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Indemnity Revisited: Insurance of the Shifting Risk

By Scott Conley* and George Sayre**

Indemnity, the right of one to recover from another because of his obligation to a third party, has dramatically broadened in scope and application in California since these authors surveyed the then-embryonic field in 1961. Several decisions of the California Supreme Court and over forty reported cases from the California District Courts of Appeal attest to the widespread popularity and rapid development of this method of shifting risk and loss. In many of these cases, the nominal opponents are covered by insurance companies, who are the real parties in interest. Faced with escalating jury verdicts and ever-expanding concepts of tort law imposing liability upon their insureds in the first instance, liability insurance carriers and their counsel have shown ingenuity in redistributing loss among themselves by means of the devices of express and implied indemnity.

Express indemnity—arising by written or oral agreement of the promisor to be responsible for the wrongs of another—and implied indemnity—imposed by law as an exception to the rule of noncontribution between joint tortfeasors—have undergone parallel development in California law. Although there are earlier cases of the same genre,

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5. For an excellent summary, see Molinari, Tort Indemnity in California, 8 Santa Clara L. Rev. 159 (1967). See also Werner, Contribution and Indemnity in California, 57 Calif. L. Rev. 490 (1969).
the rules governing modern express indemnity may be said to stem in California from the case of *Vinnell Co. v. Pacific Electric Railway* and implied indemnity from the *San Francisco School District* case. This article will examine the California law of indemnity, both express and implied, as it has developed since 1961.

**Express Indemnity**

A. Indemnity Against One's Own Negligence—Intent of the Parties as Controlling

*Vinnell Co. v. Pacific Electric Railway* held that a negligent indemnitee may not recover from a nonnegligent indemnitor unless their agreement *expressly* provides that the indemnitee will be held harmless for his own negligence. In *Vinnell* the California Supreme Court declared that the language of the contract in question was not specific enough to compel a finding that the parties intended the negligent indemnitee to be compensated by the nonnegligent indemnitor. The court stated:

In the overwhelming majority of cases the result reached by [the courts’] interpretational efforts can be condensed into the simple rule that where the parties fail to refer expressly to negligence in their contract such failure evidences the parties intention not to provide for indemnity for the indemnitee's negligent acts.

The simplistic approach of *Vinnell* had the advantage of easy application. If the contract did not contain express language assuming

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8. As before, the examination of the right of indemnity arising out of warranties that pass from sellers and suppliers of chattels to consumers is outside the scope of this article.


10. *Id.* at 414, 340 P.2d at 605.

11. The relevant terminology of the contract was as follows: "8. Contractor hereby releases and agrees to indemnify and save Railroad harmless from and against any and all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused, resulting directly or indirectly from the performance of any or all work to be done upon the property and beneath the tracks of Railroad and upon the premises adjacent thereto under said agreement between District and Contractor, also from all injuries to and deaths of persons, claims, demands, cost, loss, damage and liability, howsoever same may be caused either directly or indirectly, made or suffered by said Contractor, Contractor's agents, employees and subcontractors, and the agents and employees of such subcontractors, while engaged in the performance of said work." *Id.* at 414, 340 P.2d at 606.

12. *Id.* at 415, 340 P.2d at 607; *accord*, Baldwin Contracting Co. v. Winston
responsibility for the indemnitee's own negligence, the court would deny indemnity without further inquiry.

More recent cases, particularly in situations where both indemnitor and indemnitee are negligent, have suggested a return to the fundamental rule of contractual interpretation that the intent of the parties, as determined from all the circumstances, will be given effect. Application of this rule to indemnity agreements is traceable to the 1960 California Supreme Court decision in *Harvey Machine Co. v. Hatzel & Buehler, Inc.* Hatzel & Buehler was engaged in certain electrical construction work on Harvey Machine Company's premises. An employee of Hatzel & Buehler was injured when he fell into an open elevator shaft. The injured workman brought suit against Harvey Machine Company, which cross-complained against Hatzel & Buehler on the basis of a hold-harmless clause in the construction contract. The hold-harmless agreement was held sufficient to allow indemnity. The court noted that "[the accident, in these circumstances, was one of the risks, if not the most obvious risk, against which Harvey sought to be covered.]"

In another construction industry case, *John E. Branagh & Sons v. Witcosky,* a workman injured on the job recovered judgment against both Branagh, the general contractor, and Witcosky, the subcontractor. Branagh thereafter recovered from Witcosky in an action on a written hold-harmless agreement despite the fact that both had negligently caused the workman's injury. The court pointed out that the very purpose of this agreement was to provide for indemnity in cases of concurrent negligence and that the contract did not attempt to render the subcontractor liable for the contractor's sole negligence.


14. The indemnity provision provided in part: "[Defendants agree] . . . to indemnify and hold harmless Harvey Machine Co., Inc., and its officers and employees, against liability, including all costs and expenses, for bodily or personal injuries including death at any time resulting therefrom, sustained by any person or persons including employees of . . . [defendants], and arising from the use of the premises, facilities or services of Harvey Machine Co., Inc., its officers or employees." *Id.* at 447, 353 P.2d at 926, 6 Cal. Rptr. at 286.
15. *Id.* at 448, 353 P.2d at 927, 6 Cal. Rptr. at 287.
17. The agreement provided: "Subcontractor further agrees . . . to fully indem-
"Common sense and basic concepts of fair dealing" were used to support an award of indemnity in *Atchison, Topeka & Santa Fe Railway Co. v. James Stewart Co.*\(^{18}\) Stewart Company, a building contractor, was engaged in a construction job on a site adjacent to the plaintiff's railway line. In order that Stewart might have direct access to the highway on the opposite side of the railroad tracks, Santa Fe and Stewart entered into a written agreement whereby the railway gave permission to cross its right-of-way and tracks. In the agreement, Stewart agreed to provide a flag man at the crossing and further agreed:

That it will at all times indemnify and save harmless the Railway Company against all claims, demands, actions or causes of action, arising or growing out of loss of or damage to property or injury to or death of persons or livestock, resulting in any manner from the construction, maintenance, use, state of repair, or presence of the Crossing upon the Railway Company's premises. . . ."\(^{19}\)

A passenger train struck a truck operated by Swan-Wheeler Transportation Company as it crossed the tracks, resulting in injury to Osuna, one of the train's passengers. Osuna obtained a judgment against both the railway and Swan-Wheeler. In this action, brought by the railway to recover indemnity for its portion of the judgment, the trial court expressly found that Stewart breached the contract by failing to have a flag man present at the time of the collision and that this breach was a proximate cause of the collision. On appeal, judgment for the railway was affirmed. The sole consideration for the crossing agreement, said the court, was Stewart's promise to indemnify and take precautions. When the parties clearly intend that the promisee would be indemnified even when negligent, this intention will be enforced despite the absence of explicit language.

In the case at bench, the railway gave Stewart a favor, and in return Stewart promised to carry the risks. Stewart expressly promised to do an act which would have prevented the loss and it expressly promised to pay for the kinds of losses which were actually sustained. Both promises were breached. The law, common sense, and basic concepts of fair dealing all dictate that Stewart (or its insurance carrier) should pay.\(^{20}\)

19. *Id.* at 823, 55 Cal. Rptr. at 317.
20. *Id.* at 831, 55 Cal. Rptr. at 322; *accord*, Schackman v. Universal Pictures Co., 255 Cal. App. 2d 857, 63 Cal. Rptr. 607 (1967) (written agreement for use of work under this subcontract, excepting only such injury or harm as may be caused solely and exclusively by the fault or negligence of Contractor." *Id.* at 836 n.2, 51 Cal. Rptr. at 845 n.2.
In Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., the supreme court, considering the intent of the parties to be of paramount importance, held that parol evidence of intent was admissible to construe a written contract of indemnity which was not ambiguous on its face. The defendant Thomas contracted with plaintiff P.G. & E. to furnish the labor and equipment necessary to remove and replace the metal cover of plaintiff's steam turbine, agreeing to perform the work at its own risk and expense and to "'indemnify' plaintiff 'against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract.' " During the work, the cover fell and damaged the exposed rotor of the turbine. P.G. & E. obtained judgment against Thomas on the theory that the indemnity provision covered injury to all property whether belonging to third parties or to P.G. & E. itself. Thomas offered extrinsic evidence to prove that the parties had intended the contract to be limited to damage to the property of others, but the evidence was refused. In reversing the lower court, the supreme court held:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations omitted.]

