Boston College Law Review

Volume 9
Issue 3 *Water Use - A Symposium*

Article 8

4-1-1968

Contracts—Indemnity—Architect's Duty to Supervise—Employer's Duty to Indemnify Despite Workmen's Compensation Act.—Miller v. DeWitt

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CASE NOTES

Contracts—Indemnity—Architect's Duty to Supervise—Employer's Duty to Indemnify Despite Workmen's Compensation Act.—*Miller v. DeWitt.*[1]—An architectural firm, DeWitt-Amdal and Associates, contracted with the Maroa Community Unit School District Number 2 to design and supervise the remodeling of a school gymnasium. Fisher-Stoune, Incorporated, a builder, contracted with the school district to perform the construction. The contract between the architect and the school district provided, in part, that the architect would supervise the work, endeavoring to guard against defects and deficiencies on the part of the builder. The architect's supervision was to be distinguished from continuous personal superintendence, however, and he was not a guarantor of the performance of the builder's contract.[2] The latter's contract with the school district provided, in part, that the builder must take precautions for the safety of his employees and that the architect had general supervision of the work *and authority to stop the work to insure the proper execution of the contract.*[3] There was no contract between the architect and the builder.

The architect's material and artistic specifications did not include specifications for the temporary shoring of the gymnasium roof, nor was the load that would be placed upon the shores computed. During construction, the builder shored up temporary trusses in an unsafe manner and the roof of the gymnasium collapsed, injuring plaintiffs, Miller and two other employees of the builder. Since the Illinois Workmen's Compensation Act protects the

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[1] 37 Ill. 2d 273, 226 N.E.2d 630 (1967).

[2] Id. at 280, 226 N.E.2d at 635.

[3] Id. at 281-83, 226 N.E.2d at 636-37. The pertinent provisions of the builder's contract with the school district are as follows:

"12. *Protection of Work and Property.*

. . . .

"The Contractor shall take all necessary precautions for the safety of employees on the work, and shall comply with all applicable provisions of Federal, State, and Municipal safety laws and building codes to prevent accidents or injury to persons on, about or adjacent to the premises where the work is being performed. He shall erect and properly maintain at all times, as required by the conditions and progress of the work, all necessary safeguards for the protection of workmen and the public . . .; and he shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents. The name and position of any person so designated shall be reported to the Architect by the Contractor.

. . . .

"38. *Architect's Status:*

"The Architect shall have general supervision and direction of the work. . . . He has authority to stop the work when ever such stoppage may be necessary to insure the proper execution of the Contract.

. . . .

"55. *Protection:*

* * *

"*Bracing, Shoring and Sheeting:* The Contractor shall provide all bracing, shoring and sheeting as required for safety and for the proper execution of the work, and have same removed when the work is completed.

builder-employer from suit by his employees for their injuries,[4] the plaintiffs sued the architect. Their claim for damages was based on the architect's alleged negligent supervision of the construction work. They alleged that the architect had a duty to prevent the builder from carrying out the work in a faulty manner and that the architect had failed to perform this duty.[5] The defendant contended that a supervising architect has neither the right nor the duty to control the methods used by the builder, but has only the duty to see that the construction, when completed, meets the plans and specifications contracted for by the owner. In addition to this defense, the architect filed a third-party complaint against the builder for indemnity, alleging that the builder was actively negligent and that the architect's negligence, if any, was passive.[6] The Illinois trial court dismissed the architect's third-party complaint on motion by the builder before any evidence was heard, and the jury found the architect liable in damages for the builder's employees' injuries. The intermediate appellate court affirmed both the judgment against the architect and the dismissal of his claim against the builder.[7] On appeal, the Illinois Supreme Court HELD: An architect who has the contractual duty of general supervision and the right to stop work to insure the proper execution of a builder's contract with the owner has a corresponding duty to stop work if he knows or should know of an unsafe condition during a portion of the work. If the part of the work being done by the builder is a major part of the entire operation and one that involves obvious hazards, a jury could find from the evidence that the architect is guilty of negligence in failing to inspect and watch over that particular aspect of the work.[8] With respect to the lower court's dismissal of the architect's third-party complaint against the builder, however, the Illinois Supreme Court reversed. The court held that a passively negligent third party tortfeasor can recover indemnity from an actively negligent employer, even though the employer is covered by a workmen's compensation act which provides that compensation paid under the act to the injured employee shall be the measure of responsibility of a covered employer on account of such injury.[9]

The *Miller* case is significant in that it deals with two issues of substantial concern to architects and builders and, indeed, to any party who is held liable to an injured employee when the latter's negligent employer is

[4] Ill. Ann. Stat. ch. 48, § 138.5(a) (Smith-Hurd 1967).

[5] 37 Ill. 2d at 276, 226 N.E.2d at 633. Plaintiffs also alleged, and the Illinois court agreed, that the architects were persons "having charge" of the work under the Illinois Structural Work Act, Ill. Ann. Stat. ch. 48, §§ 60, 69 (Smith-Hurd 1967), so as to be liable for the plaintiffs' injuries. Whether the architects were persons in charge of the work or whether the shoring was within the purview of the Structural Work Act are issues beyond the scope of this note.

