

THE CORONATION AND BANISHMENT OF “VICARIOUS LIABILITY” AS THE UNIFYING PRINCIPLE OF IOWA IMPLIED INDEMNITY LAW

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I. INTRODUCTION

It has been a tortuous ride for the equitable doctrine of implied indemnity.¹ From the death of Mr. Engle’s horse on the rails of the

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1. Implied indemnity comes in several different lexicological models: common-law indemnity, *see* *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001); equitable indemnity, *see id.* at 824; *State ex. rel. Miller v. Philip Morris, Inc.*, 577 N.W.2d 401, 406 (Iowa 1998), *Franzen v. Dimock Gould & Co.*, 101 N.W.2d 4, 10 (Iowa 1960); tort-based indemnity, *see McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002); implied contractual indemnity, *see McNally*, 648 N.W.2d at 573; implied-in-fact indemnity, *see Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 9 (Iowa 1970); and implied-in-law indemnity, *see Horrabin v. City of Des Moines*, 199 N.W. 988, 990 (Iowa 1924). *See generally* E. Eugene Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517 (1952); Dale B. Furnish, *Distributing Tort Liability*:

Chicago & Northwestern Railway in 1881² to a multi-million dollar fire at an ice cream plant nearly one hundred twenty years later,³ Iowa courts have struggled in fashioning a consistent justification for the transfer of one tortfeasor's liability to another.⁴ Can you blame them? The courts are confronted with situations in which parties not only failed to address the issue of liability as part of their transaction or relationship, but also most likely did not even give it a second's thought.⁵ Not to be deterred, however, one of these parties, invoking little more than general notions of fairness and justice, demands that the court intervene and shift all liability to the other.⁶ In the face of this cry for equity, the courts must consider and weigh such competing traditional legal concepts as stability, simplicity, and stare decisis.⁷ Sometimes, however, the judicial balancing acts are not so Solomonic. One commentator opined (although not about Iowa decisions) that "few areas of law have evoked such daring displays of uninhibited judicial activism with centuries-old doctrines being bulldozed out of the way to clear a path for an 'equitable' compromise."⁸ The Eighth

Contribution and Indemnity in Iowa, 52 IOWA L. REV. 31 (1966); Jeffrey A. Stone, *The Law of Contribution and Tort-Based Indemnity in Iowa*, 55 DRAKE L. REV. 113 (2006). All these models are but shorthand expressions designed to describe a single and identical situation—the attempt by a tortfeasor to pass his entire liability to another without the benefit of an express contractual provision. See *McNally*, 648 N.W.2d at 573–74; *Hansen*, 630 N.W.2d at 823; *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969). Just recently, the court appeared to settle on two descriptions: implied contractual indemnity (claims which arise out of contract) and equitable indemnity (claims which arise from noncontractual relationships). See *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 470 (Iowa 2009); see also *infra* notes 329–33 and accompanying text.

2. See *Chi. & Nw. Ry. Co. v. Dunn*, 13 N.W. 722, 722–23 (Iowa 1882) (finding that when a railroad was required to compensate a party for injury to a horse that strayed through a removed gate, the railroad was entitled to recover the entire amount paid from the person who wrongfully removed the gate).

3. *Wells Dairy*, 762 N.W.2d at 476.

4. See *id.* at 469–70 (describing the nomenclature used by courts in implied indemnity claims as confusing and lacking precision); *McNally*, 648 N.W.2d at 574 (acknowledging the complexities and challenges of applying the law of indemnification to specific factual circumstances).

5. See, e.g., *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987) (providing an example of contractual parties failing to set forth terms of indemnification prior to performance of contract).

6. See, e.g., *id.*; *Hunt v. Ernzen*, 252 N.W.2d 445, 448 (Iowa 1977) (demand for liability to be shifted to hospital).

7. See *Woodruff Constr. Co.*, 406 N.W.2d at 785–87.

8. *Id.* at 785–86 (quoting 2A ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 76.11, at 14-563 (1986)).

Circuit's appraisal of Iowa implied indemnity law was less hyperbolic, characterizing it as "clouded and unsatisfactory."⁹ The Supreme Court of Iowa has been a bit more understated, acknowledging the historical complexity of the doctrine and the challenges it presents to judges and lawyers alike.¹⁰

In recent years, the Iowa Supreme Court has reduced the complexities of this doctrine to a familiar litany of four grounds on which liability may be transferred.¹¹ Those time-honored grounds exist in the following scenarios:

- (1) The party seeking indemnity has only derivative or vicarious liability for damage caused by the one sought to be charged;
- (2) The party seeking indemnity has incurred liability by action at the direction of, in the interest of, and in reliance upon the one sought to be charged;
- (3) The party seeking indemnity has incurred liability because of a breach of duty owed to him by the one sought to be charged; and
- (4) The party seeking indemnity has incurred liability merely because of failure, even though negligent, to discover or prevent the misconduct of the one sought to be charged.¹²

Although the adoption of comparative fault principles has led to the demise of one theory of implied indemnity—the active–passive negligence variety—the others still recognized by the court have not yet been served with formal notices of extinction.¹³ But in 2002 the court signaled the end was near by mandating that a party seeking indemnity in the absence of a contract must be both legally liable *and* morally innocent before liability

9. *Great N. Ry. Co. v. Bartlett & Co. Grain*, 298 F.2d 90, 92 n.2 (8th Cir. 1962) (quoting Davis, *supra* note 1, at 560).

10. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 574 (Iowa 2002) (acknowledging the complexity of the law of indemnification and the challenges in applying the law to specific factual situations); *see also Alliant Energy-Interstate Power & Light Co. v. Duckett*, 732 N.W.2d 869, 877 (Iowa 2007) (citing *McNally*, 648 N.W.2d at 574).

11. *See Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001).

12. *Id.* (quoting *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969)).

13. *See Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989).

may be legitimately transferred.¹⁴ This, of course, is another way of saying an indemnitee must be vicariously liable, not in the narrow sense of respondeat superior—such as master–servant or principal–agent¹⁵—but in the larger sense of being legally accountable for the misconduct of another, yet free from any actual fault or moral culpability.¹⁶

This notion of vicarious liability transcends and undercuts the conventional theories of implied indemnity. It diminishes the need to explore the contours and varieties of alleged independent duties; it renders obsolete the occasion to scrutinize the nature and texture of a party's conduct for evidence of reliance or failure to prevent misconduct; and it removes the search for that elusive “right” answer.¹⁷ It also makes sense from a policy standpoint, because implied indemnity can and should protect only those who, without fault, are held legally liable for the misconduct of others. They are the ones, after all, who deserve the prize for which the equitable right to indemnity was created—restitution.¹⁸ Recognizing this, the authors of the *Restatement (Third) of Torts* have moved in the direction of adopting vicarious liability as the exclusive ground for implied indemnity.¹⁹

In *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, the Iowa Supreme Court had occasion to definitively adopt the principles of vicarious liability as the sole ground by which tort liability may be shifted from one party to another in the absence of an express agreement, and to declare the common-law heritage of implied indemnity dead—right alongside Mr. Engle's horse.²⁰ The court chose not to do so. In fact, the court went in the opposite direction by allowing a factually culpable party to shift its liability upon proof that another party breached a specific and

14. See *McNally*, 648 N.W.2d at 576–77.

15. See *Peppmeier v. Murphy*, 708 N.W.2d 57, 63 (Iowa 2005) (explaining the doctrine of respondeat superior).

16. See *State v. Casey's Gen. Store, Inc.*, 587 N.W.2d 599, 601 (Iowa 1999).

17. See *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987) (“[t]here is no right or wrong answer” to the question of whether an indemnity agreement will be implied when an employer is the proposed indemnitor; instead, the “resolution turns on application of diverse and often competing” interests).