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

Writing for the majority, Chief Justice Traynor concluded that "magic words" in the contract cannot alone provide the answer.

If words had absolute and constant referents, it might be possible to discover contractual intent in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents.

Under the holding of the Drayage case, the court must interpret the contract to effectuate the intent of the parties; if extrinsic evidence proves that the words of the agreement do not conform to their intent, those words will be given no effect. The court's duty is thus to deter-

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22. Id. at 36, 442 P.2d at 643, 69 Cal. Rptr. at 563.
23. Id. at 37, 442 P.2d at 644, 69 Cal. Rptr. at 564.
24. Id. at 38, 442 P.2d at 644, 69 Cal. Rptr. at 564.
mine from all the available facts whether the parties intended the indemnitee to be responsible for the indemnitee's negligence in a given situation; the supreme court thus implicitly repudiated the mechanical approach enunciated in the earlier Vinnell decision.

Recent decisions of the supreme court and of the courts of appeal, however, seem to indicate a return to the Vinnell concept that express contractual language is necessary to obligate a promisor to indemnify a negligent indemnitee. Further, the courts of appeal have taken an approach, now apparently sanctioned by the supreme court, which involves a preliminary characterization of the indemnitee's negligence as active or passive, with indemnity allowed only when the indemnitee's conduct may be characterized as passive.

In Price v. Shell Oil Co. the plaintiff, a Flying Tiger mechanic, was injured when a ladder broke on a Shell gasoline truck which had been leased to Flying Tiger Lines. In the principal action, Shell's cross-complaint for indemnity against Flying Tiger was dismissed on motion for nonsuit. On appeal, the dismissal was affirmed. Shell, although merely a bailor, was held strictly liable to plaintiff in the first instance. The lease provided that the lessee

shall indemnify Shell against any and all claims and liability for injury or death of persons or damage to property caused by or happening in connection with the equipment or the condition, maintenance, possession, operation or use thereof. A

According to the court, this lease was not sufficiently specific under Vinnell to permit indemnity.

The supreme court went on to cite as additional ground for denying indemnity the rule it had announced in Markley v. Beagle, wherein it was held:

An indemnity clause phrased in general terms will not be interpreted, however, to provide indemnity for consequences resulting from the indemnitee's own actively negligent acts. [Citations omitted.] Mere nonfeasance, however, such as a negligent failure to discover a dangerous condition arising from the work will not preclude indemnity under a general clause.

Thus, the generality of the provision, coupled with the active conduct in furnishing a defective tank truck, precluded recovery.

Despite the language of Drayage that the overall intent of the parties must determine the disposition of the case, Price v. Shell Oil seems to represent a return to the narrower Vinnell rule. Additionally, the

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26. Id. at 256, 466 P.2d at 729, 85 Cal. Rptr. at 185.
28. Id. at 962, 429 P.2d at 136, 59 Cal. Rptr. at 816.
injection of the active-passive concept into questions of contractual interpretation which are presented in express indemnity situations serves only to further muddy already troubled waters.\(^{29}\)

This active-passive dichotomy had been applied in several court of appeal cases which arose mainly out of construction industry accidents. Typical of these cases is the 1962 decision of *Safeway Stores, Inc. v. Massachusetts Bonding & Insurance Co.*\(^{30}\) Defendant King, as general contractor, agreed to construct a store for Safeway; King also entered into a written subcontract with Timber Structures, Inc., which promised to furnish wood trusses for the roof of the building. The trusses collapsed, injuring six King employees who brought actions against Timber Structures, Inc. and Safeway. The latter defendant sued King for the amount of the settlement, attorneys’ fees and expenses. The written indemnity agreement between Safeway and King was general in nature, providing:

- Contractor agrees to indemnify and save owner harmless from and against any and all liability, loss, costs or expenses incurred by owner in connection with or as a result of any claims, demands, actions or causes of actions that are made or brought against owner for or on account of any injury to or death of any person or for loss of or damage to any property when such injury, death loss or damage results from or occurs in connection with the performance of this contract by contractor, his agents, employees or subcontractors.\(^{31}\)

The evidence indicated that Safeway had retained general supervisory control of the work and had the authority to reject the defective trusses. Nevertheless, it was held that Safeway’s negligence was at most passive, and that it was therefore entitled to indemnity despite the absence of express language in the agreement requiring King to indemnify against Safeway’s negligence.\(^{32}\)

\(^{29}\) *Price v. Shell Oil* is principally notable for its application of the doctrine of strict liability to lessors and bailors of personal property. That the supreme court was concerned about the effect that the allowance of indemnity would have upon the extension of strict liability in these situations seems evident by the concluding sentence of the opinion: "[I]t would do violence to the doctrine of strict liability and thwart its basic purpose, if we were to interpret so general a clause as transferring the liability for a defective article from the party putting the article in the stream of commerce to the user or consumer of the article who is within the class the doctrine was designed to protect." 2 Cal. 3d 245, 258, 466 P.2d 722, 731, 85 Cal. Rptr. 178, 187 (1970). Thus, the disposition of the case may be explained by the court’s policy decision to impose liability upon the party that made the product available to the consumer. The rationale of the products liability decisions, not that of the recent indemnity cases, led to the denial of indemnity.


\(^{31}\) *Id.* at 105, 20 Cal. Rptr. at 822-23.

\(^{32}\) There are several California cases that support this proposition. *E.g.*,..
In other cases the facts have been presented by way of pleadings only. Usually, the appellate courts have been reluctant to characterize indemnitee's negligence as active or passive on the bare allegations of complaint and answer, preferring to leave such determinations to the trier of fact. In Western Gulf Oil Co. v. Oilwell Service Co.,\(^3\) for example, the trial court sustained a demurrer to a complaint requesting declaratory relief for indemnity based on a written agreement, because complaints in the main personal injury actions alleged that the indemnitee was negligent. In reversing the judgment, the appellate court held that the character of indemnitee's negligence could not be determined as a matter of law on the pleadings. The court concluded that "[t]he plaintiff is entitled to have the court render its declaratory judgment even though such declaratory judgment may be unfavorable to him."\(^3^4\)

There is, however, some recent authority for the proposition that the active-passive dichotomy has no application to express contracts of indemnity, a conclusion which would seem to follow if the intent of the parties is the true test. In Del Real v. San Diego Gas & Electric Co.,\(^3^5\) plaintiff Del Real, injured when his avocado-picking pole came into contact with an overhanging high-voltage wire, recovered judgments against both the Electric Company and Davey Tree Surgery Company. Davey, which had a contract with Electric Company to trim trees under electric power lines, agreed that it would be solely liable for all injuries to any and all persons arising out of the work. The contract also required Davey to indemnify Electric Company even though the negligence

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Markley v. Beagle, 66 Cal. 2d 951, 429 P.2d 129, 59 Cal. Rptr. 809 (1967) (warehouse owner awarded indemnity against contractor who negligently left railing in dangerous condition injuring a third party; negligent failure to discover the dangerous condition did not preclude indemnity); Pacific Tel. & Tel. Co. v. Chick, 202 Cal. App. 2d 708, 21 Cal. Rptr. 326 (1962) (telephone company entitled to indemnity against its contractor who left dirt on the highway, causing claimant's vehicle accident; knowledge of telephone company's foreman of the dangerous condition did not preclude recovery); Indenco v. Evans, 201 Cal. App. 2d 369, 20 Cal. Rptr. 90 (1962) (architect entitled to indemnity against subcontractor, claimant's employer); cf. King v. Timber Structures, Inc., 240 Cal. App. 2d 178, 49 Cal. Rptr. 414 (1966), in which the plaintiff, after being held liable to indemnify Safeway, sought indemnity from the subcontractor Timber Structures. The court held that his negligence as found in the earlier litigation must be characterized as active, thus precluding indemnity.