[6] Illinois law recognizes the justice of requiring a person whose actual negligence has been the proximate cause of an injury to pay damages. It thus permits recovery by a wrongdoer who has only passively allowed a condition to arise against an active wrongdoer who actually did the act causing the injury. Griffiths & Son Co. v. National Fireproofing Co., 310 Ill. 331, 337, 141 N.E. 739, 741 (1923).

[7] Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 249 (1965).

[8] 37 Ill. 2d at 286, 226 N.E.2d at 639.

[9] Id. at 289-90, 226 N.E.2d at 640-41. See Ill. Ann. Stat. ch. 48, § 138.11 (Smith-Hurd 1967).

covered by a workmen's compensation act. Of interest to architects and builders is the question whether an architect can be liable for damages sustained by a builder's employee, resulting from the builder's negligence in carrying out methods of construction, on the basis of a provision in the builder's contract with the owner giving the architect authority to stop work in order to insure the proper execution of the contract. Of general interest is the question whether a third party found liable to another's injured employee can recover indemnity from the latter's employer notwithstanding the existence of a workmen's compensation act. Both issues are the subject of legal uncertainty and present difficult questions of fairness and justice to the parties concerned.

In *Miller*, the court recognized the general rule that an architect's duty of "supervision," owed to the owner with whom he has contracted, is the duty to see that the building, when constructed, meets the plans and specifications contracted for.[10] The majority found, however, that where the architect had not only a duty of supervision but also the authority to stop work to insure the proper execution of the contract, the architect, therefore, had a duty to interfere and stop the work if he knew or should have known that the builder was using unsafe construction methods. The court admitted that the architect had no duty to specify the method the builder would use in shoring, but held that he had a right to insist upon a safe and adequate use of that method. Because of this right, the court imposed on the architect a corresponding duty to stop the work until the unsafe condition had been remedied. Breaching such a duty, he would be liable, not only to the owner, but also to persons who could foreseeably be injured by such breach.[11] The court believed that the shoring and removal of the old roof was a major part of the remodeling job which involved obvious hazards to others, and since this process was of such importance, the jury could find from the evidence that the architect was guilty of negligence in failing to inspect and oversee this operation.

The dissenting judge could not read into the contract a duty which was not imposed by it. He felt that the architect's contract here was a standard form, that supervision was limited to results and that continuous personal superintendence of the builder's methods was not envisioned. It was his view that the architect did not contract to be present at all phases of construction since, according to the contract, a clerk-of-the-works was to be selected and was to provide personal continuous superintendence.[12]

Contract clauses giving to architects the right to stop work are rarely discussed in determining an architect's liability though they frequently appear in contract documents relating to construction. Courts have ordinarily dealt with an architect's liability by simply defining the word "supervision."[13] A determination is made as to what duties are imposed upon an architect under contract terms such as *general* supervision and *adequate* supervision of the work. Generally, the term "supervision" imposes on the architect a duty to

[10] 37 Ill. 2d at 284, 226 N.E.2d at 638.

[11] Id. at 285, 226 N.E.2d at 638-39.

[12] Id. at 293, 226 N.E.2d at 642-43.

[13] See, e.g., Day v. National United States Radiator Corp., 241 La. 288, 304, 128 So. 2d 660, 666 (1961); Garden City Floral Co. v. Hunt, 126 Mont. 537, 545, 255 P.2d 352, 357 (1953).

the owner to see that the construction project is completed in accordance with the plans and specifications of the contract.[14] Therefore, it is a supervision of *results* and not of *means* or methods used to attain that result.[15] The architect should inspect during construction and upon completion only with respect to compliance with the architectural plans and use of proper materials.[16]

In supervising the results of the builder's work, the architect will be held liable to the owner if he negligently and incorrectly determines that the results of the work are proper.[17] He will also be held liable to third parties for any injuries they may sustain as a consequence of his negligent determination that the completed construction is in conformity with the contract specifications. This is so despite the absence of privity of contract with the injured parties.[18] It should be kept in mind, however, that the courts are almost unanimous in declaring that an architect under a duty of supervision has no power or control over the contractor's *means* or *methods* of reaching the desired result and, thus, has no duty to supervise the contractor's methods.[19]

In *Miller,* the Illinois court was faced with a case of injury to an employee of the builder caused by the builder's negligent use of a *method* of construction, namely, the negligent use of the temporary truss. The only function of the temporary truss was to support the roof until the new support was completed. It was not properly part of the materials or specifications set forth in the architect's plans but merely a technique utilized by the builder to accommodate those plans. As such, it does not appear to be so related to the end result of the construction as to call for an architect's supervision.

