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MODERN THIRD-PARTY PRACTICE — SUBSTANTIVE OR PROCEDURAL?

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THE area within which a person charged with negligence is permitted to pass liability on to another allegedly negligent party is closely circumscribed in New York, both by statutory and by decisional law. It encompasses a group of special situations and relationships where it has seemed reasonable to impose an ultimate responsibility upon a party who has played an active role in a negligent situation in favor of one who is made answerable to the injured person, but whose part in the event is merely passive, or arises from the sanction of public policy, contract, or status.[1]

I. THE PURPOSE AND FUNCTION OF IMPLEADER

THE theory of indemnification over by the primary tort-feasor against another held equally liable to an injured third person is still in evolution, however, as the cases sometimes involve narrow distinctions which rest upon the precise facts.[2] This, notwithstanding a decade of adjudicative experience with Section 193-a of the Civil Practice Act, which embodies the general objective of making impleader practice in New York more liberal and definitive, and of removing the more drastic limitations of the older provision regarding impleader procedure under the superseded Section 193, subdivision 3 of the Civil Practice Act which was found on the statute books prior to 1946.[3]

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[1] Anderson v. Liberty Fast Freight Company, Inc., 285 App. Div. 44, 135 N. Y. S. 2d 559 (3rd Dep't 1954).

The rules by which the relative delinquencies of joint tort-feasors are appraised would seem to represent the outpost judicial approach in New York to the doctrine of comparative negligence. See, Meltzer v. Temple Estates, Inc., 203 Misc. 602, 116 N. Y. S. 2d 546 (City Ct. N. Y. 1952).

[2] Harrington v. 615 West Corp., et al., 1 App. Div. 2d 435, 151 N. Y. S. 2d 564 (1st Dep't 1956).

The legalistic demarcation, however, between the "active-passive" duality and the doctrine of contributory negligence is very narrow. See, Opper v. Tripp Lake Estates, Inc., 300 N. Y. 572, 89 N. E. 2d 527 (1949).

[3] Fortune v. City of Syracuse, 191 Misc. 738, 78 N. Y. S. 2d 775 (Sup. Ct. Onondaga Co. 1948).

The development of the concept may be traced to the case of City of Brooklyn v. Brooklyn City R. R. Co., 47 N. Y. 475, 487, 7 Am. R. 469 (1882), where the court stated, "Where the parties are not equally criminal, the principal delinquent may be

Hence, despite the fact that under the present New York law impleader is no longer limited to cases where the claim of the defendant against a third party is identical to, or emanates from, the claim which is asserted in the original controversy,[4] and is proper as long as the two controversies involve substantial questions of law or fact common to both,[5] the basic historical requirement of "liability over" persists,[6] and must be clearly set forth in the third party complaint.[7] Therefore, where a third party complaint against a steel company in an action by the company's employee against the company's transportation contractor for personal injuries, arising from the contractor's failure to warn such employee of the manner in which the truck was maintained and loaded, alleged that the contractor had no control over the loading and unloading operations, and had neither actual nor constructive notice of improper loading, the third party complaint was

held responsible to a co-delinquent for damage paid by reason of the offense in which both were concerned in different degrees as perpetrators." Then, by logical development, the rule of indemnity was gradually evolved to cover municipalities, property owners, contractors, and sub-contractors. Harrington v. 615 West Corp., *supra*, note 2. See, however, Wolf v. La Rosa & Sons, Inc., 298 N. Y. 597, 81 N. E. 2d 329 (1948), for what seems to be a narrow construction of the purpose and function of § 193-a of the Civil Practice Act.

[4] The old requirement under § 193, subd. 3 of the Civil Practice Act permitting impleader only upon a showing of definite liability over, as well as identity of claims, was changed by § 193-a (added L. 1946), Ch. 971, which now allows third-party practice upon a showing that the third-party "may be liable" to the defendant for all or part of the plaintiff's claim against the impleading defendant. Hence it is now sufficient if merely one question of law or fact be indicated. Salzberg v. Raynay Holding Corp., 188 Misc. 1009, 69 N. Y. S. 2d 608 (City Ct. N. Y. 1947).

[5] That the third-party complaint alleges facts inconsistent with the original plaintiff's complaint, and which, if true, would absolve the third-party plaintiff of liability to the original plaintiff, is of no moment, however. Robinson v. Binghamton Construction Company, 277 App. Div. 468, 100 N. Y. S. 2d 900 (3d Dep't 1950).

[6] Wolf v. La Rosa & Sons, Inc., note 3, *supra*.

When the third-party complaint shows upon its face, however, that there is no basis for a claim of indemnity against the impleaded defendant, it must be dismissed. Green v. Hudson Shoring Co., Inc., 191 Misc. 297, 77 N. Y. S. 2d 842 (Sup. Ct. Kings Co. 1947). The same result would follow if the third-party complaint merely spells out the defense to plaintiff's charges that the defendant was guilty of active negligence. Ingraldi v. Chazen, 207 Misc. 977, 131 N. Y. S. 2d 431 (Sup. Ct. Queens Co. 1954).