34. Id. at 240, 33 Cal. Rptr. at 23; accord, Whitmire v. H.K. Ferguson Co., 261 Cal. App. 2d 594, 68 Cal. Rptr. 78 (1968), wherein the court reversed summary judgment for the defendant, holding that the factual question of the character of the indemnitee's negligence remained to be tried.

of Electric "may have jointly caused or contributed, by its negligence, to" the liability.\(^3\) An award of indemnity to Electric Company under this contract was affirmed on appeal. Noting that the findings in the principal action collaterally estopped Davey from denying that it had a duty to Del Real, the court of appeal held that the contract contemplated a duty to protect pickers as well as to keep trees from touching the electric lines. The court stated that the active-passive rule has no application to an agreement expressly providing for indemnity where the loss is occasioned by the concurrent negligence of the indemnitee and the indemnitor.\(^3\)

The cases demonstrate that the courts have employed a number of differing approaches in resolving the question of contractual indemnity where the party seeking indemnity has himself been negligent. In some cases, the court has considered the contractual language only, denying indemnity unless the language clearly and explicitly requires that it be granted. Other decisions have turned on the relative participation of the indemnitor and the indemnitee in the circumstances leading up to the loss; disposition of these cases has been based on concepts of "active and passive" negligence. Although results in cases in which the foregoing analyses were employed may be generally correct, it is submitted that the court should inquire into the intent of the parties in light of all of the circumstances of the case. To be sure, the court should consider the wordings of the contracts and the conduct of the parties leading up to the loss in reaching a decision, but they should be considered only in relation to the ultimate issue of intent.

B. Right to Indemnity Under Another’s Contract—Third Party Beneficiary Theory

In a few construction industry cases, parties have attempted to obtain the benefit of indemnity agreements made between others with whom the putative indemnitees were not in privity of contract. Except for one federal district court decision, courts have denied these attempts to recover on a third party beneficiary theory.

In *Southern California Gas Co. v. A.B.C. Construction Co.*\(^8\) A.B.C. contracted with the Los Angeles County Flood Control District to install a storm drain, promising to comply with all laws, orders and regulations affecting the work and to undertake certain responsibilities with respect to utility pipelines encountered during its operations. In

\(^3\) Id. at 425, 89 Cal. Rptr. at 704.
\(^3\) Id. at 427, 89 Cal. Rptr. at 706.
\(^8\) 204 Cal. App. 2d 747, 22 Cal. Rptr. 540 (1962).
the course of the work, A.B.C. damaged Gas Company's underground pipelines, resulting in an explosion which injured two of A.B.C.'s workmen. These claimants sued Gas Company which settled the claims and then sued A.B.C. for indemnity. The complaint was based entirely upon the theory that Gas Company was entitled to recover as a third party beneficiary of the contract between A.B.C. and the Flood Control District. The trial court sustained a demurrer to this complaint without leave to amend and this decision was affirmed on appeal. The opinion, which discussed the three types of third party beneficiaries as defined in *Restatement of Contracts*, section 133, concluded that “[i]t has frequently been held that where a contract incidentally benefits a third person but is not expressly made for his own benefit, he cannot recover thereon.”

In *Progressive Transportation Co. v. Southern California Gas Co.* Mesnick agreed to demolish a gas tank for the Gas Company. Mesnick rented a crane from Progressive Transportation Company, and Gray, a Mesnick employee, was killed when the negligent operation of the crane caused the gas tank to collapse. Gray's heirs filed suit against Progressive which cross-complained against Gas Company and Mesnick for indemnity. The demurrers of Gas Company and Mesnick to the cross-complaint were sustained on the ground that the complaints failed to state a cause of action. On appeal, the judgment of the trial court was affirmed:

Progressive's action against the Gas Co. is not based on any contractual relationship. Progressive alleges in essence that it rented equipment to Mesnick which in turn had a contract with the Gas Co. to demolish the gas holder. Progressive's right of indemnity, if any, would necessarily rest on equitable considerations. The pleadings disclose no such equitable consideration.

39. Section 133 of the Restatement of Contracts (1932) posited three types of beneficiaries: donee beneficiary, to whom the donor intended to make a gift; creditor beneficiary, to whom the donor owed some duty; and incidental beneficiary, who did not fall into either of the first two categories.

Section 133 of the Restatement (Second) of Contracts (Tent. Draft No. 3, 1967) suggests only two categories: intended and incidental beneficiaries. “[A] beneficiary of a promise is an intended beneficiary if (a) the performance of the promise will satisfy a duty of the promisee to the beneficiary; or (b) the promisee manifests an intention to give the beneficiary the benefit of the promised performance. . . .” Thus the Restatement (Second) has redefined donee and creditor beneficiaries by the use of somewhat broader language.

40. 204 Cal. App. 2d at 750, 22 Cal. Rptr. at 543.
42. Id. at 741, 51 Cal. Rptr. at 119.
However, in *Great American Insurance Co. v. Evans* Great American's insured, a warehouse owner, leased a building to Evans which in turn contracted with Valley Elevator to keep elevators properly maintained. An Evans employee was killed when an elevator fell, and his heirs recovered a judgment against the warehouse owner. The warehouse owner's insurer, which was subrogated to the rights of its insured, was successful in recovering indemnity from Valley Elevator on the theory that it was a third party beneficiary of the elevator maintenance contract between Valley Elevator and Evans:

In this case this requirement [of the existence of some contractual relationship] is satisfactorily met by recognizing that the plaintiff's insureds are third party beneficiaries of the contract between Valley and Evans and that the implied warranties which would necessarily run to Evans inure to the benefit of the owners of the warehouse as well. The contract between Evans and Valley was for the maintenance of the elevator located on the owners' property. Its benefits were to run to those persons who would be held responsible for the safe operation of the specific elevator which Valley agreed to inspect. If the owners, are to be held liable as a matter of law for the safe operation of this elevator, and it was Valley's contractual duty to maintain the elevator in a safe condition, then the owners were third party beneficiaries of Valley's services.

From the few cases which have discussed the third party beneficiary aspect of indemnity contracts, it is apparent that the court will grant indemnity if the plaintiff is an intended or express beneficiary of the agreement in question. In *Great American* it is true that the parties may not have specifically intended that the owner of the building was to be benefited by the agreement. As the court pointed out, however, they did intend that the contract protect all those who might be held responsible for a negligently maintained elevator. To that extent, the owner was an intended beneficiary.