The Illinois court recognized that an architect has no duty to specify the method a builder should use.[20] However, it found that the right-to-stop-work clause gave the architect the *right* to specify a safe and adequate use of the builder's methods.[21] On the basis of this right, the court imposed a duty on the architect to inspect and to stop work if the architect knew, or should have known, that the builder's methods were unsafe. It seems doubtful that a *right* to stop work creates a *duty* to stop work. A duty involves no discretion on the part of the person owing it; it must be carried out or there is a breach. On the other hand, a right gives a party discretion as to whether he shall exercise it or not. If he does not exercise the right there is no breach of a right. The dissenting judge in *Miller* conceded that the architect had the *right* to insist upon a safe and adequate use of the builder's methods, but

[14] Cases cited note 13 supra. See also Walker v. Wittenberg, Delony & Davidson, Inc., 242 Ark. 97, —, 412 S.W.2d 626, 631 (1967); Clinton v. Boehm, 139 App. Div. 73, 75, 124 N.Y.S. 789, 792 (1910).

[15] See cases cited notes 13 & 14 supra.

[16] Day v. National United States Radiator Corp., 241 La. 288, 304, 128 So. 2d 660, 666 (1961).

[17] See, e.g., Pastorelli v. Associated Eng'rs, Inc., 176 F. Supp. 159 (D.R.I. 1959).

[18] Id. See generally Inman v. Binghamton Housing Authority, 3 N.Y.2d 137, 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

[19] Cases cited notes 13 & 14 supra.

[20] 37 Ill. 2d at 285, 226 N.E.2d at 638.

[21] Id.

stated that "to parlay that 'right' into a duty is neither consistent with generally accepted usage nor contemplated by the contract."[22]

An architect's liability to persons, not party to his contract with an owner, is clearly related to his breach of a contractual *duty* to the owner. If negligent, the architect is properly liable to anyone who foreseeably might have been injured. The right-to-stop-work clause, however, involves a delegation of authority to the architect, a *right* as opposed to a *duty*. The *Miller* court did not seem troubled, however, with this distinction between right and duty. Its sole reference to the distinction appears in its conclusion that the architect "had the right and corresponding duty to stop the work until the unsafe condition had been remedied."[23]

Thus, the *Miller* court found that the right-to-stop-work clause in the builder's contract with the owner increased the normal extent of the architect's duty of supervision. The right-to-stop-work clause is found in many such contracts, and is considered to be merely a tool with which the architect can enforce against the builder his general supervisory powers as to materials and specifications.[24] There appears to be no reason why the clause should now be held to place a greater burden of supervision on the architect.

Only one other jurisdiction has employed the right-to-stop-work clause in deciding a case similar to *Miller*. In *Erhart v. Hummonds*,[25] the Arkansas court used the right-to-stop-work clause to impose liability on the architects. But in that case, the architects were specifically employed by the owner to guard its interests by supervising all aspects of the construction of the building in addition to their normal architectural duties. They were in fact paid a separate fee to conduct such supervision.[26] Another and crucial distinction between the *Erhart* case and *Miller* exists in the fact that the architects in *Erhart* knew of the unsafe condition which caused the injuries. While they did inform the contractor, he did not stop the work.[27]

The *Erhart* case has apparently been limited by the later case of *Walker v. Wittenberg, Delony & Davidson, Inc.*[28] This case dealt with the exact contract used in *Miller*, and also concerned a method of the builder that had caused injuries to his employees. The Arkansas court did not even discuss the right-to-stop-work clause, but limited its analysis to the term "supervision." The original decision, as in *Miller*, stated that the question of what duties the term "supervision" imposed on the architect was for the jury.[29] On rehearing,

[22] Id. at 293-94, 226 N.E.2d at 643.

[23] Id. at 285, 226 N.E.2d at 638.

[24] This clause is included in Article 38 of the American Institute of Architects General Conditions which sets out the standard supervisory powers of the architect. This is the exact provision that was contained in the *Miller* contracts. See Walker v. Wittenberg, Delony & Davidson, Inc., 241 Ark. 525, 527-28, 412 S.W.2d 621, 623 (1966).

[25] 232 Ark. 133, 334 S.W.2d 869 (1960).

[26] Id. at 138, 334 S.W.2d at 872.

[27] Id. at 141-42, 334 S.W.2d at 874 (dissenting opinion). Despite the architect's separate fee for supervision and his knowledge of the unsafe condition, one judge dissented on the ground that the contractor, and not the architect, was responsible for the maintenance of safety precautions. Id.

[28] 241 Ark. 525, 412 S.W.2d 621 (1966), rev'd in part on rehearing, 242 Ark. 97, 412 S.W.2d 626 (1967).