[7] Resnick v. City of New York, 286 App. Div. 861, 141 N. Y. S. 2d 802 (2d Dep't 1955).

It should be noted that the right of the State of New York to implead a third-party defendant must await such time as it consents to be sued in a court of general jurisdiction, such as the New York Supreme Court. Or, in the meantime, the state may, by separate action, enforce any right of indemnification from third parties in a court of general jurisdiction, but not in the Court of Claims. Horoch v. State of New York, 286 App. Div. 303, 143 N. Y. S. 2d 327 (3rd Dep't 1955).

held to have alleged facts which precluded liability on the part of the contractor, and was insufficient.[8]

§ 193-a of the Civil Practice Act provides:

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

In other words, the two controversies to be adjudicated must have some connection with each other and involve common factual or legal issues, and the third-party defendant must have the obligation of exonerating or reimbursing the original defendant (the third-party plaintiff) for all or part of the original plaintiff's recovery against him. Therefore, a resort to the practice whereby, pursuant to Section 271 of the Civil Practice Act, a defendant in a action may set up a counterclaim against the plaintiff along with another party, is not deemed a third-party complaint within the meaning or purpose of the impleader statute.[9] Nor may a third-party plaintiff assert an affirmative claim for his own damages where he is under no legal liability to the original plaintiff.

It follows, hypothetically, that where a third-party claim is based upon C's duty to exonerate or reimburse B for all or part of a recovery by A in the main action, that B may implead C irrespective of whether C is also directly liable to A. Where there is no such duty, impleader is improper *as a matter of law* even though C may be liable to A jointly with B. Thus impleader of a joint tort-feasor, on the ground that he is liable to the plaintiff jointly with the defendant, must be denied. Furthermore, a joint tort-feasor who has not been sued, neither "is" considered liable over, nor "may" he become liable over, to the original defendant sued in the action, since there can be no joint money judgment in plaintiff's favor against both joint tort-feasors as required by Section 211-a of the Civil Practice Act. And even if the plaintiff had commenced action against both joint tort-

[8] Coffey v. Flower City Carting & Excavating Co., Inc., 2 App. Div. 2d 191, 153 N. Y. S. 2d 763 (4th Dep't 1956).

[9] Hirsch v. Schiffman, 199 Misc. 883, 101 N. Y. S. 2d 913 (Sup. Ct. King's Co. 1950).

feasors, one of them would not be permitted to file a cross-claim against the other, pursuant to Sections 264 and 474 of the Civil Practice Act, as the right of contribution does not arise, nor is a remedy for its prosecution given, by Section 211-a until one of the defendants has paid more than his proportionate share of the judgment. Much less can there be an impleader of a joint tort-feasor whom the original plaintiff has not sued.[10]

It has been suggested by the Appellate Division, Third Department, however, that:

"If it appears at the trial that the third-party plaintiffs are asserting a severable separate cause of action on their own, the Trial Term would have discretion to sever, although whether it should at that stage of the litigation exercise its discretion in this direction when all parties are present, merely to follow procedural form, we do not now decide."[11] This issue would usually, therefore, be raised on the pleadings, as either the original complaint or the third-party complaint must *on its face* allege facts from which liability of the third-party defendant may be inferred; that is, that the third-party defendant is one who is, or may be, liable to the third-party complainant for all or part of the complainant's demand over.[12] Put otherwise, the third-party complaint must allege, as a pleading, facts establishing prima facie the complainant's right to indemnification.[13] This means, in turn, that it must allege facts which legally establish, or at least indicate, the primary liability of the third-party defendant, together with the concomitant implication of the third-party plaintiff's merely *passive* negligence.[14]

[10] Gleason v. Sailer, 203 Misc. 227, 116 N. Y. S. 2d 409 (Sup. Ct. Nassau Co. 1952; MacGoldberg et al. v. Lieberthal, 203 Misc. 350, N. Y. S. 2d (Sup. Ct. Bronx Co. 1951).

[11] B. M. C. Manufacturing Corp. v. Tarshis, 278 App. Div. 266, 272, 104 N. Y. S. 2d 254, 259 (3rd Dep't 1951).

[12] Resnick v. City of New York, *supra,* note 7.

Under § 264 Civil Practice Act, a party to an action may claim over as against any other party, whether plaintiff or defendant, in order to avoid a multiplicity of suits, and to determine in one action all issues arising out of a given set of circumstances. D'Onofrio v. City of New York, 284 App. Div. 688, 134 N. Y. S. 2d 569 (1st Dep't 1954).