18. See *McNally*, 648 N.W.2d at 570; *Hunt v. Ernzen*, 252 N.W.2d 445, 447–48 (Iowa 1977).

19. See *RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY* § 22(a)(2) (2000); *infra* notes 281–93 and accompanying text.

20. *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463 (Iowa 2009).

defined contractual duty or professional obligation.²¹ The decision strikes an anachronistic chord by embracing pre-comparative fault aspects of the implied indemnity heritage and by elevating the concept of “duty” to an independently significant status.²² This Article argues that vicarious liability alone strikes the appropriate balance between the competing legal concepts of stability, simplicity, and *stare decisis* on the one hand, and the equitable concept of restitution on the other. Before advocating for this proposal and discussing the impact of *Wells Dairy*, we must first “peer into the abyss” of the common law of implied indemnity.²³

II. THE IOWA COMMON LAW OF INDEMNITY

A. Historical Overview

The common law of indemnity developed as an exception to the general rule that neither contribution nor indemnity was available to joint tortfeasors.²⁴ Joint tortfeasors were deemed to be equally guilty, or *in pari delicto*.²⁵ The justification for this general rule was that no one should be allowed to base a claim on one’s own wrong.²⁶ In many cases, however, courts could not tolerate the application of this general rule because it led to unjust and unsatisfactory results.²⁷ Accordingly, courts of equity permitted a transfer of liability from one tortfeasor to another based on what they perceived to be community notions of justice.²⁸ The premise—

21. See *id.* at 470, 473–74.

22. See *infra* notes 335–404 and accompanying text.

23. See *Wells Dairy*, 762 N.W.2d at 467.

24. See *Hathaway v. Sioux City*, 57 N.W.2d 228, 233 (Iowa 1953) (noting that “the rule is subject to some qualifications or exception”); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951) (“[T]here are several limitations upon, or exceptions to, the rule.”); *Pfarr v. Standard Oil Co.*, 146 N.W. 851, 853 (Iowa 1914) (“[A]n examination of the cases discloses the fact that there are many exceptions to this rule.”); see also *Union Stock Yards Co. of Omaha v. Chi., Burlington & Quincy Ry. Co.*, 196 U.S. 217, 224 (1905) (stating that “[i]n many instances, however, cases have been taken out of [the] general rule”); *Wash. Gas Light Co. v. District of Columbia*, 161 U.S. 316, 328 (1896) (discussing the general rule and noting exceptions thereto).

25. See *Rozmajzl*, 49 N.W.2d at 506; *Horrabin v. City of Des Moines*, 199 N.W. 988, 989 (Iowa 1924); see also *Wash. Gas Light Co.*, 161 U.S. at 327–28.

26. See W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 51, at 341 (5th ed. 1984).

27. See *id.* (noting that the courts have been more likely to reject the general rule with respect to indemnity than contribution).

28. See WILLIAM L. PROSSER, *LAW OF TORTS* § 51, at 313 (4th ed. 1971).

often unarticulated—was that one tortfeasor was “unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay.”²⁹ The situations in which indemnity was allowed tended to be more expansive in jurisdictions where contribution was not allowed.³⁰ Courts in these states may have been motivated more favorably toward the prevention of unjust enrichment than if contribution had been available and the burden of liability could have been distributed rather than completely shifted.³¹ Thus, as between the alternate remedies of all or nothing, courts inclined to the former³² to such an extent that the right of indemnity swallowed the general rule prohibiting recourse between joint wrongdoers.³³

In rationalizing the transfer of culpability between joint tortfeasors, courts—using the legal idiom of the day—have found that parties were not *in pari delicto* because of a difference in the character of the duty they owed the injured party, the nature of their own relationship, and the nature and extent of their misconduct or omissions.³⁴ Out of this discussion arose one of the first black-letter maxims of indemnity: primary versus secondary liability.³⁵ This catch-phrase embraces a hodgepodge of concepts. Primary liability contemplates personal participation in an affirmative act of negligence or a negligent failure to perform a duty which

29. RESTATEMENT (SECOND) OF TORTS § 886B cmt. c (1977).

30. See *id.* cmt. l. Until the Iowa Supreme Court’s decision in *Best v. Yerkes*, 77 N.W.2d 23 (Iowa 1956), contribution between negligent joint tortfeasors in Iowa was not allowed. See *id.* at 27–29.

31. See *Jacobs v. Gen. Accident Fire & Life Assurance Co.*, 109 N.W.2d 462, 467 (Wis. 1961) (citing Francis H. Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 554 (1936); Gus M. Hodges, *Contribution and Indemnity Among Tortfeasors*, 26 TEX. L. REV. 150, 152 (1947)).

32. See RESTATEMENT (SECOND) OF TORTS § 886B cmt. l.

33. See *Hathaway v. Sioux City*, 57 N.W.2d 228, 233–34 (Iowa 1953).

34. See, e.g., *Horrabin v. City of Des Moines*, 199 N.W. 988, 989–90 (Iowa 1924).

35. See, e.g., *Hathaway*, 57 N.W.2d at 233 (holding that joint tortfeasors could recover from party primarily liable); *Weidert v. Monahan Post Legionnaire Club, Inc.*, 51 N.W.2d 400, 404 (Iowa 1952) (same); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951) (same); *Horrabin*, 199 N.W. at 989–90 (same); *Maine v. James Maine & Sons Co.*, 201 N.W. 20, 21–22 (Iowa 1924) (holding that wife could not recover from husband’s employer when husband was primarily liable); *Hobbs v. Ill. Cent. R.R. Co.*, 152 N.W. 40, 41–43 (Iowa 1915) (holding that employer is not liable when employee is found not at fault); *Pfarr v. Standard Oil Co.*, 146 N.W. 851, 853–54 (Iowa 1914) (discussing indemnity between two tortfeasors); *Chi. & Nw. Ry. Co. v. Dunn*, 13 N.W. 722, 722–23 (Iowa 1882) (holding that joint tortfeasor could recover from primarily liable party).

is the equivalent of a positive act.³⁶ In contrast, secondary liability means fault that is imputed or constructive—a mere failure to perform a duty imposed by law; or nonfeasance and inaction, such as a failure to discover or correct a defect; or a failure to remedy a dangerous condition caused by the act of the one primarily responsible.³⁷ The active–passive negligence dichotomy was yet another phrase the court used to express the same distinction.³⁸ However baffling, elusive, or slippery these distinctions and formulas were,³⁹ the Iowa courts employed them for nearly a century to determine if indemnity was justified. Vicarious liability could have been, but—with perhaps one exception—never was the actual basis of an indemnity finding.⁴⁰ From 1882 to 1956, when contribution between joint tortfeasors was finally permitted,⁴¹ and even to some extent beyond that time frame, the major theme of Iowa implied indemnity law revolved around the question of who was *in pari delicto* and who was not.⁴²

36. See *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980).

37. See *id.*

38. See, e.g., *Rees v. Dallas County*, 372 N.W.2d 503, 505 (Iowa 1985) (characterizing the distinction between primary and secondary liability as the “active–passive negligence” distinction); *Hathaway*, 57 N.W.2d at 233 (holding “primary and active wrongdoer” liable to “passive wrongdoer . . . only constructively . . . and secondarily liable”); *Rozmajzl*, 49 N.W.2d at 506 (“Indemnity is also frequently allowed a party guilty of passive negligence against one guilty of active or positive negligence.”).