C. Statutory Limitations on Indemnity

In several areas the California Legislature, presumably at the instance of special interests, has by statute limited rights to indemnity. Thus, California Labor Code section 3864, adopted in 1959, provides:

43. 269 F. Supp. 151 (N.D. Cal. 1967).
44. Id. at 155. Alternatively, the court held that Great American had a right of indemnity even in the absence of a contractual relationship, as the liability of the insured arose "not from an active fault, but from the legal obligation that the owners have to provide a safe premises." Id. at 157. In short, the owner's negligence was merely passive.
45. See also CAL. CIV. CODE § 1559.
If an action as provided in this chapter [which permits an employer to be subrogated to the rights of his employee against third party tortfeasors] prosecuted by the employee, the employer, or both jointly against a third person results in judgment against such third person, or settlement by such third person, the employer shall have no liability to reimburse or hold such third person harmless on such judgment or settlement in absence of a written agreement so to do executed prior to the injury.46

When the underlying claimant is indemnitor's employee, the courts have interpreted this statute to require an agreement which specifically provides for indemnity.47

Civil Code section 2782, enacted in 1967,48 provides as follows:

All provisions, clauses, covenants, or agreements contained in, collateral to, or affecting any construction contract and which purport to indemnify the promisee against liability for damages for (a) death or bodily injury to persons, (b) injury to property, (c) design defects or (d) any other loss, damage or expense arising under either (a), (b), or (c) from the sole negligence or willful misconduct of the promisee or the promisee's agents, servants or independent contractors who are directly responsible to such promisee, are against public policy and are void and unenforceable; provided, however, that this provision shall not affect the validity of any insurance contract, workmen's compensation or agreement issued by an admitted insurer as defined by the Insurance Code.49

The language of the statute, which has been held to be prospective,50 seems to limit the scope of its application to situations where the cause of the accident is sole negligence of the indemnitee. It is probable that the risk of loss may still be shifted from indemnitee to indem-

46. Although section 3864 protects the employer and his insurance carrier against actions for indemnity, when the employer (or his carrier) seeks to recover from another for sums paid out as workman's compensation to injured employees, a different rule obtains. Under the doctrine of Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961), the employer is precluded from recovering such sums only if he has been negligent. Since disposition of the cases has apparently not depended upon the character of the employer's negligence, he is presumably barred even though his negligence should prove to have been passive.

47. Progressive Transp. Co. v. Southern Cal. Gas Co., 241 Cal. App. 2d 738, 51 Cal. Rptr. 116 (1966); cf. Wien Alas. Airlines, Inc. v. United States, 375 F.2d 736 (9th Cir. 1967), where defendant in a wrongful death action brought by the heirs of an employee killed in an airplane crash sought indemnity from the United States. Summary judgment against Wien's third party complaint for indemnity was affirmed on the ground that the Federal Employees Compensation Act provided the exclusive remedy against the United States.


49. For a similar provision referring to hauling, trucking and cartage contracts, see Cal. Civ. Code § 2784.5.

nitor by contract even when both were negligent. Nor does this code section appear to prohibit a redistribution of a loss by means of insurance, secured and paid for by the potential indemnitor, which would serve to protect the indemnitee, although he may be negligent.

**Implied Indemnity**

**A. Circumstances Under Which the Obligation to Indemnify Will Be Implied**

The right to implied indemnity rests not upon any agreement between the parties, but on the general principle that one should not be held responsible for the obligation of another. This principle conflicts with the rationale of the common-law rule against contribution among joint tortfeasors, which rationale is that negligence is equated with fault and that one who is at fault may not be heard to complain that part of the burden he bears may belong to a fellow tortfeasor. The clash of these principles has resulted in an extension of the area wherein the right to indemnity will be implied and a consequent erosion of the legal territory over which the rule of noncontribution formerly held sway.

In a landmark case, *Herrero v. Atkinson*, the court commented at length about the difficulty of determining when the right to indemnity should be implied:

A right to implied indemnity among tortfeasors may arise out of some contractual relationship between the parties, or from equitable considerations.

[N]umerous theories have been advanced to support the allowance of indemnity in particular cases, among them distinctions between primary and secondary liability, constructive liability, derivative liability, a difference in the respective duties owed by the tortfeasors, active and passive negligence, and even the doctrine of last clear chance. No one explanation appears to cover all cases.

The duty to indemnify may arise, and indemnity may be allowed in those fact situations where in equity and good conscience the burden of the judgment should be shifted from the shoulders of the person seeking indemnity to the one from whom indemnity is

sought. The right depends upon the principle that everyone is re-
sponsible for the consequences of his own wrong, and if others have
been compelled to pay damages which ought to have been paid by
the wrongdoer, they may recover from him. Thus the determination
of whether or not indemnity should be allowed must of necessity
depend upon the facts of each case.\textsuperscript{56}

This candid admission that factual considerations and not legal
principles are dispositive of individual cases goes against the grain of the
judicial mind, and the decisions in this area reflect a valiant attempt to
rationalize the results reached in terms of the legal principles. The
courts, in attempting to delineate the areas of implied indemnity, often
have expressed themselves negatively: they have held that for certain
types of conduct indemnity should \textit{not} be allowed.

Thus, when two motor vehicles collide, injuring a third person,
neither operator will be permitted to recover indemnity from the other
on the theory that the other's negligence was greater in degree or dif-
ferent in kind.\textsuperscript{57} Likewise, the courts have said that where one "part-
icipates" in causing the injury to the third party, he is precluded from
indemnity. The difficulty, of course, is in defining the meaning of
"participation." According to the well-considered opinion in \textit{Cahill
Bros., Inc. v. Clementina Co.},\textsuperscript{58} "participation" means something be-
yond the "mere" violation of a duty imposed by law. In \textit{Cahill} a
pedestrian was injured when he fell into an excavation on the site of a
building under demolition. Although Cahill was the demolition con-
tractor, Clementina had orally agreed to do the actual work, which in-
cluded the erection for proper barricades to protect pedestrians from
falling into openings. Larkin, the general superintendent of Cahill,
was also the responsible and managing officer of Clementina Co., an
entity entirely independent from Cahill. Larkin was active in barri-
cade construction in both his capacity as Cahill superintendent and as
managing officer of Clementina. The issue was whether Cahill, held
liable along with Clementina for the pedestrian's injury, should be en-
titled to recover implied indemnity from Clementina. The court held
that as a matter of law there should be no recovery, for the reason that

\textsuperscript{56} \textit{Id.} at 74, 38 Cal. Rptr. at 492-93.
\textsuperscript{57} \textit{American Can Co. v. City & County of San Francisco}, 202 Cal. App. 2d
Mont. 1968); \textit{Jacobs v. General Accident Fire & Life Assurance Corp.}, 14 Wis. 2d 1,
187, 229 N.E.2d 769 (1967); \textit{Reynolds v. Illinois Bell Tel. Co.}, 51 Ill. App. 2d 334,
201 N.E.2d 322 (1964).
the negligence of Cahill through the ubiquitous Larkin constituted active participation in the injury to the pedestrian. The court stated:

The crux of the inquiry is [whether] participation in some manner by the person seeking indemnity in the conduct or omission which caused the injury [went] beyond the mere failure to perform the duty imposed upon him by law. [Citations omitted.] The thrust of these cases is that if the person seeking indemnity personally participates in an affirmative act of negligence, or is physically connected with an act or omission by knowledge or acquiescence in it on his part, or fails to perform some duty in connection with the omission which he may have undertaken by virtue of his agreement, he is deprived of the right of indemnity. In other words, the person seeking indemnity cannot recover if his negligence is active or affirmative as distinguished from negligence which is passive. 59

In *Ferrel v. Vegetable Oil Products Co.* 60 the indemnitee's conduct was held to be mere passive negligence, not precluding indemnity. Vegetable Oil hired Bay View Welding to repair a tank which had been damaged by fire. Plaintiff Ferrel, an employee of Bay View who was injured when he fell from a scaffold while working on the job, recovered a judgment against Vegetable Oil, which sought implied indemnity against Bay View. The court, in reversing the judgment in favor of Bay View, stated:

The basis of Vegetable Oil's right to be indemnified was the duty of Bay View to conduct its operations in a careful and prudent manner and the breach of that duty, from which a right to indemnification is implied. . . .

. . . .