[13] Shass v. Abgold Realty Corp., 277 App. Div. 346, 100 N. Y. S. 2d 121 (2d Dep't 1950). Although the requirements for pleading a cross claim under section 264 Civil Practice Act are not so stringent as those with respect to a pleading under third-party practice, this does not warrant sustaining a cross claim where neither the complaint in the action nor the statement of the cross claim pleads facts from which the basis of indemnity over may be found or is fairly inferable. *Ibid.*

[14] D'Onofrio v. City of New York, *supra* note 12. See, however, the strong dis-

II. THE ACTIVE VERSUS PASSIVE DETERMINANT IN IMPLEADER PROCEDURE

APART from the prima facie showing of liability over, required to be stated in the complaint of either the original plaintiff or of the third-party complainant, the actual *determination* of the issue of active versus passive negligence in the tort-feasor relation must generally await the trial of the issues, as this question is usually for the jury.[15] Surely, if there is a substantial doubt as to whether a jury might find the presence of both active and passive negligence in the case, the doubt should be resolved by the trial court's sustaining the third-party complaint, to await disposition of the issue at the trial.[16] And if the original complaint sets forth acts of alleged negligence, both active and passive in character, the third-party complaint should not be dismissed by the court *on the pleadings*.[17]

The chief difficulty in the application of these principles to the *modus vivendi* of third-party practice has been that the active-passive negligence concept has been neither sharply delineated in judicial opinions, nor uniformly applied in substantially similar factual situations. As a learned New York Supreme Court jurist has observed:

"The unanlyzed terminology of 'active' and 'passive' conduct and of 'actual' and 'constructive' notice results, I fear, in beclouding the crucial issue. The phrasing shows what confusion will arise if we attempt to fit specific cases into the bare cubicles of easy nomenclature. Confusion made worse confounded is apparent from the fact that the principal authorities are relied upon with equal vigor by each antagonist."[18]

The problem posed by the comparative or relative culpability of joint tort-feasors is certainly not resolved simply by a facile declaration of the "active-passive" participation cliché, since the fault of

senting opinion of Froessel, J., in Middleton v. City of New York, 300 N. Y. 732, 92 N. E. 2d 312 (1950).

And indemnity against a principal wrongdoer to one less culpable is allowed although both are equally liable to the injured party. Crawford v. Blitman Construction Corp., 1 App. Div. 2d 398, 150 N. Y. S. 2d 387 (1st Dep't 1956).

[15] Ruping v. Great Atlantic & Pacific Tea Company, 283 App. Div. 204, 126 N. Y. S. 2d 687 (3rd Dep't 1953); Cosgrove v. City Ice & Fuel Co., 275 App. Div. 1030, 92 N. Y. S. 2d 392, aff'd 276 App. Div. 842, 93 N. Y. S. 2d 915 (1st Dep't 1949).

[16] Inman v. Binghamton Housing Authority, 1 App. Div. 2d 559, 152 N. Y. S. 2d 79 (3rd Dep't 1956).

[17] Coffey v. Flower City Carting & Excavating Co., Inc., *supra* note 8.

[18] Matthew M. Levy, Jr., in Falk v. Crystal Hall Inc., 200 Misc. 979, 984, 105 N. Y. S. 2d 66, 70, aff'd 279 App. Div. 1071, 113 N. Y. S. 2d 277 (1st Dep't 1952).

omission, as well as the fault of commission, may constitute *active* negligence sufficient to bar impleader.[19]

The sound determinant would seem, therefore, to rest upon the concept of comparative guilt, as between the one seeking indemnification and the one charged with liability over. The *ultima ratio* becomes a moral or ethical matrix of comparative fault. Within such frame of reference and responsibility, something left undone, where legal duty imposes affirmative action, can be tantamount to active negligence; whereas something done wrongfully or inadequately may spell out merely passive negligent responsibility for indemnification purposes. Such interpretation is no stranger to the law, and has found a firm place in the general application of the doctrine of estoppel as between two comparatively innocent parties, one of whom must suffer a loss to satisfy a legitimate claim of an injured plaintiff. At least, the principle seems well established that there can be no recovery over, between joint tort-feasors in *pari delicto* in the absence of a clear agreement of indemnity between them.[20]

III. CONTRIBUTORY FACTORS IN THE IMPLEADER CONCEPT

ADDITIONAL objections which might operate to bar the right of recovery over, under third-party practice are: (a) the failure or refusal of the New York courts to apply or extend the procedure to the doctrine of comparative negligence in highway accident cases[21] (b) the breach of a statutory duty in a case where violation of the statute is evidence of negligence *per se,* thereby depriving the obligor under the statute of the right of recovery over, even though technically he was guilty of mere omission of duty, except again, where there is an unequivocally expressed agreement of indemnity in his favor[22]

[19] Ebbe v. Harry M. Stevens, Inc., 1 N. Y. 2d 846, 153 N. Y. S. 2d 225 (1956); Burke v. Wegman's Food Markets, Inc., 1 Misc. 2d 130, 146 N. Y. S. 2d 556 (Sup. Ct. Monroe Co. 1955).

[20] Kennedy v. Bethlehem Steel Company, 307 N. Y. 875, 122 N. E. 2d 753 (1954). See also Burke v. City of New York, 2 N. Y. 2d 90, 138 N. E. 2d 332 (1956).

[21] Anderson v. Liberty Fast Freight Co., Inc., *supra,* note 1.

[22] Generally, statutes such as §§ 240 and 241 New York Labor Law, dealing with construction and demolition projects, mandate a positive, undelegable duty, the breach of which entails *per se* a primary and "active" wrongdoing charge against the non-complying defendant. Rufo v. Orlando, 309 N. Y. 345, 130 N. E. 2d 887 (1955). Other statutory provisions, however, such as section 200 of the New York Labor Law do not preclude inquiry into the question of "active or passive" negligent conduct. Soderman v. Stone Bar Associates, Inc., 208 Misc. 864, 146 N. Y. S. 2d 233 (Sup. Ct. King's Co. 1955).