[29] 241 Ark. at 530, 412 S.W.2d at 624

however, the court decided that as a matter of law an architect has no duty to exercise control over a builder with respect to day-to-day safety supervision despite the existence of a right-to-stop-work clause. Imposition of such a duty "must clearly appear from the terms of the agreement, the conduct of the parties, or the nature of the work being performed."[30]

Analysis of other provisions included in contracts such as the one in *Miller* would seem to allow the conclusion that the owner does not expect the architect to supervise safety precautions. In *Miller*, the architect's contract with the school district merely provided that, in supervising the work, the architect would "endeavor to guard the Owner against defects and deficiencies in the work of the contractors . . . ."[31] On the other hand, the contract between the builder and the school district provides that the "Contractor shall take all necessary precautions for the safety of employees . . . ." and "shall erect and properly maintain at all times . . . all necessary safeguards for the protection of workmen . . . ," and "shall designate a responsible member of his organization on the work, whose duty shall be the prevention of accidents."[32]

The various contract provisions seem clearly to place the burden of supervising material and artistic specifications on the architect and the burden of supervising safety precautions on the builder. The fact that the builder's contract with the school district authorizes the architect to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract would not seem to alter this allocation of burden. This clause delegates authority to the architect and it does not impose a contractual obligation on him to be present every day in order to insure the safety of the builder's employees. Bearing this out, the architect's contract in *Miller* expressly provides that "[t]he supervision of an Architect is to be distinguished from the continuous personal superintendence to be obtained by the employment of a clerk-of-the-works."[33]

One sentence of the contract language may offer some support for the imposition of a duty to supervise safety on the architect. According to the builder's contract, the identity of the person selected by the builder to prevent accidents was to be reported to the architect. It could be argued that if safety supervision was to be the builder's responsibility alone, the demand that the architect be notified as to the identity of the person selected by the builder to prevent accidents would be meaningless.[34] However, the very fact that the architect is informed as to the existence of a safety supervisor employed by the builder would seem to indicate the absence of a duty on the architect's part to supervise safety of methods used.

A factor which lends the strongest support to the *Miller* decision is the finding of the court that the shoring procedure, i.e., the use of temporary trusses to support the old roof while new supports were being located, was

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[30] 242 Ark. at 280, 412 S.W.2d at 630.

[31] 37 Ill. 2d at 281, 226 N.E.2d at 635.

[32] Id., 226 N.E.2d at 636.

[33] Id., 226 N.E.2d at 635.

[34] See Walker v. Wittenberg, Delony & Davidson, Inc., 242 Ark. 97, —, 412 S.W.2d 626, 632 (1967) (dissenting opinion).

a "major" and important phase of the entire remodeling operation.[35] Indeed, the court tries to limit its decision by saying that the architect need only inspect and watch over major portions of the work which involve obvious hazards to others.[36] At first glance, it seems reasonable to contend that a major operation involved in the construction project, even though it involves only a method of construction, should come within the ambit of the architect's general supervisory duty. If this were the case, however, the architect would find himself suddenly faced with the task of supervising all methods of construction employed by a builder which a court might consider major phases of the entire operation. Such a situation could leave the architect with no criterion as to what is "major" and what is "minor." A court may consider major what the architect reasonably considers minor. Rather than speculate and leave himself open to liability, the architect may feel obligated to inspect all of the builder's work all of the time. Thus the role of the architect has been expanded to include the functions of a safety engineer. To support such an extension strong public policy must be demonstrated.

As a matter of policy, it may be felt that a builder will utilize safer methods if he is aware that an architect is supervising his safety precautions. On occasion, builders may use the most expedient method of construction available at the expense of safety. It can be argued that an architect, supervising safety, could prevent such tactics. On the other hand, such a shifting of the burden for safety may only leave the builder less willing to choose and carry out methods of construction carefully. One must also return to the pure impracticality of expecting that an architect will have the time or inclination to place himself or his qualified representatives on all the jobs in which he is involved, all the time work is being conducted. The task of supervising the methods of construction employed by the builder is not the function of an architect nor is he necessarily qualified. As to methods, the builder is the expert and of necessity is on the job to insure its completion. To impose such a function on the architect will almost certainly prove to be an aggravation to the builder in that the latter will surely not appreciate being overruled in his choice of particular methods of construction. Such conflicts would produce costly delays and tense working conditions. The possibility of interference by the architect with the builder's methods will also make it difficult for builders to make accurate bids, since their bids are necessarily based on use of their methods.[37] Also, architects' fees are likely to increase due to the potential liability to builder's employees and the increased costs of supervision.[38] To burden the architect with the traditional responsibilities of the builder merely because the latter on occasion is negligent in carrying out those responsibilities will not solve the problem of negligence in construction methods nor, most likely, reduce the frequency of its incidence.

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[35] 37 Ill. 2d at 286, 226 N.E.2d at 639.

[36] Id.

[37] See id. at 294, 226 N.E.2d at 643 (dissenting opinion). See also Charles Meads & Co. v. City of New York, 191 App. Div. 365, 370, 181 N.Y.S. 704, 707 (1920).

[38] See Miller v. DeWitt, 37 Ill. 2d 294-95, 226 N.E.2d 630, 643 (1967) (dissenting opinion).