Upon the undisputed facts, we do not see how appellant could be held guilty of active negligence or any breach of duty toward Bay View. The court correctly stated, "Vegetable Oil Company, the owner thereof, did not participate in the work being done, and retained no control of the tank (except to the extent of determining whether the work was completed according to the contract). . . ."

. . . .

Therefore, it was Bay View's conduct, rather than that of Vegetable Oil, which was the primary and active cause of Ferrel's in-

59. *Id.* at 381-82, 25 Cal. Rptr. at 309. Indemnity was likewise denied because of indemnitee's active negligence in O'Melia v. California Prod. Serv., Inc., 261 Cal. App. 2d 618, 68 Cal. Rptr. 125 (1968) (oil field accident; indemnitee had right to direct).

jury; and accordingly that is where the liability for the damages resulting from such injuries should be transferred. . . .

In *Aerojet General Corp. v. D. Zelinsky & Sons* 62 Aerojet hired Zelinsky to paint the interior of two tanks. An explosion occurred while the work was in progress, killing two Zelinsky employees. It was found that air blowers and explosion-proof electrical equipment could have been used to prevent the accident. Aerojet settled the death claims and sued Zelinsky for reimbursement under the theory of implied indemnity. The court, affirming the judgment for Aerojet, concluded:

In the train of causative factors culminating in the accident, Aerojet's omission was secondary and passive, while Zelinsky's was immediate and active. Another element militating in Aerojet's favor is the fact that the peril was created by the contractor and did not precede his arrival on the scene. Zelinsky's exclusive control of the work and the absence of Aerojet control are additional factors supporting indemnity. [Citations omitted.] Aerojet's justifiable reliance on Zelinsky's judgment and knowledge is another factor. 63

Similarly, in *Muth v. Urricelqui*, 64 it was held that the general contractor of a residential subdivision was entitled to recover in implied indemnity against grading subcontractors for the amount the general contractor had paid to a homeowner whose house was damaged by a landslide. The general contractor's failure to inspect the progress of the work and detect faulty grading and filling was held to be passive rather than active negligence. Thus, it appears that California follows section 95 of the *Restatement of Restitution* which provides:

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 others' 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. 65

On the other hand, when the negligence of both indemnitee and indemnitor is passive, derivative or vicarious, no indemnity may be recovered. In *Horn & Barker, Inc. v. Macco Corp.*, 66 for example, plaintiff leased a backhoe machine and furnished an operator, one Kostka,

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61. 247 Cal. App. 2d at 120, 123, 125, 55 Cal. Rptr. at 591, 593, 594.
63. 249 Cal. App. 2d at 610-11, 57 Cal. Rptr. at 705-06.
64. 251 Cal. App. 2d 901, 60 Cal. Rptr. 166 (1967).
65. *RESTATEMENT OF RESTITUTION* § 95 (1937).
to defendant Macco Corp. for use on a construction job. While operating the machine, Kostka negligently injured Macco's employee, Carnahan. Carnahan sued and recovered against Horn & Barker, which brought an action against Macco for implied indemnity. Macco's demurrer to the indemnity complaint was sustained without leave to amend, and the court of appeal affirmed the judgment. Horn & Barker contended that its liability to Carnahan was passive or secondary in that it was held responsible merely as the general employer of Kostka; Macco, however, was Kostka's special employer. The appellate court pointed out that the liability of both Horn & Barker and Macco was imputed and that both occupied the same position in relation to the injured employee. The court concluded:

Imputed liability is not the equivalent of liability arising from passive negligence. If such were the rule, then all liability arising out of the doctrine of respondeat superior would become the basis for an action for indemnification, because the active negligence of the employee, with which the employer is chargeable, would automatically be converted into the passive negligence of the latter by the mere application of the doctrine.67

Finally, the right to indemnity may be implied when the indemnitee's liability to the third party is based upon a policy of the law which has no relevance to the relationship between indemnitor and indemnitee. Thus, although a nonnegligent master is made responsible to third parties under the doctrine of respondeat superior for injury caused by his negligent servant,68 the master is nevertheless entitled to recover indemnity from the servant.

This principle is manifested in other types of cases as well. In Herrero v. Atkinson,69 for example, Herrero was involved in a motor vehicle accident in which Lorenzo was injured. As a result of her injuries, Alice Lorenzo employed three doctors to perform an operation 18 months later. The patient died during surgery. Her administrator brought a wrongful death action against Herrero, the hospital and the doctors, alleging negligent administration of a blood transfusion. Herrero cross-complained against the hospital and doctors for indemnity. On appeal, it was held that a cause of action was stated.70 Herrero's lia-

67. Id. at 106, 39 Cal. Rptr. at 326.
70. In Herrero, Dr. Goddard, one of the defendants, cross-complained against the remaining doctors and hospital for indemnity on two theories. First, his liability to Lorenzo's heirs would rest entirely on respondeat superior because their complaint alleged that he was responsible for the conduct of the other doctors who acted as his agents. His second theory was that he should receive indemnity because his negligence,
bility for the negligence of the hospital and physicians was one imposed by law, and although he may be liable in the first instance to the party injured, he should be entitled to recover indemnity from his codefendants to the extent that the original injury was aggravated because of their sole negligence.

B. Indemnity Without "Special Relationship"

One of the assumptions of the earlier California cases was that the right to indemnity would not be implied if the parties were not in a special relationship, e.g., master-servant, contractor-subcontractor. The rule apparently stemmed from the Pennsylvania case of Builders Supply Co. v. McCabe, which held that the right of indemnity rests upon a difference between the primary and secondary liability of two persons and that secondary liability "rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties...."

The rule as stated in Builders Supply was followed in American Can Co. v. City & County of San Francisco. In American Can the Municipal Railway of the City and County of San Francisco operated a truck with a tower capable of being elevated for the repair of the Railway's overhead wires. This truck was parked in the center of an intersection with its platform elevated and overhanging the street while city employees worked on the overhead wires. American Can's indemnity complaint alleged that the accident occurred because the driver of the American truck, being unable to see the platform because of its elevated position, passed close enough to the Municipal Railway truck to allow the top of the truck to contact the platform, knocking the men on it to the street. The Railway's employees brought an action against the appellant, which then sued the City and County of San Francisco for indemnity. American Can's theory was that its negligence was passive as if any, was passive, whereas that of the other physicians and the hospital was active.

The court held that his first cause of action could be maintained, but in the absence of a special relationship as required by American Can, discussed in the text accompanying note 75 supra, the second cause of action failed to state a claim upon which relief could be granted.

71. 227 Cal. App. 2d at 75, 38 Cal. Rptr. at 493.
72. Finally, it should be noted that, as in the express contractual indemnity decisions, the courts have been reluctant to hold that the claimant's pleading is invalid on its face. See, e.g., Montgomery Ward & Co. v. K.P.I.X. Westinghouse Broadcasting Co., 198 Cal. App. 2d 759, 18 Cal. Rptr. 341 (1962).
74. Id. at 328, 77 A.2d at 371.
compared to that of the City and County, which was actively negligent in causing the injury. Specifically, the complaint asserted that the Municipal Railway should have placed warning signs advising of the presence of the men overhead and barricades to prevent vehicles from passing close enough to contact the elevated platform. Under these facts, the appellate court held that, because the parties were legally strangers, a mere difference in the degree or kind of negligence would not give rise to a right of indemnity.

In two related cases presented to different districts of the California Court of Appeal in 1968, counsel for the Santa Fe Railway unsuccessfully attempted to extend implied indemnity to a situation in which indemnitee and indemnitor were strangers. Santa Fe's train collided at a grade crossing with a truck driven by Lan Franco. Train passengers filed personal injury actions against the railway and the truck driver and, in each, the railway filed a cross-complaint seeking indemnity, alleging that (1) its negligence, if any, was passive, whereas the truck operator was actively negligent and (2) its liability as a common carrier was one imposed by law which would be secondary to the truck operator's primary and direct liability.

