Marquette Law Review

Volume 36
Issue 2 *Fall 1952*

Article 14

1952

Landlord and Tenant - Right of One to Contribution or Indemnity Against the Other Where a Covenant to Maintain and Repair the Premises is Breached

James B. Rose

shown, and the facts indicate that it may as readily be ascribed to a non-actionable as well as an actionable cause, holding that it is not within the proper province of a jury to guess where the truth lies and make that the foundation for a verdict.[17]

In view of the fact that both the language and the reasoning of the Wisconsin cases in applying or refusing to apply the *res ipsa loquitur* doctrine bear a striking resemblance to that of the *Slack* case,[18] there is good reason to believe that the Wisconsin court may follow the conservative view if called upon in the future to decide an "exploding bottle" case.

However, what the final accepted shape of the rule will be can hardly be predicted. The reasoning of the *Slack* case, requiring "control" to mean that both inspection and user must have been at the time of the injury in the exclusive control of the party charged, and stating that the mere fact that a bottle exploded does not necessarily compel an inference of negligence, would seem to be the more logical law.

Whther its application effects the most desirable results is obviously open to question in view of the modern tendency to extend the rule in order to afford relief to an injured plaintiff rather than to the defendant, who is usually better able to sustain the loss. But the question of who should bear the loss would seem to be one of policy to be decided by tthe legislature rather than by the courts.[19]

O. MICHAEL BONAHOOM

Landlord and Tenant—Right of One to Contribution or Indemnity Against the Other Where a Covenant to Maintain and Repair the Premises is Breached—Action commenced by Hardware Mutual Casualty Co. (subrogee of insured lessor) against the defendant lessee, to recover contribution of 50% of the amount which plaintiff paid Ione Vorek and her husband in settlement of claims for injuries caused by the negligently defective[1] condition of the entranceways and stairs and which were received by her while in defendant's drug store to purchase merchandise. Defendant appealed from an order overruling demurrer to complaint. *Held:* Affirmed. The complaint has stated sufficient facts to constitute a cause of action for contribution. *Hardware Mutual Casualty Co. v. Rasmussen Drug Co., 261 Wis. 1, 51 N.W. 2d 551 (1952).*

---

[17] Hyer v. City of Janesville, 101 Wis. 371, 77 N.W. 729 (1898).
[18] Klein v. Beeten, 169 Wis. 285, 172 N.W. 736 (1919); Jensen v. Jensen, 228 Wis. 77, 279 N.W. 628 (1938); Koehler v. Theinsville State Bank, 245 Wis. 281, 14 N.W. 2d 15 (1944); Wisconsin Telephone Co. v. Matson, 256 Wis. 304 41 N.W. 2d 268 (1950).
[19] Ins. L. J., *supra* note 11.
[1] WIS. STATS. (1949), sec. 101.01, 101.06.

Although no covenant to repair or maintain the premises actually existed in this case, the problem raised by such a covenant is suggested in the concurring opinion to the case by Justice Currie. Stated simply, the problem is whether A (a lessor or lessee) can recover contribution[2] or indemnity[3] from B (the other party to the covenant) for losses sustained through satisfaction of liability to third persons created by A's breach of a covenant whereby A assumed the sole responsibility of maintaining the premises and of curing any defects therein. Justice Currie concluded that A would not be entitled to recover from B for such losses.[4]

At the common law, there was no right of contribution or indemnity among joint tortfeasors.[5] In the realm of intentional wrongs, the rule is still in force.[6] However, the rule in Wiisconsin and other jurisdictions today is that contribution between joint tortfeasors may be enforced when a common liability exists between them and the wrong creating the joint liability is a mere act of negligence involving no moral turpitude.[7] The right exists in favor of an alleged joint tortfeasor who has paid more than his just share of such a loss.[8] The doctrine of indemnity has at all times been enforced in cases where a duty to another is breached and such other suffers a loss thereby.[9]

In the case of *Johnson v. Prange-Geussenhainer Co.*[10] a third party was injured as a result of ice collecting on the sidewalk from water flowing from a leaky drainpipe on the outside of a building leased by Prange Realty Co. (co-defendant) to Prange-Geussenhainer Co. (co-defendant). The lease contained a reservation by Prange Realty Co., lessor, of the right to maintain the outside of the premises and also an indemnity clause stating that the Prange Realty Co. was to be exempt from all liabilities created by the condition of the premises and that the Prange-Geussenhainer Co., lessee, would accordingly hold the Prange Realty Co. harmless therefor. In an action by the injured party against

---

[2] Payment by one of several joint tortfeasors to another of his share of a common liability which the other has satisfied. See BLACK, LAW DICTIONARY, 339 (4th ed. 1951).

[3] Satisfaction of a security given against loss, damage, or injury. See BLACK, LAW DICTIONARY, 910 (4th ed. 1951).

[4] "This case comes to us on demurrer to the complaint and I agree with the majority decision that the complaint states a cause of action for contribution, and therefore the demurrer was properly overruled by the trial court. However, after the defendant has answered and the trial is held on the merits, it may develop that the injuries to Mrs. Vorek were caused by defects to the premises which were the sole responsibility of the lessor, in which case plaintiff would then not be entitled to recover contribution from the defendant tenant." Hardware Mutual Casualty Co. v. Rasmussen Drug Co., 261 Wis. 1, 51 N.W. 2d 551 (1952).