Neither law nor policy seems to support the conclusion that the architect in *Miller* had a duty to inspect the builder's construction *methods* or supervise his safety precautions. It is submitted that the proper way to find a duty in these cases is to interpret the term "supervision" in the contracts involved, in light of the express and implied *duties* clearly shown by the language of the instrument. A duty should not, however, be implied from the mere existence of authority in the architect to stop work if he finds that the builder is not properly executing the contract. While the case might be different should the contract incorporate by reference, or otherwise, specific requirements as to methods of construction, this was not the case in *Miller*.

Having decided that the architect was liable to the employees of the builder, the Illinois court had to face "[p]erhaps the most evenly-balanced controversy in all of compensation law . . . ."[39] That controversy centers on whether a workmen's compensation act extinguishes the common law right of indemnity. Common law indemnity shifts the entire loss from one wrongdoer who has been compelled to pay damages, to the shoulders of another wrongdoer who, for good reason, should bear it instead.[40] In *Miller*, the Illinois court decided that the right of a passively negligent tortfeasor to recover indemnity from an actively negligent tortfeasor was not extinguished despite the fact that the actively negligent tortfeasor was an employer covered by the Workmen's Compensation Act.[41]

Most workmen's compensation acts provide that the employer's liability on account of an employee's injury is exclusively fixed by the act.[42] This "exclusive liability" is in place of any other liability whatsoever to the employee, his personal representatives, or anyone otherwise entitled to recover damages, at common law or otherwise.[43] The purpose behind workmen's compensation acts is to compensate employees injured on the job at stated sums, fixed or to be fixed according to the act. The employee loses his right to common law tort awards by a jury against his employer, and the employer loses the defenses he had at common law of contributory negligence, assumption of the risk, and the fellow-servant rule. However, both parties gain because the employee is always assured of some payments, and the employer is no longer open to high jury awards.

If, however, the employee is injured due to the negligence of a third

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[39] 2 A. Larson, Workmen's Compensation Law § 76.10 (1961).

[40] W. Prosser, Torts § 48 (3d ed. 1964).

[41] 37 Ill. 2d at 289-90, 226 N.E.2d at 641.

[42] See, e.g., Cal. Lab. Code § 3601 (West Supp. 1967); N.M. Stat. Ann. §§ 59-10-5 to -6 (1953); N.Y. Workmen's Comp. Law § 11 (McKinney 1965).

[43] The Illinois Act provides that compensation under the Act "shall be the measure of the responsibility" of a covered employer. Ill. Ann. Stat. ch. 48, § 138.11 (Smith-Hurd 1967). The Act further provides:

> No common law or statutory right to recover damages from the employer or his employees for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this Act, to anyone wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury.

Id. § 138.5(a).

party, he may forego the workmen's compensation payments and sue the third party in tort. The problem arises when both the employer and a third party are negligent. The employee then recovers from the third party and the third party seeks contribution or indemnity from the employer.[44] The employer, in turn, pleads the special defense of the workmen's compensation act's exclusive liability clause. If the third party is allowed to recover over from the employer, as in *Miller*, the employer has essentially become liable for full tort damages on account of an employee's injury, even though the workmen's compensation act supposedly limits such liability. It has been said, therefore, that recovery-over accomplishes indirectly what cannot be done directly and, therefore, evades the purpose of workmen's compensation legislation.[45]

On the other hand, if the third party is not allowed to recover over from the employer, he is being denied his common law right of indemnity or, in some jurisdictions, his statutory right to contribution.[46] The third party's problem is even more severe when he is not negligent at all, but is held liable to the employee based on some concept of strict liability.

The *Miller* court, while recognizing the problem in allowing indemnity against an employer covered by the Illinois Workmen's Compensation Act, obviously sympathized with the predicament of the passively negligent third party and applied the theory which allows a third party who was not actively negligent to obtain indemnification from an employer who was actively negligent.[47] This theory, which certainly may properly be applied to situations not involving the Workmen's Compensation Act, holds that as between active and passive tortfeasors, the primary liability for the damages ordinarily rests upon the actively negligent tortfeasor because of the difference in the kinds of negligence of the two. If the passive tortfeasor pays damages to the injured person, he is discharging an obligation for which the active tortfeasor is primarily liable, and, therefore, is entitled to indemnity from him.[48] The *Miller* court stated that "unless a third party who has not been guilty of active negligence can succeed in an action against an employer who has been guilty of active negligence, the third party will be made to bear the ultimate burden of a loss which should fall on the employer."[49] The *Miller* court apparently felt that this result was so inequitable as to overcome the "exclusive liability" of the employer under the Workmen's Compensation Act. This attitude was reinforced by the fact that under the Illinois Workmen's Compensation Act, if an employee recovers compensa-

[44] Unlike contribution, which distributes the loss among tortfeasors by requiring each to pay his proportionate share, indemnity shifts the entire loss from one tortfeasor who has been compelled to pay it, to the shoulders of another who should bear it instead. W. Prosser, supra note 40, § 48.