Both courts of appeal ruled that demurrers without leave to amend were properly sustained, but did so on the ground that under the facts as disclosed by the pleadings the railroad was actively negligent as a matter of law. That a special relationship obviously did not exist between the railway and Lan Franco was apparently not regarded as controlling.

_Herrerov. Atkinson_ is authority for the proposition that a special relationship is not always necessary to sustain a recovery of indemnity. Likewise, it was stated in _Lewis Avenue Parent Teachers Association v. Hussey_, a pleading case involving the sufficiency of an indemnity cross-complaint, that

failure to allege the existence of an agreement of indemnity of a special relationship is not fatal to the cross-complaint if another basis of relief is shown.

76. Because the American Can case was decided on the pleadings, the court did not have to decide whether the American Can driver was actively negligent. The court, however, clearly indicated that such a conclusion could have been drawn from the pleadings. _See id. at 526, 21 Cal. Rptr. at 36-37._


80. _Id. at 236, 58 Cal. Rptr. at 501-02._
In *City of Sausalito v. Ryan* the court of appeal squarely held that a claim of indemnity will lie even in the absence of a special relationship. The *City of Sausalito* case is no authority precedent, for the supreme court later granted a hearing, thus vacating the decision of the lower court. While the case was pending before the supreme court, the appeal was dismissed when the parties agreed upon a settlement. Although the appellate decision has no legal force, the case is of considerable interest because it probably represents the next step in the gradual expansion of the application of the indemnity concept in California.

In *City of Sausalito* Gray was an occupant of Ryan’s vehicle which collided with a car driven by Kelley on Bridgeway Boulevard in Sausalito. The Ryan vehicle went over the unrailed sidewalk into San Francisco Bay, drowning Gray. Gray’s heirs sued Ryan, alleging that he was intoxicated at the time of the accident, and Kelley, claiming that he negligently operated his automobile. Also joined was the City of Sausalito, on the ground that it had violated Government Code section 835 in maintaining the street without a guardrail. The City cross-complained for indemnity against the two drivers, alleging that its negligence, if any, was passive and secondary. Demurrers to the cross-complaints were sustained without leave to amend. In reversing, the court of appeal stated:

Ryan and Kelley’s chief contention is that in the absence of a special relationship between them and the City, there is no basis for the application of the independent doctrine of equitable indemnity. Al-


84. A guest in California must plead and prove that his injury proximately resulted from the intoxication or willful misconduct of the driver. CAL. VEH. CODE § 17158.

85. CAL. GOV’T CODE § 835 provides: “Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.”
though this was the law at the time the first implied indemnity case was decided in California [Citation omitted.], it is clear that the right can now be invoked even in the absence of any special relationship between the tortfeasors. 86

Having thus concluded that the action could be maintained in the absence of a special relationship, the court of appeal was faced with the necessity of finding a new basis for the application of indemnity. The court's rationale was that, because the respective liabilities of the parties rested upon different legal bases—negligence of the drivers and statutory liability of the City—the claimant could properly recover indemnity. The court stated:

Likewise, here, the alleged liabilities to the plaintiff of Ryan and Kelley on one hand and the City, with its statutory obligations on the other, are based on breaches of different qualities of duties toward Gray. They can be considered to be on different planes of fault and this difference, if established at the trial, would warrant a complete shifting of the loss from one to the other. If the facts prove to be as here alleged, it would seem equitable and just that implied indemnity be allowed to the city against Ryan and Kelley. We conclude that the City's first amended cross-complaint stated a cause of action in implied indemnity and that the trial court erred in sustaining the demurrers of Ryan and Kelley without leave to amend. 87

As authority for this "plane of fault" theory, the court cited the Ninth Circuit decision of United Airlines, Inc. v. Wiener. 88 In that case a United States military jet aircraft collided with a United Airlines commercial airliner, killing all the occupants of both aircraft. After judgments against both United Airlines and the United States, the former sought indemnity from the latter for amounts that it had paid to heirs of its passengers. Although the trial court held that United Airlines was entitled only to contribution, the court of appeals decided that indemnity could properly be recovered. The court based its conclusion on two grounds: first, United, as a common carrier, had a duty to exercise the highest degree of care toward its passengers. 89 Consequently, its conduct which constituted a breach of that duty could be much less culpable than that of the United States. Second, the evidence in fact did indicate that the government's negligence was far greater than United's. The court of appeals held:

United's duty to [its passengers] was to exercise the highest degree of care. . . . The government's negligent acts occurred literally from the start to the finish of this tragic incident. The cumulative ef-

86. 65 Cal. Rptr. at 393-94.
87. Id. at 395.
88. 335 F.2d 379 (9th Cir. 1964).
fect of these negligent acts was to dispatch United's [aircraft] and the government's high-speed jet training mission, conducted by a student pilot . . . into the same area without warning to those in control of either craft. . . . United's pilots, to some disputed degree of probability, could have seen the jet and, in discharge of the obligation to exercise the highest degree of care . . . should have seen and avoided the jet. In view of the disparity of duties, the clear disparity of culpability, the likely operation of the last clear chance doctrine and all the surrounding circumstances . . . we hold that there is such difference in the contrasted character of fault as to warrant indemnity in favor of United. . . .

It remains to be seen whether some other California appellate court will apply the reasoning of the City of Sausalito decision to a similar situation in which the defendants owe different legal duties to the plaintiff, thus occupying different "planes of fault," or where the degree of culpability of two defendants is so "disparate" as to warrant shifting the entire loss to the guiltier defendant. In any event, it does seem clear that the California courts will no longer impose the requirement of "special relationship" as a prerequisite to indemnity.91

Procedural Problems

A. Joinder and Severance

Where indemnity is sought prior to trial of the main action (whether by cross-complaint or separate action) it is not clear when the indemnity action should be heard. Should it be tried by way of declaratory relief before the main action? Should the question be litigated along with the underlying cause of action? Or should it be tried subsequent to the principal case when the introduction of evidence has clarified the issues?

90. 335 F.2d at 402.
91. The appellate courts of other jurisdictions seem reluctant to apply indemnity principles to motor vehicle collision cases. For example, the Wisconsin Supreme Court has stated the following propositions: (1) It seems undesirable, at least in automobile accident situations, to extend the legal consequences of the distinction between gross and simple negligence beyond their present scope. (2) A rule allowing indemnity in collision cases would tend to increase or prolong automobile personal injury litigation because of the advantage one defendant would hope to gain by showing that another defendant was guilty of gross negligence. (3) A plaintiff is more likely to settle part of his claim is he is able to give a release which fixes the limit of his recovery from one defendant without the acquiescence of the other. This ability to settle would be impaired if the defendant would remain liable for indemnity, for his incentive to settle would be reduced. (4) Courts have not considered it necessary or practicable to attempt to allocate the burden of an injury among all those whose acts have caused it, in precise proportion to gravity of fault. For example, the present rule provides an equal division of the burden among negligent tortfeasors rather than apportionment according to their respective negligence. (5) There is no funda-
In Goldman v. Ecco-Phoenix Electric Corp., where the personal injury case had not yet been tried, the supreme court remanded the declaratory relief indemnity action for further trial. In the course of the opinion it suggested that both cases be tried together:

We note that the trial of the instant case will duplicate aspects of the issues of negligence which will arise in the [principal] action against [plaintiff]. Such duplication may be avoided by the stipulation of all the parties, with the approval of the trial court, for the consolidation of the two trials.

On the other hand, there may be good reasons of judicial administration to require that the prosecution of the indemnity action be abated until the conclusion of the principal case. For example, it is possible that the claimant would find it necessary to introduce issues extraneous to the resolution of the main action, thus confusing the jury. In Vegetable Oil Products Co. v. Superior Court, for example, it was held that, under California Code of Civil Procedure section 1048, the trial court has the discretion to sever issues raised by the indemnity cross-complaint for separate trial.