(c) the third-party plaintiff cannot seek impleader where he is under no legal liability to the original plaintiff,[23] nor can the original plaintiff proceed against the third-party defendant brought into the case if the original defendant is found not liable to the original plaintiff[24] (d) the right to implead may be lost by proof that the third-party plaintiff created a dangerous condition which caused the original plaintiff's injury or damage[25] (e) by proof that the third-party plaintiff, after discovering the danger created by the party sought to be impleaded, acquiesced in the continuation thereof.[26]

IV. THIRD-PARTY PRACTICE IN CONTRACTOR RELATIONS

As APPLIED to contractor relations, the right of a general contractor to indemnity against a sub-contractor on a particular job, may be waived in either one of the following situations: (a) where the general contractor assumed control over the sub-contractor's workmen and directed them to proceed under dangerous circumstances[27] (b) where the general contractor furnished the sub-contractor or his workmen with a defective appliance and knowingly permitted its use

[23] Del Longo v. Bennett-Brewster Co. Inc., 192 Misc. 426, 80 N. Y. S. 2d 901 (Sup. Ct. N. Y. Co. 1948).

[24] Sottile v. Rednick, 205 Misc. 83, 129 N. Y. S. 2d 642 (Sup. Ct. Bronx Co. 1953), holding that a tenant in control of a condition causing injury to a plaintiff cannot be held by such plaintiff if such tenant is not originally brought into the case, simply because the latter is impleaded as a third-party defendant by the landlord, if the landlord is held not liable to the plaintiff, e.g., as being out of possession and control of the premises. Nor can a defendant compel the original plaintiff to join a third-party defendant in the action even though the proposed third-party defendant may also be liable to the plaintiff, as that choice is the plaintiff's alone to make. Sullivan v. O'Ryan, 206 Misc. 212, 132 N. Y. S. 2d 211 (Westchester Co. 1954). This suggests the danger of allowing judgment to proceed against a party who *could* have brought in another as a third-party defendant under § 193-a, as even the innocent defendant may have to contribute, under section 211-a Civil Practice Act, with the active tort-feasor. Tron v. Thime, 201 Misc. 85, 90, 105 N. Y. S. 2d 546 (Sup. Ct. Westchester Co. 1951).

[25] Inman v. Binghamton Housing Authority, *supra* note 16.

[26] It would seem, however, that *actual,* not merely constructive notice of the dangerous condition on the part of the property owner must be shown to bar his right of indemnification over against the contractor creating the danger, at least where the work is delegable, and there is no absolute liability imposed on the owner by statute. Harrington v. 615 West Corp., *supra,* note 2.

The statement in Falk v. Crystal Hall, supra note 18, that there is no justifiable distinction in principle between actual and constructive notice as a differentiating basis for disallowing or permitting indemnity, must be considered a mere *obiter dictum* as the landlord in that case *had* actual notice of the dangerous condition.

[27] Broderick v. Cauldwell Wingate Co., 301 N. Y. 182, 93 N. E. 2d 629 (1950).

without inspecting it for defects.[28] But a general contractor is not obligated to protect employees of a sub-contractor against the negligence of their employer. Nor has a general contractor any duty to inspect machinery or tools furnished by a sub-contractor to the latter's employees, nor to repair a defective appliance used by a sub-contractor, as the general duty of a contractor to employees of a sub-contractor is merely that of assuring them of a safe place to work.[29] It follows, therefore, that where the negligence of a sub-contractor is the sole cause of his employee's injuries, the employee's exclusive remedy is under the Workmen's Compensation Law.[30]

In contract actions, a contractor is allowed to implead the owner of the premises on which work was performed by a sub-contractor, because if the latter's work was satisfactory the general contractor would be liable therefor, and in turn the owner would be liable to the general contractor. The claim of the contractor against the property owner, however, cannot exceed the amount claimed against the contractor by the sub-contractor.[31] But the contractor's right of impleader may be sacrificed where it violated some statutory provision imputing negligence *per se* in construction or demolition work, since here the statutory violation renders the contractor, by legal construction, an active tort-feasor in *pari delicto* with the sub-contractor who created the danger, unless there is a clearly phrased agreement of indemnification between them.[32]

As regards the right of an owner of property under construction or repair to implead a general contractor on the job, when the owner

[28] Dolnick v. Edward Donner Lumber Corporation, 275 App. Div. 954, 89 N. Y. S. 2d 783 (2d Dep't 1949). It has been held that an inclusive arbitration clause in a contract may preclude a contractor from impleading a sub-contractor. See, Knolls Cooperative Section No. 1, Inc. v. Hennessy, 3 Misc. 2d 220, 150 N. Y. S. 2d 713 (Sup. Ct. Bronx Co. 1956).

[29] Gambella v. Johnson & Sons, Inc., 285 App. Div. 580, 140 N. Y. S. 2d 208 (2d Dep't 1955).

