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Code Pleading - Impleader - A Comparison of the Wisconsin and Federal Rules of Third Party Practice

Razy G. Kletecka

NOTES

IMPLEADER—A COMPARISON BETWEEN THE WISCONSIN AND THE FEDERAL PRACTICE

One of the procedural devices available to both the plaintiff and defendant in an action in state courts, including Wisconsin, is that of Third Party Practice or "Impleader." It becomes available to a party to an action upon a motion to bring into the suit a third party who is liable for all or a part of the claim asserted against the moving party.

> "A defendant, who if he be held liable in an action, will thereby obtain a right of action against a person not a party may apply for an order making such a person a party defendant and the court may so order."[1]

The provisions of Rule 14 (a) of the Feneral Rules of Procedure covering Impleader in the federal courts are much more extensive than Impleader in the state practice, in that the Rule permits the defendant to ask for bringing in not only of a person liable to him, but also of a person "liable to the plaintiff" * * * for all or a part of the plaintiff's claim."[2] Under this provision the original defendant, by the third party complaint, may tender to the plaintiff another defendant, who, it is alleged, is liable for all of the claim asserted against the original defendant.

Impleader, although a comparatively modern innovation in law and equity, prevailed for many years in admiralty practice under the Admiralty Rule 56. Under the Conformity Act, Impleader was applied in Federal Courts in actions at law when it was allowed in state procedure.

Impleader is permitted in four distinct instances: (1) In cases of vicarious liability;[3] (2) in cases of contribution; (3) in subrogation cases under the equitable principles; and (4) in indemnity cases as in the case of liability insurers.[4]

Commencing with the decision in *Ellis* v. *Chicago and North Western Railroad*,[5] the Wisconsin courts have efficiently put into operation this advanced advanced system of procedure in contribution cases. In that case a judgment was rendered against both a railway company and a traction company for damages on account of personal injuries sustained as a result of a collision between a train and an interurban car; the court based its decision upon the reasoning that although both were negligent, the one in failing to ascertain that the train was coming, and

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[1] Wis. Stat. (1941) Sec. 260.19(3).
[2] Fed. Rules of Civil Procedure. Rule 14(a).
[3] Fedden v. Brooklyn Eastern District Terminal. (1923) 204 App. Div. 741, 199 N. Y. Supp. 9.
[4] Tullgren v. Jasper. D. C. Md. 1939, 27 F. Supp. 413.
[5] Ellis v. C. & N. W. R. Co. 167 Wis. 392, 167 N. W. 1048 (1918).

the other in running the train at an unlawful rate of speed, yet it appeared that there was no wilful or conscious wrong upon the part of either negligent party, and that therefore the company which pays the judgment might compel contribution from the other. The Wisconsin Court considered the decision in the English case of *Merryweather* v. *Nixon*,[6] which held that the law would not imply contribution between wrongdoers, but followed the reasoning which distinguishes between wrongs intentionally committed through inadvertance and negligence.[7] In respect to offences in which there is involved any moral delinquency or turpitude, all parties are deemed equally guilty and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum* and is in no respect immoral, it is not against the policy of the law to inquire into the relative delinquency of the parties and to administer justice between them although both parties be wrongdoers.[8]

Before 1939 when the present statute was enacted, the Wisconsin courts allowed a defendant, who would show by an affidavit that if he would be liable in an action he would have a right of action against a third person not a party to the action for the amount of the recovery against him, upon due notice to such person and the opposing party, to make an application to the court for an order making such third person a party defendant in order that the final rights of all parties might be completely settled in one action.[9] Then the court in its discretion might make such an order.[10] The present statute enacted in 1935 still continues this discretionary power. An examination of the statute in Wisconsin reveals that the defendant in an action may not bring in a third party who would be solely liable to the plaintiff, but the defendant himself must be liable in part and seek a partial recovery from the party whom he seeks to implead.[11] However under the present day practice in Wisconsin, which differs in this respect from that of New York and other code states,[12] a defendant is not forced to rely upon a joint judgment before he can seek contribution from a joint-tortfeasor.

In the Federal Courts, by the provision of Rule 14(a) Impleader is more extensive than in the most liberal code-state practices.[13] The purpose of Impleader is to avoid circuity of action and to dispose of the entire subject matter in one litigation and to accomplish ultimate justice with the least number of trials possible. For this reason, under the Federal Rule 14(a), the defendant may bring in not only a person who

[6] Merryweather v. Nixon, 8 T. R. 186.
[7] 6 R. C. L. 1055.
[8] Supra, note 7.
[9] Wis. Stat. (1935) c. 541 s. 10.
[10] Supra, note 9.
[11] Supra, note 1.
[12] N. Y. Stat. (1935) 211(a)
[13] Supra, note 2.