As a practical matter, it appears that issues raised by cross-actions for indemnity among defendants should be reserved for submission to the trial court sitting without a jury at the conclusion of the principal case. This procedure would enable the trial judge to consider all of the evidence introduced in the main action, as well as any additional evidence produced in the indemnity phase. There would be no need for a separate indemnity action and, consequently, no duplication of the evidence introduced in the first trial. Moreover, since the jury would not be sitting during the presentation of the additional—and possibly irrelevant—evidence, there would be no danger of confusion.

B. Res Judicata and Collateral Estoppel

When the principal action involving both indemnitor and indemnitee as defendants has gone to verdict and judgment, to what extent does the judgment determine the issues in a subsequent indemnity action un-
der the doctrine of collateral estoppel? The answers supplied by the appellate courts have been various and inconsistent, and they suggest that a trap for the unwary indemnitee may lurk in certain factual situations.

In *County of Los Angeles v. Cox Brothers Construction Co.*, for example, the court's application of the doctrine of res judicata effectively deprived the indemnitee of its day in court. In the first case, a motorist was injured on a county highway then under construction by Cox Brothers, which had agreed in writing to indemnify the county. The motorist sued both the county and Cox Brothers, but Cox settled out of the action in return for a covenant not to sue and took no part in the trial, which resulted in a judgment against the county. The county then brought an action for express indemnity against Cox Brothers, which had refused to hold the county harmless from the original action, as required by their contract. The judgment for the county against Cox was affirmed on appeal. It was specifically held that the facts litigated in the first action were "as much res judicata against [Cox Brothers] as they are against respondent county. . . ." 

The decision may be attacked on two grounds. First, it is the general rule that, if the plaintiff and defendant in the new action were co-defendants in the original suit, the judgment is not an estoppel, because it was not rendered between them. Although it has been held that codefendants who were actually adverse parties should be bound in a later action between them by determinations made in the first suit, that is apparently the minority rule. In this case, even if it is assumed that Cox was a party to the first action, it and the county had not been in an adversary posture. Thus, it is difficult to understand why the determinations in the first action were held to be res judicata in the second litigation.

Second, in the tort suit, the action against Cox was dismissed after it had settled out of court. It was, therefore, not a party to the action and it could not be bound by any determinations made in that ac-

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98. Id.
99. 195 Cal. App. 2d at 840, 16 Cal. Rptr. at 252.
In Vegetable Oil Products Co. v. Superior Court, however, the court held that the petitioner could cross-complain for indemnity despite a plea of res judicata by the potential indemnitor. The plaintiff in the underlying action had sued Vegetable Oil (petitioner) and his employer Bay View (indemnitor) to recover damages for bodily injuries. Bay View's demurrer was sustained, and the subsequent judgment was reversed. On remand, Vegetable Oil cross-complained against Bay View for indemnity. The court rejected Bay View's contention that its dismissal from the suit constituted res judicata that it was not negligent. The court declared:

The most obvious probable reason for the dismissal of Bay View is that the complaint showed that Bay View was plaintiff's employer, and Labor Code, section 3601, bars any such action against the employer by an employee who is entitled to the benefits of the compensation act. A judgment in an action in which the parties were not adversaries, but only joined as co-defendants, is not res judicata as between them. [Citation omitted.] There is nothing before the court to indicate that any adverse claim as between Bay View and Vegetable Oil was raised before Bay View was dismissed as a defendant in 1958.

In Baldwin Contracting Co. v. Winston Steel Works, Inc. Baldwin was general contractor in construction of a building. It subcontracted to Winston, a structural steel fabricator, which in turn subcontracted the erection of the building to Sacramento Erectors, Inc. Steele, Sacramento's foreman, was injured when he fell after contacting high voltage wires belonging to Pacific Gas and Electric Company. After Steele recovered judgment against Baldwin and Pacific Gas, Baldwin sued Winston on a written contract of indemnity, Winston claimed that Baldwin was collaterally estopped by the jury's determination in the employee's action that Baldwin had been negligent, but this argument was rejected by the court of appeal, which stated:

The judgment obtained by Steele against Baldwin . . . does not establish Baldwin's active negligence as a matter of law by collateral

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104. F. James, supra note 102, § 11.26, at 589.
106. For facts of the underlying action, see text accompanying notes 60-61 supra.
estoppel. There were no special interrogatories addressed to the jury. The judgment could well have been based on the general contractor's common law duty to afford the subcontractors' employees a safe place to work [Citation omitted.] or on the more stringent statutory liability imposed on the general contractor as "employer" under Section 6304 et seq. of the Labor Code. . . .109

In Horn & Barker, Inc. v. Macco Corp.110 the court, although apparently denying that it was applying res judicata, nevertheless employed that doctrine to deny indemnity as a matter of law. Macco's employee, Carnahan, was injured by the negligent operation of a backhoe machine, which Horn & Barker had leased to Macco for use on a construction job.111 Carnahan sued and recovered judgment against Horn & Barker, which brought an action for implied indemnity against Macco on the ground that because it alone supervised Carnahan's activities, Macco was solely liable for his tortious conduct. The court, observing that "plaintiff is seeking to relitigate the determinative issue which necessarily was decided adversely to it in the prior action,"112 sustained defendant's demurrer:

We need not here consider the effect of the doctrine of res judicata as applied in rulings upon demurrers [citations omitted]. This is true because plaintiff's pleadings itself affirmatively established that previously it had been judicially determined that it, as "general employer," was bound to bear the responsibility "for the negligent acts and omissions of [the challenged employee] Kostka during the time Kostka was operating [its] machine." To the extent that it seeks by its present pleading to relitigate this issue and to shift the identical imputed liability to the defendant, as special employer, it must necessarily fail.113

Although the court inexplicably declared that it did not have to "consider the effect" of res judicata, it is clear that the doctrine was applied to deny recovery. The plaintiff, which had been held liable as a general employer in the principal action, could not deny that liability.

In King v. Timber Structures, Inc.114 the doctrine was expressly applied. The action arose out of the collapse of a Safeway store which King has been constructing. It was determined that the cause of the accident was the failure of roof trusses supplied by Timber Structures. Six injured King employees brought actions against Safeway which set-

109. Id. at 571-72, 46 Cal. Rptr. at 425.
111. For facts of the case, see text accompanying notes 66-67 supra.
112. 228 Cal. App. 2d at 100, 39 Cal. Rptr. at 322.
113. Id. at 101-02, 39 Cal. Rptr. at 323.
tled and then successfully recovered indemnity against King.\textsuperscript{115} In Safeway's action against King, it was specifically found that King had been negligent. King then sought indemnity against Timber Structures, but in the court trial indemnity was denied. On appeal, judgment was affirmed. The determination (in Safeway's action against King) that King was negligent collaterally estopped it from relitigating that issue in its action against Timber Structures. In King v. Timber Structures the trial court determined only that the character of that negligence was active, precluding an award of indemnity.\textsuperscript{116} The nature of King's negligence, of course, had not been previously determined.