It is possible that a general contractor may be liable to an employee of a sub-contractor for failure to provide a safe place to work. Nevertheless, the sub-contractor may also be liable over to the general contractor for failure to inspect allegedly defective material claimed to have caused the accident. Pursuing this further, the sub-contractor may now be entitled to recovery against the supplier of the defective material as a primary wrongdoer, assuming that the supplier had knowledge of the use and users of the material. Crawford v. Blitman Construction Corp., 1 App. Div. 2d 398, 150 N. Y. S. 2d 387 (1st Dep't 1956).

[30] NEW YORK WORKMEN'S COMPENSATION LAW, §§ 10, 11.

[31] Carroll Sheet Metal Works, Inc. v. Mechanical Installations, Inc., 201 Misc. 689, 110 N. Y. S. 2d 581 (Sup. Ct. Queen's Co. 1951).

[32] Gambella v. Johnson & Sons, *supra* note 29.

is sued by one injured or killed on the premises as a result of the negligence of the contractor, the New York courts have generally treated such owner as merely a passive tort-feasor where liability is premised on the sole fact of his ownership right in the property on which the accident occurred,[33] unless the duty of care in performing the work is non-delegable,[34] or unless, after his receiving *actual* notice of the dangerous condition created by the contractor, he acquiesced therein.[35] Even an indemnity agreement between an owner and a contractor purportedly absolving the owner from liability at the hands of the injured party may prove legally ineffective because of the invalidating effect of public policy,[36] or statute,[37] or because it is not sufficiently broad in purpose to effectuate the indemnity coverage intended by the parties.[38]

[33] Tipaldi v. Riverside Memorial Chapel, Inc., 298 N. Y. 686, 82 N. E. 2d 585 (1948).

[34] Schwartz v. Merola Bros. Construction Corp., 290 N. Y. 145, 152, 48 N. E. 2d 299 (1943).

An interesting itemization of such non-delegable duties is set forth in Janice v. State of New York, 201 Misc. 915, 919-922, 107 N. Y. S. 2d 674, 678-680 (Ct. Claims 1951):

(1) Where the work in the natural course of events will produce injury unless certain precautions are taken;

(2) Where the work contracted to be done is inherently or intrinsically dangerous;

(3) Where the employment of an independent contractor is for work likely to render the premises dangerous to invitees;

(4) Where the owner fails to use reasonable care to select a competent contractor.

[35] Harrington v. 615 West Corp., *supra,* note 2.

See, also, Stabile v. Vitullo, 280 App. Div. 191, 112 N. Y. S. 2d 693 (4th Dep't 1952), where the agreement of the third-party defendant to repair damage to stairs caused by its employees did not relieve the third-party plaintiffs, as owners of the property, of their duty to the public to correct the defect of which they had actual notice.

And a breached agreement to carry insurance to save the contractor harmless may further curtail the property owner's right of recovery over which right would otherwise have existed. Gorham v. Arons, 282 App. Div. 147, 121 N. Y. S. 2d 669 (1st Dep't 1953), rearg. denied, 282 App. Div. 760, 122 N. Y. S. 2d 892 (1st Dep't 1953), aff'd 306 N. Y. 782, 118 N. E. 2d 600 (1954).

[36] Rufo v. Orlando, *supra,* note 22.

An agreement of indemnity must be set forth in the third-party complaint. A mere allegation that there is a contract of indemnification is insufficient. Verder v. Schack, 191 Misc. 935, 79 N. Y. S. 2d 700 (Sup. Ct. N. Y. Co. 1948).

[37] Where liability of a landowner or contractor exists, it cannot be circumvented by the terms of any agreement for the construction, repair, or maintenance of real estate. NEW YORK REAL PROPERTY LAW, § 235.

[38] Broderick v. Cauldwell-Wingate Co., Inc., 305 N. Y. 872, 93 N. E. 2d 629 (1953), action by general contractor against sub-contractor.

Good Neighbor Federation v. Pathe Industries, Inc., 202 Misc. 951, 114 N. Y. S. 2d 365 (Sup. Ct. N. Y. Co. 1952), aff'd 281 App. Div. 968, 120 N. Y. S. 2d 925 (1953), where the contract was construed to indemnify the owner against the negligent acts of the contractor, and not for the owner's own negligence.

It is, therefore, not the mere fact of property ownership which, strictly speaking, bars an owner from the right of recovery over, but rather, as a general rule,[39] his ownership as coupled with the incidents of occupation and control of the premises on which the plaintiff's injuries occurred.[40] This entails the further connotation of the right of the owner not merely to enter the property for the purpose of making repairs at the tenant's request, nor even of an agreement by him to make repairs,[41] but rather, as the Court of Appeals has recently held, it means the practice and procedure of retaining a general supervision over the premises.[42] On the other hand, apart from the provisions of a lease, a lessee may be held liable to the lessor, within the general principle of indemnity in tort actions, for any liability to which the lessor might be subjected by reason of the lessee's breach of its primary obligation to exercise care and to comply with all relevant statutes while the lessee is in occupation of the premises.[43] This obligation to indemnify the lessor is not, it has been held, satisfied or discharged in advance by the lessee's procurement of public liability insurance under a specific requirement of the lease, as such procurement, not being voluntary on the lessee's part, does not immunize the lessee from liability for its own wrongdoing.[44]