39. See *Chi. & Nw. Ry. Co. v. Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. 33, 58–59 (N.D. Iowa 1959). In addition, Judge Graven believed that the “tests, formulas, and rules” courts generally employed in implied indemnity cases were confusing and inconsistent. *Id.* at 58. Iowa cases were not immune from this confusion and inconsistency, as is reflected in the question of whether certain implied indemnity holdings were based on the primary–secondary theory or principles of vicarious liability. Compare *State ex rel. Miller v. Philip Morris, Inc.*, 577 N.W.2d 401, 406 (Iowa 1998) (stating that *Peters v. Lyons*, 168 N.W.2d 759 (Iowa 1969) is a classic case involving vicarious liability) with *Sweeny*, 294 N.W.2d at 822 (stating that *Peters* provides an illustration of primary–secondary liability).

40. See *infra* notes 267–78 and accompanying text.

41. See *Best v. Yerkes*, 77 N.W.2d 23, 29 (Iowa 1956).

42. See *Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. at 63 (holding that “the parties were *in pari delicto* in that each was guilty in the matter of inspection and discovery of the defect”). The following cases illustrate the earlier state of law in Iowa: *Sweeny*, 294 N.W.2d at 821–23; *McCarthy v. J.P. Cullen & Son Corp.*, 199 N.W.2d 362, 371 (Iowa 1972); *Peters*, 168 N.W.2d at 768; *Hathaway*, 57 N.W.2d at 234; *Weidert v. Monahan Post Legionnaire Club, Inc.*, 51 N.W.2d 400, 404–05 (Iowa 1952); *Rozmajzl*, 49 N.W.2d at 506; *Sweet v. Atkinson*, 182 N.W. 793, 794 (Iowa 1921); *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 825 (Iowa 1920); *Pfarr v. Standard Oil Co.*, 146 N.W. 851, 853–54 (Iowa 1914); *Chi. & Nw. Ry. Co. v. Dunn*, 13 N.W. 722, 722–

One of the first cases involved Martin Engle's horse, which was killed in March of 1881 when it strayed onto the tracks of the Chicago & Northwestern Railway Company and was struck by a train.⁴³ The railroad had erected a gated fence along that part of its right-of-way abutting the property of Dunn, a livestock farmer.⁴⁴ For whatever reason, Dunn removed the gate from its hinges.⁴⁵ One month later, Engle's horse wandered onto the tracks through the opening left by the removal of the gate and met its fate.⁴⁶ The railroad paid Engle \$110 for the horse and sought indemnity from Dunn.⁴⁷ The trial court sustained Dunn's demurrer, but the supreme court reversed and held that the railroad had stated a viable claim for indemnity.⁴⁸ It found the parties were not *in pari delicto* because Dunn had created the hazard by removing the gate, while the railroad had merely allowed the gate to remain down.⁴⁹ In the court's words, Dunn was arguably "guilty of an active wrong" whereas the railroad was only "passively guilty."⁵⁰

The United States Supreme Court gave its imprimatur to the active-passive negligence or primary-secondary liability distinction in two indemnity cases decided near the turn of the twentieth century. In *Washington Gas Light Co. v. District of Columbia*, and nine years later in *Union Stock Yards Co. of Omaha v. Chicago, Burlington, & Quincy Railroad Co.*, the Court allowed an inquiry into the relative delinquency of the parties in deciding whether a shift in liability was warranted.⁵¹ The Iowa Supreme Court relied upon these two cases in subsequent decisions, which gave further validity to the primary-secondary liability framework by which entitlement, if any, to indemnity was determined.⁵² In *Pfarr v. Standard Oil Co.*, for example, a retailer sought indemnity from the manufacturer of a defective kerosene heating product which had exploded

23 (Iowa 1882); *see also* *Rees*, 372 N.W.2d at 504; *see generally* Stone, *supra* note 1, at 120-27.

43. *See Dunn*, 13 N.W. at 722.

44. *Id.*

45. *See id.*

46. *Id.*

47. *Id.*

48. *Id.* at 722-23.

49. *See id.*

50. *Id.* at 722.

51. *Wash. Gas Light Co. v. District of Columbia*, 161 U.S. 316, 327-28 (1896); *Union Stock Yard Co. of Omaha v. Chi., Burlington, & Quincy R.R. Co.*, 196 U.S. 217, 224-28 (1905).

52. *See Pfarr v. Standard Oil Co.*, 146 N.W. 851, 854 (Iowa 1914).

in a home, causing several deaths.⁵³ Today, there would be little doubt that a court would hold that the manufacturer has an implied duty to indemnify the retailer if an implied warranty was violated.⁵⁴ But not in 1914. The *Pfarr* court allowed a claim for indemnity to be stated, but only on the grounds that the manufacturer was primarily or principally at fault while the retailer was less culpable.⁵⁵

Cases involving municipalities and their contractors were before the court frequently on the question of who should bear the burden for damage done to a member of the public. In *City of Des Moines v. Des Moines Water Co.*, the city had settled a case in which the plaintiff's intestate died after tripping and falling over a water cap that protruded a few inches above a public sidewalk.⁵⁶ The cap originally had been level with the sidewalk, but over the years the concrete had settled, leaving a "protrusion" two to three inches above the sidewalk.⁵⁷ The city sued the public utility responsible for the water cap to recover the \$2,500 it had paid to settle the underlying claim.⁵⁸ The court held a claim for indemnity was properly stated.⁵⁹ It went so far as to note that the utility, under its contract with the city, had an implied duty to the public to maintain those instrumentalities with which the public may come into contact, but it stopped short of basing its indemnity holding on a breach of that implied term of the contract.⁶⁰ Rather, the court held that because the utility possessed the primary duty to maintain the cap for the safety of the public, it could be held primarily liable.⁶¹ The city's liability was secondary because it only had failed to remedy the hazard or nuisance which the utility had allowed to exist.⁶² Accordingly, the parties were not *in pari delicto*, and the city could state a claim for indemnity.⁶³

A municipality was not immune from an indemnity claim, however,

53. *See id.* at 851–52.

54. *See, e.g.,* Hawkeye-Sec. Ins. Co. v. Ford Motor Co., 174 N.W.2d 672, 678–79 (Iowa 1970).

55. *See Pfarr*, 146 N.W. at 854–55.

56. *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 822 (Iowa 1920).

57. *Id.*

58. *Id.*

59. *See id.* at 824–25.

60. *See id.* at 823–25.

61. *See id.* at 824–25.

62. *Id.* at 825.