King argued that res judicata should not be applied against a party who was a defendant in the previous action because he "did not have the initiative and thus did not have a full and fair opportunity to litigate the issue effectively."\textsuperscript{117} The court pointed out, however, that King knew that his own pending cross-complaint would be barred "if he were found guilty of negligence which would be found to be active in kind" in the indemnity action.\textsuperscript{118}

The principle to be derived from these decisions is that a party seeking indemnity in a later action will be precluded from proving that he was not negligent although the quality of that negligence may be litigated. Such a result is clearly consistent with the test enunciated in Bernhard v. Bank of America:\textsuperscript{119}

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?\textsuperscript{120}

C. Measure and Extent of Damages

Since it is the general purpose of the law of indemnity to make one whole where he has paid the obligation of another, a successful indemnitee should recover from the indemnitor the full amount of any judgment awarded against him in favor of the third party. This recov-

\textsuperscript{116} 240 Cal. App. 2d at 182, 49 Cal. Rptr. at 418.
\textsuperscript{117} Id. at 183, 49 Cal. Rptr. at 418.
\textsuperscript{118} Id. at 183-84, 49 Cal. Rptr. at 418; cf. Freightliner Corp. v. Rockwell-Standard Corp., 2 Cal. App. 3d 115, 82 Cal. Rptr. 439 (1969).
\textsuperscript{119} 19 Cal. 2d 807, 122 P.2d 892 (1942).
\textsuperscript{120} Id. at 813, 122 P.2d at 895 (emphasis added). Nor should it make a difference if the claimant of indemnity was a defendant in the initial action. See Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P.2d 439, 25 Cal. Rptr. 559 (1962).
ery would include not only interest at the legal rate from the date of the judgment of the main action, but also reasonable expenses of investigation and defense, including attorneys' fees. Thus, California Civil Code, section 2778 (4) provides:

The person indemnifying is bound, on request of the person indemnified, to defend actions or proceedings brought against the latter in respect to the matters embraced by the indemnity, but the person indemnified has the right to conduct such defenses, if he chooses to do so. . . . 121

In the absence of special circumstances, such as a conflict of interest between the indemnitee and indemnitor, the former may not recover attorneys' fees if he rejects the indemnitor's counsel and employs his own attorney. 122 Finally, without an express agreement, an indemnitee is not entitled to recover expenses and attorneys' fees incurred in prosecuting the indemnity action itself. 123

Insurance Coverage Decisions Involving Indemnity

In accordance with the doctrine that an insurance contract will be construed against the insurer to provide coverage whenever possible, 124 recent decisions have apparently expanded the potential liability of insurers to insureds who are held liable to indemnify others, under either express or implied agreements of indemnity. In Indemnity Insurance Co. of North America v. California Stevedore & Ballast Co., 125 for example, the court, narrowly construing an exclusionary provision regarding contractual liability, held the insurer liable under the contract. Shipowners sought indemnity against stevedores in personal injury cases involving stevedore's employees; the stevedore's liability insurance carrier


122. See Buchalter v. Levin, 252 Cal. App. 2d 367, 60 Cal. Rptr. 369 (1967). Appellant, a purchaser of real property, entered into an express indemnity agreement with respondent, a real estate broker, to protect against possible claims of other real estate brokers for commissions arising out of the purchase. A suit was filed by such a broker, and respondent broker offered to provide counsel to defend appellants. The offer was rejected, litigation proceeded and was settled by respondent broker without contribution by appellant. Held, appellant was not entitled to recover attorneys' fees in the absence of a showing of good cause why it could not have been defended by respondent's counsel, e.g., a conflict of interest or other need for a different or separate defense. Cf. Cal. CIV. CODE § 2778.


125. 307 F.2d 513 (9th Cir. 1962).
refused to defend or make payment. Stevedore then brought this declaratory relief action. The liability policy provided:

Exclusion (c)

This policy does not apply under coverage A [bodily injury liability] except with respect to liability assumed under written contract, to bodily injury [liability].

The insurer argued that the stevedore’s liability rested, if at all, upon implied indemnity, not upon the written contract. However, the insured stevedore successfully maintained that its liability arose out of its contract to perform stevedoring services for the vessel, and the insurer was held liable to defend and pay.

In Employers Surplus Lines Insurance Co. v. Fireman’s Fund Insurance Co., the court held that the liability insurance policies issued to a stevedoring company covered the company’s indemnity liability to shipowners against whom employees of the stevedoring company had successfully pursued claims. The policies provided that they did not apply to injuries to the assured’s employees “except with respect to liability assumed under contract.” The liability carriers argued that there was no coverage under the policy because some of the injuries had occurred during the loading of the ship under an oral, not a written, contract. The court noted that the language of the policies did not differentiate between written and oral contracts, concluding that obligations under either were thus covered.

In Stolte, Inc. v. Seaboard Surety Co., the court held that a potential liability arising from implied indemnity was within the ambit of coverage for “liability imposed upon (the insured) by law,” but further held a potential liability arising from a written contract of indemnity was not covered without specific language providing for such coverage. In this case, Rosendahl, a commercial leasing company, leased a crane, accompanied by an operator and an oiler, to Stolte. The crane, while being operated under the control and supervision of Stolte, hit some wires, causing injury to two of Stolte’s employees. The injured parties sued Rosendahl, recovering against Rosendahl on the theory that the crane operator, a Rosendahl employee, was negligent. In conjunction with the lease, Stolte had executed a written indemnity agreement in favor of Rosendahl, which then sued Stolte for indemnity, alleging that

126. Id. at 515 n.1.
Rosendahl was entitled to recover on the theory of implied indemnity and under the written contract of indemnity. Stolte then brought a declaratory relief action to establish that it was covered under the policy issued by Rosendahl's insurer, which policy included coverage on the crane.

The appellate court held that, under the language in the policy providing that the company would indemnify the “insured” (which terms included Stolte as a permissive user) for “liability imposed upon him by law,” the insurer owed coverage and a defense to Stolte for the cause of action in implied indemnity. Stolte was not afforded coverage under the policy for its liability on the written contract, however, because the “liability assumed by contract” coverage contained in the policy only applied to the named insured by the terms of the policy.

It seems to be the clear trend of these decisions that policy provisions relating to coverage for indemnity exposures will be construed to provide coverage wherever possible. Certainly, as far as the duty of the insurer to defend actions is concerned, the recent California case of Gray v. Zurich Insurance Co.130 would appear to require defense of indemnity actions wherever there is a possibility that a judgment might be within the coverage afforded.

**Conclusion**

The application of indemnity devices, including both express written contracts of indemnity and implication of indemnity by operation of law, has greatly increased in California in recent years. In the area of express contractual indemnity, early decisions which followed a rigid and literal interpretational approach appear to have been superseded by a line of cases which regard the intent of the parties as the ultimate guide. In such instances, parole evidence is freely admitted, not only to explain potential contractual ambiguities, but also to contradict the express language of the contract in order to give effect to the intent of the parties.

A divergent line of authority examines the conduct of the parties in the transaction giving rise to the original liability in order to determine whether that conduct was negligent and, if so, whether such negligence was active or passive. This approach is less desirable because the parties may have intended that the indemnitee would recover, regardless of the nature of his negligence. Thus, the court's disposition of the case may be contrary to the original intent of the parties.

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When a party claims that indemnity should be implied by law despite the absence of express agreement, the "active-passive" litmus test is still applied to determine whether a negligent indemnitee may recover against a negligent indemnitor. The results in specific cases have been predictably irreconcilable. The proposition that there must be a "special relationship" between indemnitor and indemnitee seems to be undergoing constant erosion; in its place has arisen a general theory that where in equity and good conscience the facts suggest unfairness in holding one party liable to pay another's obligation, indemnity will be awarded. The adoption of the intriguing concept of "planes of fault" by one court of appeal suggests that the basis for indemnity may exist when the liability of codefendants rests upon different legal theories.

It is apparent that the conflicting forces of the marketplace will continue to give rise to attempts to shift liability by means of express contractual agreement and that the courts will sanction such arrangements when they appear to be reasonable and to have been intended by the parties. Where, however, such agreements amount to contracts of adhesion, the courts may afford protection to the putative indemnitor by finding a contrary intent or by judicious use of the "active-passive" test. Meanwhile, the burgeoning field of implied indemnity will challenge judicial ingenuity to delineate the areas wherein shifting of loss is to be permitted "in equity and good conscience."