V. THE POSITION OF AN INSURANCE COMPANY IN THIRD-PARTY ACTIONS

IN REFERENCE to the right of an insured to implead the insurance company in an action against the insured by an aggrieved plaintiff, the issue would seem to depend first, upon the terms of the insurance contract, and second, upon the fact as to whether impleader would prejudice the company. Usually there is no sound reason why the

[39] That is, putting aside decisions dealing with the duty of care owed by a landlord out of possession to one on property to which members of the general public are admitted; or the duty to a passerby on a public street; or in respect to a public way adjoining the leased premises. See, Appel v. Muller, 262 N. Y. 278, 186 N. E. 785 (1933).

[40] Wischnie v. Dorsch, 296 N. Y. 257, 72 N. E. 2d 700 (1947).

[41] Dick v. Sunbright Steam Laundry Corp., 307 N. Y. 422, 121 N. E. 2d 399 (1954).

[42] De Clara v. Barber Steamship Lines, Inc., 309 N. Y. 620, 132 N. E. 2d 871 (1956), holding that a landlord may retain the essential element of control of leased premises by reserving to himself the right, to be exercised in his independent discretion, to enter the premises at any time to make repairs on his own responsibility, even though the primary duty of repair may rest on the tenant.

[43] Merkle v. 110 Glen Street Realty Corp., 282 App. Div. 617, 125 N. Y. S. 2d 881 (3rd Dep't 1953).

[44] *Id.* at 620, 621.

right of an insured to indemnity from an insurer cannot be determined at the same time as the original claim by the plaintiff against the insured is decided,[45] provided the insurer is protected against the possibility that judgment against the insurer may be rendered prior to judgment on the issue against the insured.[46] Where the action will be tried by a jury, however, it has been held that the third-party defendant insurance company is entitled to an order of severance, as the fact of insurance coverage should not be brought to the attention of the jury to whom will be submitted the issues between the original plaintiff and the insured.[47] Notwithstanding the general rule, however, that in negligence cases the admission of evidence before a jury that a defendant carries insurance constitutes reversible error,[48] the Appellate Division of the Second Department has permitted the impleader of the disclaiming insurance carrier despite this objection.[49] Likewise, the Appellate Division of the Second and Third Departments have allowed impleader of the insurance company despite a provision in the insurance contract to the effect that "no action shall lie against the company until the amount of the insured's obligation shall have been finally determined either by judgment against the insured after trial, or by written agreement of the insured, the claimant, and the insurance company."[50] Although this latter determination appears not

[45] Caserta v. Beaver Construction Corp., 197 Misc. 410, 95 N. Y. S. 2d 131 (Sup. Ct. Queen's Co. 1949).

[46] Judy Negligee, Inc. v. Portnoy, 194 Misc. 508, 89 N. Y. S. 2d 656 (City Ct. N. Y. Co. 1949).

[47] Caserta v. Beaver Construction Corp., *supra,* note 45.

[48] Simpson v. Foundation Co., 201 N. Y. 479, 95 N. E. 10 (1911); Morton v. Maryland Casualty Company, 1 App. Div. 2d 116, 148 N. Y. S. 2d 524 (2d Dep't 1955).

[49] Adelman Mfrs. Corp. v. New York Wood Finisher's Supply Co., 277 App. Div. 1117, 100 N. Y. S. 2d 867 (2d Dep't 1950); Brooklyn Yarn Dye Co. v. Empire State Warehouses Corp., 276 App. Div. 611, 96 N. Y. S. 2d 738 (2d Dep't 1950), motion for leave to appeal denied, 277 App. Div. 796, 97 N. Y. S. 2d 552 (2d Dep't 1950).

An examination of the records on appeal of both these cases fails to reveal, however, that the question of prejudice was raised. See, Gleason v. Sailer, 203 Misc. 227, 116 N. Y. S. 2d 409 (Sup. Ct. Nassau Co. 1952).

[50] Brooklyn Yarn Dye Co. v. Empire State Warehouses Corp., note 49, *supra;* Lecouna Cuban Boys Inc. v. Kiamesha Concord Inc., 276 App. Div. 808, 93 N. Y. S. 2d 113 (3rd Dep't 1949), motion for leave to appeal denied, 276 App. Div. 940, 94 N. Y. S. 2d 202, app. dism. 300 N. Y. 740, 92 N. E. 2d 317 (1950).