63. *Id.*

when it was the primary tortfeasor. In *Hathaway v. Sioux City*, the city had contracted with a local company to remove dirt from the company's property in order to furnish necessary dirt filling for the building of a highway.⁶⁴ The company's property was located on a slope which abutted several residential dwellings occupied by the plaintiffs.⁶⁵ The excavation of the slope caused earth slides which destroyed a street adjacent to the homes and affected the lateral support of the homes.⁶⁶ A jury found both the city and local company liable for the plaintiffs' damages.⁶⁷ On the company's cross-petition for indemnity, the trial court found the city primarily liable, having previously stated that "considerations of haste and expediency prompted [the city] to avoid condemnation or attempt to purchase plaintiffs' properties."⁶⁸ The Iowa Supreme Court affirmed, noting the contract between the parties, that the city had initiated the project, and that the city had solicited the company into entering into the arrangement.⁶⁹ Although the court concluded that the contract revealed the city as the one ultimately liable for damage to third persons, the court rested its indemnity holding not on the breach of a contractual duty, but on the traditional rule that the city was the primary and active wrongdoer.⁷⁰

Two cases decided four months apart in the early 1950s further illustrate the Iowa Supreme Court's preference for an analysis based on fault comparison, as opposed to vicarious liability or breach of contract. In *Rozmajzl v. Northland Greyhound Lines*, Northland, after selling tickets to twenty-two passengers, had contracted with Sioux Lines to furnish a bus and driver for a scheduled run due to a mechanical failure to one of Northland's buses.⁷¹ While on the run, the Sioux Lines bus was involved in an accident due to the bus driver's negligence.⁷² Plaintiff, a passenger on the bus, successfully sued both Northland and Sioux Lines for the injuries she sustained in the accident.⁷³ As between Northland and Sioux Lines, the supreme court held that Northland was entitled to indemnity because

64. *Hathaway v. Sioux City*, 57 N.W.2d 228, 229 (Iowa 1953).

65. *Id.* at 229–30.

66. *Id.* at 230.

67. *Id.*

68. *Id.* (quotation omitted).

69. *Id.* at 233–34.

70. *See id.*

71. *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 503–04 (Iowa 1951).

72. *Id.* at 504–05.

73. *See id.* at 503.

the Sioux Lines bus driver was primarily at fault.⁷⁴ The court made no mention of an implied contractual claim for indemnity, and although it mentioned the concept of vicarious liability as a potential ground, it did not base its holding on that concept.⁷⁵

A contract to repair a water heater provided the factual backdrop for an indemnity claim decided four months later in *Weidert v. Monahan Post Legionnaire Club, Inc.*⁷⁶ Arthur Weidert, a commercial merchant and tenant, brought suit against a fellow tenant, the Legionnaire Club, for damages to his merchandise caused by water leaking from the third floor quarters of the club.⁷⁷ The leak occurred an hour or two after a plumber employed by the club to fix its water heater had completed his work.⁷⁸ The club successfully claimed indemnity from the plumber after the court awarded damages in favor of Weidert.⁷⁹ The plumber's breach of his contractual duty to properly perform the repairs arguably could have formed the foundation of the implied indemnity claim, but it did not; the court chose instead to summarily invoke the holding of *Rozmajzl* as authority for the club to obtain indemnity.⁸⁰

Only one older indemnity case exists that does not expressly rely on the primary–secondary distinction. In *Horrabin v. City of Des Moines*, the parties entered into a contract wherein the city agreed to procure the right-of-way on which Horrabin would build a bridge and approach.⁸¹ Unfortunately, the city engineer in charge of the project directed Horrabin to build these structures on land the city did not own.⁸² Predictably, the landowner sued the city and Horrabin for trespass, and obtained a judgment against each.⁸³ Horrabin paid the judgment and subsequently sought indemnity from the city.⁸⁴ The supreme court affirmed Horrabin's

74. *See id.* at 506.

75. *See id.*

76. *Weidert v. Monahan Post Legionnaire Club, Inc.*, 51 N.W.2d 400, 401 (Iowa 1952).

77. *Id.* at 400–01.

78. *Id.* at 401.

79. *Id.*

80. *See id.* at 404 (citing *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951)).

81. *Horrabin v. City of Des Moines*, 199 N.W. 988, 989 (Iowa 1924).

82. *Id.*

83. *Id.*

84. *Id.*

judgment for indemnity.⁸⁵ The court emphasized that Horrabin had performed his contractual obligations in good faith, that he had acted in reliance on the properly constituted authority of the city officer in charge, and that he had the right to assume that the city would procure the proper real estate on which to build the improvements.⁸⁶ Blending the concepts of detrimental reliance, breach of contract, and agency, the court held Horrabin was entitled to indemnity because “[w]here one is employed or directed by another to do an act not manifestly wrong, the law implies a promise of indemnity by the principal for damages resulting proximately from the good-faith execution of the agency.”⁸⁷

Notwithstanding *Horrabin*, the general approach the Iowa Supreme Court took in deciding implied indemnity cases remained the same—a case-by-case analysis of who, if anyone, was the primary tortfeasor, and whether the parties acted *in pari delicto*.⁸⁸ The last paragraph of *Hathaway* confirms this approach, as well as the problematic application of the concept:

We are aware of the frequent difficulty in determining when tortfeasors are and when they are not *in pari delicto*; or when they are and when they are not in the same fault toward the person injured, and whether the fault of one is or is not the primary and efficient cause of the injury.⁸⁹

Three years after *Hathaway* was decided, the Iowa Supreme Court finally allowed tortfeasors who shared a common liability to an injured party to seek contribution from one another.⁹⁰ But the primary–secondary theory of indemnity was too entrenched in Iowa law to go silently into the night. Not content with merely being allowed to share fault or culpability, tortfeasors continued to urge courts of equity to shape or mold their fault into the “semantic cubicle”⁹¹ of passive or secondary liability such that all

85. *Id.* at 991.

86. *See id.* at 990.

87. *Id.*

88. *See Hathaway v. Sioux City*, 57 N.W.2d 228, 234 (Iowa 1953); *Weidert v. Monahan Post Legionnaire Club, Inc.*, 51 N.W.2d 400, 404 (Iowa 1952); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951); *Sweet v. Atkinson*, 182 N.W. 793, 794 (Iowa 1921); *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 825 (Iowa 1920); *Pfarr v. Standard Oil Co.*, 146 N.W. 851, 854 (Iowa 1914); *Chi. & Nw. Ry. Co. v. Dunn*, 13 N.W. 722, 722–23 (Iowa 1882).

89. *Hathaway*, 57 N.W.2d at 234.

90. *See Best v. Yerkes*, 77 N.W.2d 23, 29 (Iowa 1956).

91. *Chi. & Nw. Ry. Co. v. Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. 33,

their culpability would be shifted.⁹² Nothing changed from the courts' perspective, either. They continued to struggle with what was active or primary, and what was passive or secondary.⁹³ Not only were the concepts troublesome and difficult to apply, "in some circumstances passive negligence [was] much more reprehensible than active negligence."⁹⁴ Even after the theory was abandoned in 1989 due to the adoption of comparative fault principles,⁹⁵ the court continued to mention that negligent tortfeasors could seek indemnity.⁹⁶

Meanwhile, about the same time contribution was first allowed, parties sued by workers injured in the workplace began to point the legal finger at employers as the ones who should bear all the liability.⁹⁷ Application of primary-secondary liability principles proved problematic because employers, whose liability was governed by workers' compensation laws, did not share a common liability with the accused tortfeasors.⁹⁸ No problem, the third parties responded, because they sought to transfer liability based on the employer's alleged breach of its duty to the third party—a duty independent of the employer-employee relationship.⁹⁹ This concept and its development are explored in the next section.

60 (N.D. Iowa 1959).