[5] For complete discussion see Note, 140 A.L.R. 1306 (1942).

[7] Ellis v. Chicago NWR Co., 167 Wis. 392, 167 N.W. 1048 (1918).

[8] Brown v. Haertel, 210 Wis. 354, 244 N.W. 633 (1933).

[9] See Note, 140 A.L.R. 1307 (1942).

[10] Johnson v. Prange-Geussenhainer Co., 240 Wis. 363, 2 N.W. 2d 723 (1942).

both the lessor and the lessee for injuries sustained as a result of falling on the icy sidewalk, judgment was had against both under the Wisconsin Safe Place Statute.[11] The lessor was then granted a judgment over against the lessee for indemnity even though the lessor had breached its covenant to repair the outside of the premises and that breach was the cause of the injury to the plaintiff. The judgment over for indemnity was based solely on the indemnity clause contained in the lease.

The majority rule is that a lessor is not liable to the lessee for injuries resulting from his (lessor's) failure to carry out his agreement to maintain the premises.[12] However, Wisconsin favors the minority rule that the lessor is liable to the lessee where he negligently fails to carry out the agreement to maintain the premises.[13] Whre A covenants with B to the effect that A will maintain the premises and cure any defects therein, and then A breaches such covenant, resulting in injury to a third party, and B has been obliged to pay to such injured third party a claim for damages caused by such breach, it has been held that A must indemnifyB for the loss.[14]

The American Law Institute's Restatement of Restitution states the rule as follows:

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels which was created by the misconduct of the other or which, as between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of the danger he acquiesced in the continuation of the condition."[15]

This rule applies to situations where a person is subjected to liability because another has failed in his duty (by contract or by statute) to keep the premises in a safe condition and a third party is harmed.[16]

> "In all that class of cases where one party owes a legal duty to the public and to third persons to keep a place or an instrumentality reasonably safe, whenever another, by contract, agrees to perform that duty for him upon sufficient consideration, such contract by implication of law becomes one of indemnity and renders the party assuming such duty by contract liable for all damages that may legally be recovered by third persons against such party upon whom the law had in the first instance cast such

---

[11] *Supra,* note 1.
[12] For complete discussion of the cases see Note, 163 A.L.R. 310 (1946).
[13] Baum v. Bahn Frei Mut. Building & Loan Ass'n., 237 Wis. 117, 295 N.W. 14 (1940); Skrzypczak et ux. v. Konieczka, 224 Wis. 455, 272 N.W. 659 (1937); see Note, 28 A.L.R. 1450 (1924).
[14] Trego v. Rubovits, 178 Ill. App. 127 (1913); see Note, 157 A.L.R. 623 (1945).
[15] RESTATEMENT, RESTITUTION, §95 (1937).
[16] RESTATEMENT, RESTITUTION, Explanatory Notes, §95 (1937).

duty, as a result of the failure to comply with such contract."[17]

Thus, a covenant to maintain premises and cure defects therein, is by operation of law a covenant to indemnify for any failure or breach of such duty. Further, it is held that one of the general remedies of the lessee against the lessor for breach of the covenant to repair is an action at law to recover the damages, including injuries to third persons, suffered through such breach.[18]

The Wisconsin court construed the indemnity clause of the lease to the extent of controlling the liabilities of the parties and did not consider the equities involved, viz., that the breach of the covenant to repair became by operation of law a covenant to indemnify which therefore rendered the indemnity clause of the lease inoperable.[19] Should the problem again arise in Wisconsin, or other jurisdictions holding similarly thereto, consideration should be given to the equitable effect of a breach of a covenant to repair which by operation of law becomes a covenant to indemnify.

Thus, it may be concluded that the convenantor who agrees to maintain the premises and cure any defects therein cannot recover contribution (which is based on equity and justice) or indemnity (which is based on contract) where he breaches the covenant. The reasons why the covenantor should be thus precluded from recovery are that such a covenant is by operation of law an indemnity provision and it is not equitable or just to allow him to recover contribution or indemnity for payment for injuries caused by a defective condition which he promised to alleviate. Further, where contribution or indemnity is granted the covenantor, the covenantee should be allowed a counterclaim or setoff by reason of the cause of action he has acquired by the covenantor's breach of the covenant to maintain the premises and cure any defects therein.

JAMES B. ROSE

Wills—Direction to Employ Certain Attorney for Probate—In his will testator designated appellant as attorney for his estate but testator's sister and next to kin claimed to be entitled to name an attorney of her own choosing. The corporate administrator was willing to retain either attorney and petitioned the county court for instructions. From a ruling that the next of kin was entitled to name the attorney, the lawyer named by the testator appealed. *Held:* Reversed. Since the administrator was willing to carry out the expressed desire of the testator, his

[17] Trego v. Rubovits, 178 Ill. App. 127 (1913).
[18] *Supra,* note 13.
[19] *Supra,* note 10.