[45] 2 A. Larson, supra note 39, § 76.52.

[46] The *Miller* court did not have to deal with the contribution problem because there is no contribution among joint tortfeasors in Illinois. 37 Ill. 2d —, 226 N.E.2d 630, 641.

[47] 37 Ill. 2d at 288-89, 226 N.E.2d at 640.

[48] Florida Power & Light Co. v. Hercules Concrete Pile Co., 275 F. Supp. 427, 429 (S.D. Fla. 1967); Hunsucker v. High Point Bending & Chair Co., 237 N.C. 559, 563, 75 S.E.2d 768, 771 (1953).

[49] 37 Ill. 2d at 289, 226 N.E.2d at 641.

tion from his employer and subsequently recovers damages from a third party, the employee must reimburse his employer in the amount of compensation received from him under the Act.[50] Thus the employer is fully indemnified.

Many courts have had to deal with this controversy, but it seems that the *Miller* decision goes farther than any, given the facts involved, in allowing indemnity. In assessing the validity of the *Miller* decision, the case law should be separated into two categories: (1) those cases in which, as in *Miller*, there is no contractual relationship between the third party and the employer, and (2) those cases in which a contract exists between the third party and the employer.

In the first category of cases, involving no contractual relationship between the third party and the employer, the third party is ordinarily denied indemnity from the employer covered by a workmen's compensation act.[51] If there is no contract, it is said that the obligation to indemnify springs from the injury itself, and thus is on account of the injury, and the employer is protected by the exclusive liability clause.[52]

Another reason why an indemnity claim based on the active-passive theory is generally denied is that jurisdictions which ordinarily apply this theory require that the parties be joint tortfeasors having a common liability to the injured party. However, there can be no common liability to the employee when the employer's liability is governed by a workmen's compensation act, and the third party's liability is based on common law negligence. The employer and third party are not, in law, joint tortfeasors and the passively negligent third party cannot discharge any common law obligation of the actively negligent employer.[53] As Judge Learned Hand stated: "[T]here is nobody of sure authority for saying that differences in the degrees of fault between two tortfeasors will without more strip one of them, if he is an employer, of the protection of a compensation act . . . ."[54] The *Miller* court applied the active-passive indemnity doctrine in favor of the third party without reference to the common liability criteria. In so doing, the *Miller* court relied on three lower Illinois appellate court decisions which it felt were controlling.[55] An examination of these cases however, indicates that they are distinguishable from the *Miller* situation in that the third party seeking indemnity in those cases was an owner of property who had contracted with the employer from whom it sought indemnity. Thus the three cases really belong in the second category of indemnity cases; namely, those

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[50] Ill. Ann. Stat. ch. 48, § 138.5(b) (Smith-Hurd 1967).

[51] E.g., White v. McKenzie Elec. Coop., Inc., 225 F. Supp. 940, 944-45 (D.N.D. 1964); Slechta v. Great Northern Ry., 189 F. Supp. 699, 703 (N.D. Iowa 1961), aff'd sub nom. Great Northern Ry. v. Bartlett, 298 F.2d 90 (8th Cir. 1962); 2 A. Larson, supra note 39, § 76.10 (Supp. 1968).

[52] 2 A. Larson, supra note 39, § 76.10 (Supp. 1968).

[53] Cases cited note 51 supra.

[54] Slattery v. Marra Bros., Inc., 186 F.2d 134, 139 (2d Cir. 1951).

[55] Krambeer v. Canning, 36 Ill. App. 2d 428, 184 N.E.2d 747 (1962); Boston v. Old Orchard Business Dist., Inc., 26 Ill. App. 2d 324, 168 N.E.2d 52 (1960); Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App. 2d 534, 165 N.E.2d 346 (1960).

in which there is a contract between the third party and employer. A discussion of this latter category is, therefore, relevant at this point.

In the most obvious situation, if there is a contract between the third party and the employer which includes an express agreement by the latter to indemnify the former, the third party can enforce this contract. This applies notwithstanding the employer's coverage under a workmen's compensation act.[56] In the typical case, however, the contract between the parties contains no such indemnification agreement. The leading case in this area is the United States Supreme Court decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*[57] The Court was confronted with an "exclusive liability" clause in the Longshoremen's and Harbor Worker's Compensation Act, which limited the employer's liability on account of any injury to an employee.[58] A shipowner had contracted with a stevedore to have the latter repair his ship. An employee of the stevedore was injured due to the negligence of another employee and the injured employee sued and recovered from the shipowner. The shipowner sought indemnity from the stevedore and the Court allowed recovery reasoning that the employer, in performing his work under the contract with the shipowner (third party), had a nonexpressed, yet essential, obligation as part of the contract to perform the services in a workmanlike way.[59] Therefore, an obligation existed to indemnify the shipowner for damages sustained as a result of the nonperformance of the implied duty to perform the work safely. The exclusive liability clause was not a bar to the shipowner's claim for indemnity because he was suing on account of the employer's contract with him, and not on account of the injury to the employee.[60] While some jurisdictions have followed *Ryan*,[61] a few have rejected the *Ryan* reasoning because they feel that the wording of their compensation acts precludes indemnity under any circumstances.[62]

The three Illinois appellate court cases cited as support by the *Miller* court were *Ryan*-type cases. In the earliest of the three cases, *Moroni v. Intrusion-Prepakt, Inc.*,[63] a railroad (third party) entered into an agreement with a contractor (employer) to have work done for the railroad. An employee of the contractor-employer was injured and recovered from the railroad. The railroad was allowed to recover indemnity from the employer

[56] Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124, 132 (1956); see 2 A. Larson, supra note 39, § 76.41.