92. See, e.g., *Rees v. Dallas County*, 372 N.W.2d 503, 505–06 (Iowa 1985); *Sweeny v. Pease*, 294 N.W.2d 819, 821 (Iowa 1980); *McCarthy v. J. P. Cullen & Son Corp.*, 199 N.W.2d 362, 371 (Iowa 1972); *Peters v. Lyons*, 168 N.W.2d 759, 768 (Iowa 1969). In effect, the primary-secondary theory of indemnity became nothing more than "an extreme form of contribution." *Rees*, 372 N.W.2d at 506 (quoting *Slattery v. Marra Bros.*, 186 F.2d 134, 138 (2d Cir. 1951)).

93. See *Rees*, 372 N.W.2d at 506.

94. See *id.* at 506 n.2 (quoting Henry Woods, *Some Observations on Contribution and Indemnity*, 38 ARK. L. REV. 44, 62–63 (1984)).

95. *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989).

96. See, e.g., *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002); *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001) (recognizing abandonment of active-passive negligence indemnity).

97. See, e.g., *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 127–28 (1956), *superseded by statute*, 33 U.S.C. § 905(b) (2006), *as recognized in* *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979); *Great N. Ry. Co. v. Bartlett & Co., Grain*, 298 F.2d 90, 91 (8th Cir. 1962); *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 561 (Iowa 1962).

98. See, e.g., *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 309 (Iowa 1966).

99. See *id.* at 317; *Blackford*, 118 N.W.2d at 564–65.

B. *Genesis and Development of the Independent Duty Theory*

Just as the Supreme Court led the way in establishing the primary-secondary basis of implied indemnity liability with its decisions at the turn of the twentieth century,¹⁰⁰ so did the Court help blaze the trail on the breach-of-independent-duty theory in a 1956 decision, *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*¹⁰¹ In that case, an employee of Ryan Stevedoring, Frank Palazzolo, was injured while unloading cargo from Pan-Atlantic's ship—cargo that originally had been stowed by Ryan's employees in another port.¹⁰² Much like the typical state workers' compensation statutes, the federal Longshore and Harbor Workers' Compensation Act provides an exclusive remedy against an employer.¹⁰³ After collecting compensation and receiving payments for his medical bills from Ryan Stevedoring Co., Palazzolo sued Pan-Atlantic, alleging that "either the unseaworthiness of the ship, or the shipowner's negligence in failing to furnish a safe place to work" caused his injuries.¹⁰⁴ Pan-Atlantic in turn sued Ryan Stevedoring Co. for indemnity, alleging that it breached an implied term of its contract because its employees had stowed the cargo in an unreasonably unsafe manner.¹⁰⁵ The Supreme Court agreed, noting that competent and safe storage were essential and unescapable elements of the service contract.¹⁰⁶ The fact that Ryan Stevedoring Co. employed Palazzolo was irrelevant.¹⁰⁷ The exclusive-remedy provisions of the federal statute did not apply because the statute did not address Ryan Stevedoring Co.'s "independent contractual obligation" to Pan-Atlantic to load the cargo safely.¹⁰⁸

The stage had now been set for other courts to embrace the independent-contractual-duty concept as a basis for implied indemnity, particularly in the context of workplace injuries. In fact, the Eighth Circuit

100. See *Union Stock Yards Co. of Omaha v. Chi., Burlington & Quincy R.R. Co.*, 196 U.S. 217 (1905); *Wash. Gas Light Co. v. District of Columbia*, 161 U.S. 316 (1896).

101. *Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124 (1956).

102. *Id.* at 126.

103. See 33 U.S.C. § 905(a) (2006).

104. See *Ryan Stevedoring Co.*, 350 U.S. at 127.

105. See *id.* at 131–32.

106. *Id.* at 133.

107. See *id.* at 131–32.

108. See *id.* at 130. In 1972, Congress effectively overruled *Ryan Stevedoring Co.* by amending the Longshore and Harbor Workers' Compensation Act to provide immunity for employers from such third-party actions. See 33 U.S.C. § 905(b).

already had declared that the exclusive remedy provisions of the Iowa Workers' Compensation Act did not bar an implied indemnity action against an employer.¹⁰⁹ The Iowa Supreme Court first faced the issue in 1962, in *Blackford v. Sioux City Dressed Pork, Inc.*¹¹⁰ In *Blackford*, R. E. Langley entered into a contract with Sioux City Dressed Pork "under the terms of which Langley agreed to furnish labor to wash the walls, equipment and floors" of the pork plant after each day's operations.¹¹¹ Langley expressly agreed to perform the work according to sanitary requirements, to supervise and to control the work, and to assume responsibility for personnel employed by him.¹¹² The written contract did not contain an indemnity clause.¹¹³ An employee of Langley, Robert Blackford, was injured while cleaning a piece of equipment while it was in motion.¹¹⁴ Blackford brought suit against Sioux City Dressed Pork on the basis that there was not a proper guard or other safety appliance in the machine.¹¹⁵ Sioux City Dressed Pork denied liability, but also sought indemnity against Langley for negligence in failing to instruct Blackford as to the proper method of cleaning the equipment at issue and in allowing him to wash the machine while it was operating.¹¹⁶ Like the third-party defendant in *Ryan Stevedoring Co.*, Langley raised the exclusive-remedy provision of the applicable workers' compensation statute as a bar to the indemnity claim.¹¹⁷ Like *Ryan Stevedoring Co.*, this argument was rejected.¹¹⁸ Citing *Ryan Stevedoring Co.*, the court held the indemnity action was not based on Langley's negligence, but on an implied contractual duty to perform the work safely.¹¹⁹ This implied duty was based on Langley's express contractual representation to Sioux City Dressed Pork that it would control and supervise the method of cleaning and that it would take responsibility for the actions of its personnel.¹²⁰ This duty stood independent of Langley's duties to Blackford and all his employees such that the exclusive-remedy provisions of the Iowa Workers'

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109. *Am. Dist. Tel. Co. v. Kittleson*, 179 F.2d 946, 954-55 (8th Cir. 1950).
110. *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559 (Iowa 1962).
111. *Id.* at 560.
112. *Id.*
113. *See id.* at 561-62.
114. *Id.* at 560-61.
115. *Id.* at 561.
116. *Id.*
117. *See id.*
118. *See id.* at 564-65.
119. *See id.* at 563-64.
120. *See id.*

Compensation Act, which governed the relationship between Langley and Blackford, did not apply.¹²¹ Accordingly, the court held that Sioux City Dressed Pork could state a claim for implied indemnity based on a breach of duty arising out of its contract with Langley.¹²²

Another workplace injury—this time with a different contractual twist—served as the basis for an indemnity action in *Iowa Power and Light Co. v. Abild Construction Co.*¹²³ Glenn Visser, an employee of Abild Construction, was severely injured “when an angle iron he was holding came into contact with a 13,000 volt power line belonging to” Iowa Power.¹²⁴ Visser successfully sued Iowa Power, which then sought indemnity against Abild on various grounds.¹²⁵ One of those grounds was a promise an Abild foreman had made to Iowa Power to notify it ahead of the time that Abild would be working near the subject power line so Iowa Power could either shut off electrical service or temporarily move the line.¹²⁶ The foreman neglected to notify Iowa Power.¹²⁷ Iowa Power argued that had such notification been made, it could have performed its part of the agreement to move the line or shut off power and the accident could have been avoided.¹²⁸ Although its failure to do so constituted negligence against Visser, the court held Iowa Power could transfer all of its liability to Abild for the breach of the agreement to notify.¹²⁹ Like *Blackford*, the court implied a duty to indemnify from a contract between an employer and a third party.¹³⁰ Unlike *Blackford*, however, in which the court based its implied indemnity holding on an implied contractual duty to perform the work safely, the court in *Iowa Power & Light Co.* implied a duty to indemnify from an express promise to notify.¹³¹

The Iowa Supreme Court soon made clear that indemnity arising out

121. See *id.* at 563–65.

122. See *id.* at 565.

123. *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303 (Iowa 1966).