It would seem, however, that where the insurance policy in so many words specifically negatives the right to join the company as a co-defendant in any action against the insured to determine the insured's liability, it successfully prevents the use of impleader between the insured and the insurer, since section 193-a, being procedural in nature and not involving fundamental public policy, may be waived by agreement. Aulisio v. California Oil Company, 202 Misc. 1050, 120 N. Y. S. 2d 582 (Sup. Ct. Ulster Co. 1952).

to have been passed upon by the Court of Appeals, or by the Appellate Division of the First Department, the Supreme Court of New York County has recently followed the ruling of the Second and Third Departments, suggesting however, that the device of a declaratory judgment might be preferable to impleader against the insurance carrier to establish the legal rights of the insured and the insurer under the policy.[51]

The case law in New York pertaining to the right of an insurance company to implead a third-party defendant in an action upon the policy is rather meager. Ordinarily, an insurer possesses no right of subrogation against a party causing the insured's loss until the insurer has paid the loss under the policy.[52] Where, however, the claim over is based on negligence rather than on contract, it has been decided that a third-party complaint by an insurance company is sufficient under Section 193-a although no payment has been made by the company to its insured.[53] In the case last referred to, the owner of certain premises sued the defendant insurer for a fire loss. The defendant in its answer was permitted to bring in as a third-party defendant a subcontractor whose electrical installation work was claimed by the insurance company to have been negligently performed, thereby causing the loss to the insured. Where, however, there is no claim in negligence by the insurer against a primary wrongdoer, and where the alleged liability over is based strictly on the insurance contract, impleader would probably be denied.

VI. EXAMINATION BEFORE TRIAL POSSIBILITIES IN IMPLEADER PRACTICE

THERE is considerable difference of opinion among the New York courts as to whether a defendant should be permitted to examine a

[51] Kahn v. George F. Driscoll Company et al., 1 Misc. 2d 405, 146 N. Y. S. 2d 902 (Sup. Ct. N. Y. Co. 1955).

See, however, Chizik v. Fuchs, 193 Misc. 297, 76 N. Y. S. 2d 437 (N. Y. Co. 1947), an eight year earlier case, denying the right of impleader in a negligence action against a non-defending insurance company on its contractual liability to the insured, on the ground that the merger of the contract with the tort issue would *necessarily* prejudice the company. Such construction seems narrow in the light of the more recent decisions.

[52] Ocean Accident & Guaranty Corp. v. Hooker Electrochem Co., 240 N. Y. 37, 147 N. E. 351 (1925).

[53] Madison Ave. Properties Corp. v. Royal Insurance Co., 281 App. Div. 641, 120 N. Y. S. 2d 626 (1953). This case, however, has been considered a very advanced construction of the impleader procedure. See, Prashker, New York Practice 284, § 163A, note 16 (3d ed., Brooklyn 1948).

co-defendant before trial to determine the circumstances of the case. Those decisions denying the right rest upon the broad argument that the defendant seeking the examination does not have the affirmative of any of the issues in the action.[54] More recent cases, however, decided since the enactment of Rule 121-a of New York Civil Practice (July 1952), have allowed such examination even in the absence of a cross complaint.[55] This rule provides:

"In any action, at any time after the service of an answer, any party may cause to be taken by deposition before trial, the testimony of any other party, his agent or employee as prescribed by sections 288 and 289 of the Civil Practice Act, regardless of the burden of proof."

In line with the increased liberality and encouragement of pre-trial examinations throughout the state in negligence actions,[56] and in modern recognition of the fact that *all* surrounding circumstances of an accident are just as material and necessary to a defendant as they are to a plaintiff in a negligence case, such examination before trial of a co-defendant should now no longer be withheld. Thus, a defendant should be allowed also to examine before trial another defendant who, although not an original party to the action, is nonetheless brought into the case by impleader as a third-party, within the general purpose of Rule 121-a which permits any party, after the service of an answer, to cause to be taken by deposition before trial the testimony of any other party.[57]

VII. THE EFFECT OF THIRD-PARTY PRACTICE UPON SUBSTANTIVE RIGHTS

AN INTERESTING question, raised by the possibility of impleader against a passive wrongdoer, is whether a defendant may be brought into an action under Section 193-a when such defendant has a valid de-

[54] Johansen v. Gray, 279 App. Div. 108, 108 N. Y. S. 2d 35 (1951), where the Appellate Division, Second Department denied such examination on the added ground that in the absence of any issues between the defendants, the examination was not material and necessary under § 288 CIVIL PRACTICE ACT.

[55] Fenwick v. Kappler, 205 Misc. 594, 129 N. Y. S. 2d 55 (Sup. Ct. Monroe Co. 1954); Powers v. Marrone, 206 Misc. 173, 133 N. Y. S. 2d 110 (Sup. Ct. Nassau Co. 1954).

[56] See, Bronx County Supreme Court Rules for Trial and Special Terms, Rule XIX; New York County Supreme Court Rules for Trial Terms, Rule X; RULES CIVIL PRACTICE, Rule 121-a and CIVIL PRACTICE ACT, section 292-a.