[57] 350 U.S. 124 (1956).

[58] 33 U.S.C. § 905 (1964).

[59] 350 U.S. at 133-34. The Court dealt only with a contractual right to indemnity.

[60] Id. at 130-32.

[61] E.g., McDonnell Aircraft Corp. v. Hartman-Hanks-Walsh Painting Co., 323 S.W.2d 788 (Mo. 1959); Moroni v. Intrusion-Prepakt, Inc., 24 Ill. App. 2d 534, 165 N.E.2d 346 (1960); Blackford v. Sioux City Dressed Pork, Inc., 254 Iowa 845, 118 N.W.2d 559 (1962).

[62] These courts hold that since the employer's liability is fixed not only to the employee, but to "anyone otherwise entitled to recover," the latter phrase must include would-be indemnitees or the purpose of the compensation act would be obviated. E.g., American Radiator & Standard Sanitary Corp. v. Mark Eng'r Co., 230 Md. 584, 589-90, 187 A.2d 864, 867 (1963); Royal Indem. Co. v. Southern Cal. Petroleum Corp., 67 N.M. 137, 143, 353 P.2d 358, 362 (1960). See also Calvery v. Peak Drilling Co., 118 F. Supp. 335 (W.D. Okla. 1954).

[63] 24 Ill. App. 2d 534, 165 N.E.2d 346 (1960).

despite the exclusive liability clause of the Illinois Workmen's Compensation Act. The court discussed active-passive negligence, but grounded its decision on the breach by the employer of an independent duty owed to the third party railroad arising out of their contract. The *Moroni* court cited *Ryan* for support.[64] The *Moroni* court stated that only those who attempt to recover from the employer through some relationship with the injured employee are barred by the statute. Those who seek to recover on a duty separate and apart from that owing to the injured employee are not barred.[65] The third party railroad was allowed to recover on the separate duty owed to it by the employer arising out of their contract.

The other two cases cited by *Miller* rely heavily on *Moroni*, and both involve contracts between the third party and the employer.[66] The cases used active-passive language, but ultimately were decided on the breach-of-independent-duty theory since a duty arising out of the third party-employer contract was breached by the employer in both cases. The active-passive labels were apparently used to weigh the degree of breach by the employer against the acts of the third party.

In *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*,[67] the Supreme Court of the United States declared "that in the area of contractual indemnity an application of the theories of 'active' or 'passive' as well as 'primary' or 'secondary' negligence is inappropriate."[68] The language used should be "breach of implied obligation to perform work safely," *i.e.*, breach of an independent duty arising out of the contract.[69] The Court pointed out, however, that the conduct of the third party should be looked to in order to determine if it constitutes "conduct on its part sufficient to preclude recovery."[70] The Supreme Court has made no effort thus far to provide a working rule as to what is required to constitute "conduct on its [the third party's] part sufficient to preclude recovery."[71] It appears however, that the active-passive criterion is still applicable though under a new name.[72]

It is thus apparent that the use of the active-passive criterion in contract cases, whether referred to in language of tort or contract, is not determinative of its use in noncontract cases, such as *Miller*. The *Miller* court unjustifiably relied on this theory and the three lower appellate court decisions which made use of it.

While the *Miller* court discusses no other theory for allowing indemnity to the third party architect, it is meaningful to examine briefly another approach to the problem, namely, the breach-of-an-independent-duty, *not* arising out of a contract between the third party and the employer. This theory seems to have originated in the case of *Westchester Lighting Co. v.*

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64 Id. at 539, 165 N.E.2d at 349.

65 Id. at 544, 165 N.E.2d at 352.

66 Krambeer v. Canning, 36 Ill. App. 2d 428, 184 N.E.2d 747 (1962); Boston v. Old Orchard Business Dist., Inc., 26 Ill. App. 2d 324, 168 N.E.2d 52 (1960).

67 355 U.S. 563 (1958).

68 Id. at 569.

69 Id. at 567.

70 Id.

71 2 A. Larson, supra note 39, § 76.10 (Supp. 1968).

