

58. Note, 63 YALE L.J. 570 (1954) (research indicates only six reported cases in the twentieth century).

59. *Fireman's Fund Am. Ins. Co. v. Turner*, 260 Ore. 30, 488 P.2d 429 (1971).

60. *Id.* at 36, 488 P.2d at 432: "[L]egislation which undertakes to relieve persons from responsibility for their wrongful acts is usually subject to strong criticism. (Witness the current controversy over proposals for 'no fault' insurance legislation.)"

61. Jolowicz, *The Right to Indemnity Between Master and Servant*, 1956 C.A.M.B. L.J. 101.

62. *Crowson v. Bridges*, 227 Miss. 73, 85 So. 2d 810 (1956); cf. *Maryland Cas. Co. v. Employer's Mut. Liab. Ins. Co. of Wis.*, 208 F.2d 731 (2d Cir. 1953).

63. Jolowicz, *The Right to Indemnity Between Master and Servant*, 1956 C.A.M.B. L.J. 101.

against the employees for their acts of ordinary negligence.⁶⁴ Although the validity of such provisions has never been at issue, they would not appear to violate public policy.⁶⁵

Conclusion

The master's right of indemnity for the servant's acts of ordinary negligence is an outmoded and illogical rule of law given our present industrial environment. Neither the British nor the American decisions offer any strong rational basis for supporting the indemnity action. Following the former approach, an employee, upon entering employment, would contract never to make a mistake. To imply such an intention on the part of employees appears contrary to reality. A right of indemnity based on simple equity *i.e.*, liability upon the wrongdoer, is just as irrational in its result. In general, the indemnity action tends to subvert both the policy behind *respondeat superior* and the effectiveness of modern risk distribution. A better policy would be to limit the right of indemnity to servants' acts of gross negligence or intentional injury.

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64. James, *Indemnity, Subrogation, and Contribution and the Efficient Distribution of Accident Losses*, 21 NACCA L.J. 360 (1958). A subrogee obtains no greater rights than those of his subrogor. Therefore, since the employer has contracted away his right to indemnity, the insurer would have no action against the employee.

65. *Id.*