[57] See, Frost v. Walsh, 195 Misc. 390, 90 N. Y. S. 2d 292 (Ct. of Claims Rensselaer Co. 1949), aff'd 275 App. Div. 1017, 91 N. Y. S. 2d 746 (3rd Dep't 1949).

fense against the claim of the original plaintiff. To allow such procedure would often have the effect of rendering such defendant ultimately liable for a claim which the law permits him successfully to resist. Yet, both modern adjudication and statutory law have clearly sanctioned such possibility. In *Schomber* v. *Tait*,[58] decided by the Supreme Court of Westchester County in 1955, an action was brought against the owner of an automobile which was driven by plaintiff's father, on the ground of the father's negligent operation of the car, causing injuries to the infant plaintiff who was a passenger in the car. The New York law is well settled that an unemancipated child may not maintain an action for a non-willful personal injury against his parent.[59] On the other hand, the owner of a motor vehicle is responsible under the New York Vehicle and Traffic Law for the negligent operation of the vehicle by one using the car with the express or implied permission of the owner.[60] The issue raised, therefore, was whether the owner of the car could be held vicariously responsible for the driver's negligence if no cause of action lay against the operator because of the parental relation. Held, that the plaintiff's inability to sue his father was premised upon a purely personal defense, and not upon the fact that the father was not inherently negligent. The personal relationship does not absolve the father of his wrongful conduct. Therefore, the car owner, to whom the law imputes such wrongful negligent conduct, must answer for plaintiff's damages.

A case of this type immediately suggests the question, can the owner implead the driver as a third-party defendant? The Court of Appeals in 1955, in the case of *Traub v. Dinzler*,[61] decided that where liability is predicated upon the ownership of a motor vehicle under Section 59 of the Vehicle and Traffic Law, and where the negligence of the owner is merely passive, that such owner is entitled to recover over, against the actively negligent driver. And in the recent case of *Lanser* v. *Baumrin*,[62] the New York Appellate Term, Second Department

[58] 207 Misc. 328, 140 N. Y. S. 2d 746 (Sup. Ct. Westchester Co. 1955).

[59] Cannon v. Cannon, 287 N. Y. 425, 40 N. E. 2d 236 (1942); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928).

Where a parent is accused on proper factual allegations of operating a car "willfully, wantonly and culpably", however, thereby causing injury to the plaintiff infant. the complaint states a good cause of action. Siembab v. Siembab, 284 App. Div. 652, 134 N. Y. S. 2d 437 (4th Dep't 1954).

[60] § 59, New York Vehicle and Traffic Law.

[61] 309 N. Y. 395, 131 N. E. 2d 564 (1955).

[62] 2 Misc. 2d 610, 151 N. Y. S. 2d 466 (2d Dep't 1956).

held, that in an automobile negligence action, a cross complaint of a defendant owner of the vehicle for judgment, declaring that if such defendant is held liable to plaintiff's passenger, then the plaintiff operator must indemnify such owner, is not barred by the statute of limitations as a cause of action for indemnity does not accrue until actual payment of the main claim, whether such payment be made voluntarily or pursuant to court judgment. These principles were held to apply irrespective of whether indemnity be sought under Sections 193-a or 264 of the Civil Practice Act, as both are intended to accomplish the same purpose under different circumstances, although with somewhat different pleading and procedural requirements.

Hence, returning to the *Schomber* case, it would seem to follow that if the car owner had not been in the car, (the fact was brought out in the decision that the owner was present in the car at the time of the accident and retained dominion over it), and had not retained the right to control its operation, his cause today for impleader against the driver, plaintiff's father, would have been established under the rationale of the *Traub* case. Such result would, as a consequence, render the third-party defendant liable for indemnification to the third-party plaintiff for a liability which the original plaintiff (the infant) could not charge against the third-party defendant (the parent) by direct suit because of the latter's personal disability.[63]

An analogous situation in which a party may ultimately have to respond in damages through third-party practice for injuries to a plaintiff whose direct action against such party is barred by legal defense, is found in such cases as *Goldwasser* v. *Raniere*,[64] and *Schaller* v. *Republic Aviation Corporation*,[65] in which latter case it was held that in a personal injury action a defendant may implead the plaintiff's employer as an indemnitor even though the result may render the latter indirectly liable for damages for injuries to an employee for which there could be no direct recovery because of the employer's compliance with the provisions of the Workmen's Compensation Law.[66]

[63] Although the court in the Schomber case considered the evidence that the owner was in the car at the time of plaintiff's injury, it does not appear from any facts in the decision what the owner did, or failed to do, for the court to have concluded that the owner retained dominion over the vehicle, and that he had the legal right to control its operation. At any rate, the court proceeds to point out that the failure of the owner to control the operation of the car would not change his rights nor limit his liability.

[64] 2 Misc. 2d 606, 151 N. Y. S. 2d 170 (App. Term, 1st Dep't 1956).

[65] 193 Misc. 60, 83 N. Y. S. 2d 540 (Sup. Ct. Queens Co. 1948).

[66] Another interesting example of the same general principle is found in the recent

CONCLUSION

HENCE, despite the general judicial observation that the impleader statute is only procedural in nature, and that the substantial rights of the parties to third-party practice are not changed, cases such as the above would suggest that a third-party defendant's rights may be materially affected by impleader, and that often very vital personal interests depend upon the contingency of whether a party is brought into an action through this method.

case of Jacobs v. United States Fidelity and Guaranty Company, 2 Misc. 2d 428, 152 N. Y. S. 2d 128 (N. Y. Co. 1956), where it was held that a husband may be indirectly responsible to answer for damages to his wife, even though he was not sued, and that his insurance policy did not cover her because of statutory disability.