72 Id.

Westchester County Small Estates Corp.[73] There the employer, a builder, broke the lighting company's gas line and negligently enclosed the point of fracture in a tile drain. The escaping gas asphyxiated an employee of the employer, and the employee's administrator recovered judgment from the third party lighting company. The third party sought indemnity from the employer who was covered by a compensation act. The court held that the act was not a valid defense for the employer because the third party's cause of action was based on the breach of an independent duty owed by the employer to the third party. The employer committed a tort against the third party by breaking his gas line and this constituted a breach of the duty of care owed to the third party. The employer's liability, therefore, was on account of this breach and not on account of the employee's injury.[74]

This theory has not been very successful in cases not involving contracts between an employer and third party, probably for the reason that an independent duty in such cases seldom exists. There is no reference in *Miller* to any independent duty owing from the builder to the architect, nor is one apparent.

The workmen's compensation acts do protect the employer from suit "on account of any injury" to an employee. If the third party proceeds on an active-passive indemnity theory, with no contract between the third party and the employer, the suit against the employer for indemnity is actually on account of the injury. Thus, the acts should be construed to preclude indemnity in the absence of a contract between the parties or a breach of an independent duty owing to the third party from the employer. As the *Miller* case involved no contract between the builder and the architect, and as the court found no independent duty owing from the former to the latter, it is submitted that the court's reasoning was faulty, and its finding that the architect could recover over from the builder-employer was not supported by the present state of the law. It is not difficult to imagine that the majority in *Miller* considers the liability of the employer under the Illinois Workmen's Compensation Act to be too restricted and has sought to provide a judicial remedy.

While the various workmen's compensation acts and the case law which has interpreted those acts demonstrates the legally inaccurate result reached by the *Miller* court, it is submitted that, as to the indemnity issue, the result was equitable. The concept of common liability which has led many courts to deny indemnity to third parties is a source of inequity. It precludes a third party who was only slightly negligent from recovering anything from the employer who actually caused the injury. Common liability should be irrelevant in adjusting the rights of the third party and the employer. The principal reason for denying recovery to the third party is that the courts do not want to undermine the main purpose of the workmen's compensation acts, namely, limited liability of an employer on account of an employee's injury. However, the acts, themselves, do not explicitly cover the situation involving the third party seeking indemnity. The acts only fix the rights and duties of employers and employees, including those claiming under the

[73] 278 N.Y. 175, 15 N.E.2d 567 (1938).

[74] Id. at 179-80, 15 N.E.2d at 568-69.

employee, and should not affect rules of law between the employer and the type of third party involved in *Miller*.[75]

The most convincing argument for allowing recovery by the third party is that the third party receives nothing from the workmen's compensation acts, yet he must sacrifice a common law right because of them. Workmen's compensation acts give benefits to both employers and employees which they did not have at common law in exchange for some advantages they both had at common law.[76] The third party indemnitee is not a party to this mutual sacrifice and gain, and thus he should not lose any common law rights because of it.[77] Either the act should leave the common law rights of the third party and employer unaffected, or some corresponding gain should be given the third party for the loss of his common law right to indemnity.

The question of who to protect, the third party or the employer, involves policy considerations which the legislature should consider. It is a very delicate balance for a court to strike, and the legislatures of the various states should settle the indemnity controversy one way or another. Two states, Texas and California, have enacted additions to their compensation acts, which *preclude* indemnification by a third party unless the employer and the third party have a contract which expressly provides for indemnification.[78] Thus, these two states have resolved the problem, albeit not happily for many, and it is hoped that other states will follow suit.

MICHAEL ALAN PARIS

Eminent Domain—Riparian Rights—Deprivation of Access to Navigable Waterway is Not Compensable.—*Colberg v. State*.[1]—Plaintiffs, Colberg, Incorporated, and Stephens Marine, Incorporated, own real property in the city of Stockton, California, riparian to the Upper Stockton Channel. For more than 60 years they have operated shipyards upon this property for the construction and repair of yachts and ocean-going vessels. The Upper Stockton Channel runs for about 5000 feet from within the confines of the city of Stockton to a turning basin adjoining that city's port. Ships and other craft now using the Upper Stockton Channel can proceed to the turning basin and from there to a navigable tidal waterway, formed by the Stockton Deep Water Ship Channel and the San Joaquin River. This waterway extends from the port of Stockton to San Francisco Bay and the open sea.

In order to improve its freeway system, the State of California proposed to construct twin stationary freeway bridges across the Upper Stockton Channel between plaintiffs' property and the turning basin.[2] The vertical

[75] See American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950).

[76] Lunderberg v. Bierman, 241 Minn. 349, 363-65, 63 N.W.2d 355, 364-65 (1954).

[77] 2 A. Larson, supra note 39, § 76.52.

[78] Cal. Lab. Code § 3864 (West Supp. 1967); Tex. Rev. Civ. Stat. Ann. art. 8306, § 3 (1967).

[1] — Cal. 2d —, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949 (1968).

[2] Pursuant to federal law, the state applied to the Secretary of the Army and the Chief of Engineers for a permit to build such bridges. 33 U.S.C. § 525(b) (1964). Ap-