124. *Id.* at 305–06.

125. *Id.*

126. See *id.* at 313–14.

127. *Id.* at 314.

128. See *id.* at 317.

129. *Id.*

130. See *id.*; *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 565 (Iowa 1962).

131. See *Blackford*, 118 N.W.2d at 565; *Iowa Power & Light Co.*, 144 N.W.2d at 317.

of a breach of a contractual obligation—whether express or implied—was not limited to the workplace situation. In *Peters v. Lyons*, the court held that a dog owner's insurer could obtain indemnity from the retail seller of a defective dog chain that had broken, allowing the dog to break loose and attack its owner's neighbor.¹³² Substantial evidence supported the finding that an implied warranty of fitness for a particular purpose had been made when the seller, after being advised of the size and type of dog, represented that the chain would restrain the dog.¹³³

Another alleged breach of an implied warranty of fitness served as the foundation for an indemnity action one year later, this time in the context of a motor vehicle accident.¹³⁴ The court held that an insurer of a trucking company whose driver had caused an accident due to allegedly defective brakes on the truck could properly attempt to pass on its entire liability to Ford Motor Company, the seller of the truck.¹³⁵

In *Ke-Wash Co. v. Stauffer Chemical Co.*, a retail seller of a farm chemical properly sought indemnity from the chemical manufacturer as a result of the purchaser's claim that application of the chemical resulted in crop damage.¹³⁶

Finally, a real estate lease served as the basis for an indemnity claim in the 1972 case *Stowe v. Wood*.¹³⁷ The court recognized that a tenant's violation of a snow-removal provision in the lease would afford the landlord implied indemnity if he were compelled to pay damages to the plaintiff, who had fallen on an icy sidewalk.¹³⁸

The limits of the breach-of-duty indemnity theory were delineated in the 1992 case *Johnson v. Interstate Power Co.*¹³⁹ Interstate Power had "erected high voltage lines to furnish electricity to a feed mill."¹⁴⁰ An employee of the feed mill was electrocuted when a metal pole he was using to dislodge feed in a grain-processing machine came into contact with one

132. *Peters v. Lyons*, 168 N.W.2d 759, 766, 771 (Iowa 1969).

133. *Id.* at 763–64.

134. *See Hawkeye-Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672 (Iowa 1970).

135. *See id.* at 675–76.

136. *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 6–7 (Iowa 1970).

137. *Stowe v. Wood*, 199 N.W.2d 323, 324–25 (Iowa 1972).

138. *See id.* at 325–26.

139. *See Johnson v. Interstate Power Co.*, 481 N.W.2d 310 (Iowa 1992).

140. *Id.* at 313.

of Interstate Power's 8000-volt power lines.¹⁴¹ After the injured worker sued Interstate Power, Interstate Power sued the worker's employer for indemnity.¹⁴² Interstate Power alleged that as part of its contractual duty to pay for the cost of electricity, the feed mill also had promised—albeit implicitly—to warn Interstate Power when its employees would be working near electrical lines, and to train its employees as to the care needed when working close to Interstate's lines.¹⁴³ Interstate Power argued that breach of these alleged implied contractual duties warranted a shifting of all the liability for the worker's injuries to the feed mill.¹⁴⁴ The court resoundingly rejected this novel argument, stating that it stretched “the concept of contract out of all relation to reality.”¹⁴⁵ The court concluded that this would be tantamount to imposing a contractual obligation upon the buyers of all goods or products “not to use the article[s] in such a way as to bring liability upon the manufacturer.”¹⁴⁶ The court's holding was simple and straightforward—“an employer who agrees to purchase a product does not impliedly agree to indemnify the seller *simply because of the purchase*.”¹⁴⁷ Rather, there must be some “specific and defined duty” in the contract of sale and a breach of that duty before a seller can properly state an implied indemnity claim.¹⁴⁸ “[T]he general duty that every member of society owes to every other member—the duty not to harm him through tortious acts”—will not support an implied indemnity claim against an employer.¹⁴⁹

141. *See id.*

142. *Id.* at 314.

143. *See id.* at 319–20.

144. *See id.*

145. *Id.* at 320 (quoting 2A LARSON, *supra* note 8, § 76.84, at 14-871).

146. *See id.* (quoting 2A LARSON, *supra* note 8, § 76.84, at 14-876).

147. *See id.*

148. *See id.* at 319.

149. *See id.* at 320–21 (quoting *Hysell v. Iowa Pub. Serv. Co.*, 534 F.2d 775, 783 (8th Cir. 1976)). Two federal decisions provide some guidance on what is required to meet this threshold of a specific and defined duty. In *Weggen v. Elwell-Parker Electric Co.*, 510 F. Supp. 252 (S.D. Iowa 1981), a manufacturer of a low-lift platform truck brought an indemnity action against the employer of a worker injured while working in and around the platform truck. *See id.* at 253. The employer specified certain component parts and design modifications for the truck. *Id.* The court denied the employer's motion for summary judgment, reasoning that when the facts were viewed in the light most favorable to the manufacturer, the purchase agreement at issue did not involve the usual vendor–vendee relationship, but rather involved a designer–fabricator relationship. *See id.* at 254–55. It held that the “purchaser's input into the specifications and design modifications may be so intrusive, specialized and specific that it gives rise to an independent duty requiring the purchaser to use due care in the design and specification of component parts.” *Id.* at 254.

Johnson completes the evolution of the duty-based concept of implied indemnity first recognized by the court thirty years before in *Blackford*. But a breach-of-independent-duty case decided five years before *Johnson* marked a more significant turning point in the development of the court's implied indemnity jurisprudence. The case, *Woodruff Construction Co. v. Barrick Roofers, Inc.*, presented the issue of the viability of a breach-of-independent-duty claim brought by an admittedly negligent tortfeasor.¹⁵⁰ To this case, and, more generally, to this issue, we now turn.

C. Fault and Breach of Independent Duty

Woodruff Construction arose out of a construction accident in which Craig West, an employee of Barrick Roofers, was severely injured after falling through the roof of a gymnasium.¹⁵¹ He collected workers' compensation benefits from Barrick and brought suit against Woodruff, the general contractor on the gymnasium repair project.¹⁵² Woodruff settled with West, sued Barrick for indemnity, and sued an employee of Barrick (a co-employee of West) for contribution.¹⁵³ With respect to the indemnity claim, Woodruff contended that because Barrick had implicitly agreed to perform the roofing subcontract with due care, it likewise had implicitly agreed to indemnify Woodruff in the event of a breach of that

This stands in contrast to the holding in the recent case of *Subcliff v. Brandt Engineered Products, Inc.*, 459 F. Supp. 2d 843 (S.D. Iowa 2006). Brandt, a designer of equipment used on a finishing line in the manufacture of steel pipes, sought indemnity from the employer of an injured worker on the basis that the employer had breached an independent duty to monitor and notify it of any problems with the finishing line. *See id.* at 845. Brandt's allegations were based on a comment allegedly made by a manager for the employer that nothing would be done to correct an error made by others in the design and installation of the foundation for the finishing line, but that a wait-and-see approach would be taken. *See id.* at 854. An employee was injured on the finishing line and brought suit. *Id.* at 845. The court rejected, as a matter of law, that the "wait and see" remark constituted a specific and defined duty that the employer would monitor the equipment and keep Brandt informed of any problems that may develop. *See id.* at 855. In fact, the court held the remark did not even rise to the level of a contractual duty "to do anything, much less a specific and defined duty." *Id.*

150. *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783 (Iowa 1987).