may be liable to him for a part of the judgment rendered against him, but also a person claimed by the defendant to be solely liable to the plaintiff for the entire amount of the plaintiff's claim. In *Crim* v. *Lumbermen's Mutual Casualty Company*,[14] the plaintiff sought to hold the defendant insurance company liable in alternative causes of action: first, upon an oral promise to pay if she would refrain from prosecuting her claim against the decendent's personal representative; and second, on a claim of having been induced to abandon her cause of action by practice of fraud on the part of the defendant insurance company.[15] The defendant made its motion for Impleader, to make the plaintiff's attorney, a third party, on the ground that it was through his negligence that the plaintiff lost her right of action against the personal representative of the deceased, and that such a third party is liable to the plaintiff for all of the plaintiff's claim against the defendant and the third party plaintiff. The judgment that was demanded was one against the third party for all sums that might be adjudged against the defendant and payable to the plaintiff. The holding of the court sustaining the motion was based upon the reasoning that since the plaintiff might have joined the third party defendant originally, in proceeding against both him and the insurance company in the alternative, the defendant insurance company might bring in the attorney as a third party defendant.[16]

Under the Federal Rule, it was further held that a store sued for injuries could file a third party complaint against the owner of the store on the ground that the owner and mortgagee were solely liable for the injuries.[17] And in an action by an occupant of an automobile against a township and a county for injuries resulting from improper construction and maintenance of a highway across a railroad track, the occupant could not object to the addition as third party defendants of the railroad company and the owner of the automobile, on the ground that Rule 14(a) did not permit joinder of third party defendants if the substantive law of the state does not permit reimbursements, as between tortfeasors, where the township and county did not ask reimbursement but merely that any judgment recovered be against the railroad company and the owner of the automobile and not against the township and county.[18]

The plaintiff himself is not compelled under either state of Federal practice to assert a claim against a third party defendant impleaded by the original defendant. He has the privilege of amending his complaint, but not the obligation to do so. If he does not avail himself of the

[14] Crim v. Lumbermen's Mutual Casualty Company, 26 F. Supp. 715. (1939).
[15] Supra, note 14.
[16] Supra, note 14.
[17] Kravas v. Great Atlantic & Pacific Tea Co. D. C. P. 1939, 28 F. Supp. 66.
[18] Satink v. Township of Holland, D. C. N. J. 1939, 28 F. Supp. 67.

privilege he may assert his claim against the third party defendant in an independent action. However the procedure followed if the plaintiff does amend his complaint so as to include the third party defendant as a co-defendant, is precisely the same as if the plaintiff had sued them as co-defendants originally. If the plaintiff does not amend, the defendant may file his cross-claim and the sued defendant prosecutes the third party on the cross-claim exactly as the plaintiff in turn prosecutes him; the same witnesses and testimony are used in this prosecution because the purpose of the cross-litigation is to prove the third party's negligence toward the plaintiff. The two claims are litigated at the same time and all issues are submitted to the jury.[19] Any rights of appeal which exist between the plaintiff and the original defendant are also available to the third party defendant, but the plaintiff is not hindered from withdrawing from the action and executing his several judgment as soon as possible. Under such practice the plaintiff cannot complain that he is being deprived of his right to sue the party whom he wishes, and again he is not precluded from subsequently asserting his claim in an independent action.[20] When an impleaded joint tort-feasor is dismissed from an action in which no issue of contribution was raised between the defendant and the third party, the judgment is not *res adjudicata* on the issue of contribution between the defendant and the third party.[21]

The plaintiff in an action also has a right to bring in a third party when a counter-claim is asserted against him by the defendant, this practice being allowed under any circumstances when the defendant would be similarly entitled to do so.[22]

The device of Impleader arises only from a common liability and therefore the Wisconsin court, in *Zutter* v. *O'Connell,* refused the defendant's motion where a third party to be impleaded was the father of the minor plaintiff who actually concurred in the negligent act for which the defendant truck driver was being sued.[23] However, since a wife may bring a suit against her husband in Wisconsin, in *Wait* v. *Pierce,* the defendant could have contribution from the plaintiff's husband conditioned upon the payment of more than one half of the judgment.[24]

The Wisconsin, as well as the Federal practice of Impleader is a logical development of the idea of disposing of all of the subject matter incident to a cause of action based upon the same facts in a single litigation with economy of litigation by avoiding two actions which should be tried together.

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[19] Wait v. Pierce, 191 Wis. 202. 210 N. W. 822.
[20] Scharine v. Huebsch, 203 Wis. 261, 234 N. W. 358 (1931).
[21] Bakula v. Schwab, 167 Wis. 546, 168 N. W. 378 (1918).
[22] Dewey & Almy Chemical Co. v. Johnson, Drake & Piper. D. C. N. Y. 1939. 25 F. Supp. 1021.
[23] Zutter v. O'Connell, 200 Wis. 601, 229 N. W. 74 (1930).
[24] Supra, note 22.