151. *Id.* at 783.

152. *Id.*

153. *See id.* The contribution action was based on allegations the co-employee was grossly negligent as defined by Iowa Code section 85.20. The court, in a separate opinion, concluded that Woodruff had not generated a fact issue on the statutory standard. *See Woodruff Constr. Co. v. Mains*, 406 N.W.2d 787, 790–91 (Iowa 1987).

duty.¹⁵⁴ Although on the contribution claim the jury found Woodruff sixty percent at fault and Barrick's employee forty percent at fault, Woodruff argued that it was still entitled to indemnity because of Barrick's implied breach of due care.¹⁵⁵ In fact, Woodruff went so far as to argue that it would be entitled to indemnity even if it were found to be ninety-nine percent responsible.¹⁵⁶ Citing *Blackford*, Woodruff argued that because it had established that Barrick breached an implied duty arising out of their contract, a corresponding duty to indemnify had to be implied as a matter of law, regardless of the underlying facts and circumstances—including Woodruff's own fault.¹⁵⁷ The court made quick work of Woodruff's argument, summarily rejecting the notion that the law implies a right to indemnity for a party to recover damages attributed to its own negligence.¹⁵⁸ The court noted that "[t]his is not even allowed under an express indemnity agreement unless[] provided for in clear and unequivocal language."¹⁵⁹ "An implied agreement to indemnify," the court held, "cannot be elevated to a higher degree of liability than an express one."¹⁶⁰

Woodruff's second claim for indemnification—for that part of the injury not caused by its negligence—was similarly rejected.¹⁶¹ The court held that when a "proposed indemnitee aided in the creation of the hazard" or was at fault, the law would not imply a right of indemnity.¹⁶² To the extent *Blackford* could be read as holding that an implied agreement to indemnify would be read into all service contracts without regard to the fault of the indemnitee, the court expressly overruled it.¹⁶³

The law always had required a party seeking implied indemnity to be liable to the injured party before allowing the financial burden of that liability to be transferred to another.¹⁶⁴ Otherwise, the payment by an indemnitee was deemed to be voluntary, and a court of equity would

154. *Woodruff Constr. Co.*, 406 N.W.2d at 784.

155. *See id.* at 784–85.

156. *Id.* at 785.

157. *Id.*

158. *Id.* at 785, 787.

159. *Id.* at 785.

160. *Id.*

161. *See id.* at 785–86.

162. *Id.* at 786.

163. *Id.* at 787.

164. *See Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 10–11 (Iowa 1970).

simply leave the parties where it found them.¹⁶⁵ What the court in *Woodruff Construction* did in light of this principle was to create a distinction between legal liability and factual culpability. To make a viable claim for implied indemnity, an indemnitee had to be guilty of the former and be innocent of the latter.¹⁶⁶ If this sounds like vicarious liability, it is.¹⁶⁷ Although the court's holding in *Woodruff Construction* was limited, its approach stands in sharp contrast to the tradition and heritage of Iowa implied indemnity law, which revolved around an analysis of whether the parties were *in pari delicto*, or whether one tortfeasor possessed greater fault than the other.¹⁶⁸ *Woodruff Construction* is an important transitional indemnity case. In conjunction with the adoption of comparative fault principles and the abrogation of the primary-secondary theory of indemnity, *Woodruff Construction* serves as a bridge from the old school *in pari delicto* approach of implied indemnity decision-making to one based on principles of vicarious liability.¹⁶⁹ Although the court in *Woodruff Construction* neither used the term "vicarious liability" nor addressed how its holding related to the requirement of legal liability, the impact of the court's decision seems evident—only a showing of legal liability without any actual fault by the indemnitee will trigger the right to shift responsibility onto the shoulders of another.¹⁷⁰ It took the court another fifteen years before making this proposition more explicit. With its decision in *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, the court made good on the promise of *Woodruff Construction*—only those vicariously liable may state a claim for implied indemnity.¹⁷¹

William Lawson, Jr., an employee of Neumann-Kiewit Constructors (Neumann), was seriously injured while erecting a tower crane needed to

165. *See id.* at 11.

166. *See Woodruff Constr. Co.*, 406 N.W.2d at 786; *Ke-Wash Co.*, 177 N.W.2d at 10–11.

167. *See State v. Casey's Gen. Stores, Inc.*, 587 N.W.2d 599, 601 (Iowa 1998) ("vicarious liability occurs when 'one [person] is made liable, though without personal fault, for the bad conduct of someone else.'" (quoting WAYNE B. LAFAYE & AUSTIN SCOTT, JR., CRIMINAL LAW § 3.9, at 250 (2d ed. 1986))).

168. *See supra* Part II.A.

169. *See generally* Iowa Code ch. 668 (2009) (discussing liability in tort and comparative fault principles); *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989) (eliminating indemnity based on active-passive negligence).

170. *See Woodruff Constr. Co.*, 406 N.W.2d at 786.

171. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 577 (Iowa 2002); *cf. Woodruff Constr. Co.*, 406 N.W.2d at 786.

construct an office building.¹⁷² His “arm was pinched between an erected section of the tower crane and another section of the tower crane that was being hoisted into place with a crawler crane.”¹⁷³ Neumann had rented the crawler crane from McNally & Nimergood (McNally) under a written agreement by which Neumann agreed to inspect, examine, replace, or repair the crane if it was not found in good condition.¹⁷⁴ Neumann also agreed to keep the crane in good repair and to assume any liability for damages to any person while the crane was in its possession, except for damages caused by a product defect.¹⁷⁵ Lawson sued McNally, alleging it “was negligent in failing to inspect the crawler crane prior to its delivery, failing to properly maintain the crane prior to its delivery, and delivering a crane with a defective pump.”¹⁷⁶ McNally settled the claim for \$499,000 and sought indemnity against Neumann, claiming it breached the duties set forth in the rental agreement from which equity should imply an obligation of indemnity.¹⁷⁷ The trial court dismissed the indemnity claim on Neuman’s summary judgment motion.¹⁷⁸ The supreme court affirmed.¹⁷⁹

Among other issues, McNally argued that all it had to prove to recover under its implied indemnity theory was that Neumann’s negligence, arising out of its failure to properly perform its contract, was a proximate cause of Lawson’s injury.¹⁸⁰ McNally contended that considerations of its own legal liability to Lawson or being free from fault were irrelevant because its implied indemnity claim arose out of contract, not at law.¹⁸¹ This was essentially the same argument Woodruff had made in its unsuccessful attempt to transfer all of its liability to Barrick Roofers.¹⁸² McNally had no choice but to advance this rather bogus argument. First, it had to know its indemnity claim would fail as a matter of law if it were required to prove its own actual liability. Second, it was sued by Lawson for matters that were its responsibilities under its rental

172. *McNally*, 648 N.W.2d at 568.

173. *Id.*

174. *Id.* at 567–68.

175. *Id.*

176. *Id.* at 568.

177. *Id.* at 569.

178. *Id.*

179. *Id.* at 578.

180. *See id.* at 574.

181. *See id.* at 576.

182. *See Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785–87 (Iowa 1987).

agreement with Neumann—specifically, pre-delivery inspection and maintenance and product defects.¹⁸³ Because the settlement with Lawson necessarily encompassed the allegations of liability unique only to McNally, it could hardly admit its liability to Lawson and then attempt to pass on that liability to a party who had contractually avoided that liability in the first place.¹⁸⁴

McNally attempted to justify its position by arguing that if it were required to prove its liability, an irreconcilable conflict would exist between the conventional legal liability rule and the *Woodruff Construction* rule requiring proof of non-liability.¹⁸⁵ The court rejected this plea and resolved the apparent conflict by announcing a rule based on the principles of vicarious liability.¹⁸⁶ The court made clear that implied indemnity is not for the factually liable or the morally culpable—it is for those who find themselves legally liable to an injured party even though they have not personally committed a tort or breached a contract.¹⁸⁷ In the court's words, "[a]n indemnitee can be liable to the injured party by operation of legal principles, yet not actually contribute to the hazard which caused the injury."¹⁸⁸ This is vicarious liability, pure and simple. Although the court was reluctant, in a breach of contract context, to explicitly label the non-breaching party's conduct vicarious, that is precisely what it is.¹⁸⁹ The non-breaching party is being held legally liable for another's breach.¹⁹⁰

What the court started in *Woodruff Construction* reached completion in *McNally*—vicarious liability is the sole unifying principle of implied indemnity.¹⁹¹ This principle embodies the restitutionary foundation of the right to indemnity.¹⁹² Whether the underlying action sounds in tort or breach of contract, equity will only permit the shifting of legal liability in an action for implied indemnity; it will not allow the transfer of factual

183. See *McNally*, 648 N.W.2d at 568.

184. See *id.* at 573–74.

185. See *id.* at 576.

186. See *id.* at 576–77.

187. See *id.*

188. *Id.* at 577.

189. See *id.* at 576.

190. See *id.* at 576–77.

191. See *id.*; *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785–87 (Iowa 1987).

192. See, e.g., *Hunt v. Erzen*, 252 N.W.2d 445, 447–48 (Iowa 1977) (stating that indemnity is a form of restitution).

liability.¹⁹³ The common-law heritage of implied indemnity has, in large part, been altered, if not renounced. The argument for that proposition comprises the next section of this Article.

III. A HERITAGE DISPLACED AND A VINTAGE CONCEPT RESTORED

Almost every major implied indemnity case decided by the Iowa Supreme Court since the mid-1960s contains a litany of the grounds or circumstances in which the doctrine applies.¹⁹⁴ This litany—or directory—first showed up in the 1966 *Iowa Power & Light Co.* decision and, with some modification and variation, continued to flourish up to and including the pronouncements by the court in *McNally*.¹⁹⁵ According to *McNally*, there are four recognized grounds of implied indemnity: “vicarious liability, liability based on conduct directed by the indemnitor, liability based on the breach of an independent duty of care owed by the indemnitor, and liability based on the failure of the indemnitee to discover or prevent misconduct.”¹⁹⁶ The court most likely used vicarious liability to mean respondeat superior liability, such as principal–agent or master–servant.¹⁹⁷

193. See *McNally*, 648 N.W.2d at 576–77.

194. See *id.* at 570 n.1; see also *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001); *Farmers Coop. Co. v. Stockdales’ Corp.*, 366 N.W.2d 184, 186 (Iowa 1985); *Thompson v. Stearns Chem. Corp.*, 345 N.W.2d 131, 134 (Iowa 1984); *C. F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543, 553–54 (Iowa 1983); *Sweeny v. Pease*, 294 N.W.2d 819, 821 (Iowa 1980); *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 308 (Iowa 1966).

195. See *McNally*, 648 N.W.2d at 570 n.1; *Iowa Power & Light Co.*, 144 N.W.2d at 308.

196. *McNally*, 648 N.W.2d at 570 n.1. The court incorrectly believed that indemnity could be obtained on a showing that the indemnitor had failed to discover or prevent misconduct. See *id.* The actual rule is that an indemnitee’s failure to discover or prevent misconduct would not prevent a transfer of all the liability to the indemnitor. See *Peters*, 168 N.W.2d at 767 (quoting *Epley v. S. Patti Constr. Co.*, 228 F. Supp. 1, 5 (N.D. Iowa 1964), *rev’d on other grounds sub nom.* *Carstens Plumbing & Heating Co. v. Epley*, 342 F.2d 830, 837 (8th Cir. 1965)).

197. The authority the *McNally* court cites in support of the four grounds of implied indemnity can be traced to the original litany in *Iowa Power & Light Co.* See *McNally*, 648 N.W.2d at 570 n.1; *Iowa Power & Light Co.*, 144 N.W.2d at 308. In *Iowa Power & Light Co.*, the court specifically defined vicarious liability to mean “respondeat superior or the statutory liability imposed on the owners of automobiles.” *Iowa Power & Light Co.*, 144 N.W.2d at 308 (citing *Lunderberg v. Bierman*, 63 N.W.2d 355, 364 (Minn. 1954)). As a practical matter, indemnification claims based on respondeat superior are exceedingly rare. See Gary Schwartz, *The Hidden and Fundamental Issue of Employer Vicarious Liability*, 69 S. CAL. L. REV. 1739, 1753

In any event, this list and the traditional grounds of implied indemnity have been superseded and largely rendered obsolete by the court's fresh articulation of vicarious liability principles.¹⁹⁸

A. *The Impact of McNally*

The concepts of conduct directed by the indemnitor and the failure of an indemnitee to discover or prevent misconduct are outgrowths—and specific manifestations—of the primary–secondary theory of implied indemnity.¹⁹⁹ Indeed, the latter concept is the classic paradigm of the theory and its *in pari delicto* rationale.²⁰⁰ Such cases as *Chicago & Northwestern Railway Co. v. Dunn*, *Washington Gas Light Co. v. District of Columbia*, and *Hathaway v. Sioux City* illustrate the traditional common-law approach of analyzing the fault of the wrongdoers to determine if one was primary.²⁰¹ Negligence of the indemnitees in these cases was a given.²⁰² Even two of the modern cases the *McNally* court cited in support of these theories explicitly recognize that an indemnitee may be negligent or guilty of wrongful conduct but still be allowed to transfer all liability.²⁰³ Under a vicarious liability theory, negligent or factually culpable tortfeasors cannot recover indemnity.²⁰⁴ By proving their fault, these proposed indemnitees prove themselves out of court.²⁰⁵ The court's reliance on vicarious liability

(1996).

198. See *McNally*, 648 N.W.2d at 576–77.

199. See *Subcliff v. Brandt Engineered Prods., Ltd.*, 459 F. Supp. 2d 843, 856 (S.D. Iowa 2006) (noting that even after the Iowa Supreme Court's abandonment of active–passive indemnity, the primary-versus-secondary fault distinction “remains alive”); see *supra* text accompanying notes 34–37.

200. See, e.g., *Chi. & Nw. Ry. Co. v. Dunn*, 13 N.W. 722, 722–23 (Iowa 1882).

201. See *Wash. Gas Light Co. v. District of Columbia*, 161 U.S. 316, 327–28 (1896); *Hathaway v. Sioux City*, 57 N.W.2d 228, 233–34 (Iowa 1953); *Dunn*, 13 N.W. at 722–23.

202. *Wash. Gas Light Co.*, 161 U.S. at 327; *Hathaway*, 57 N.W.2d at 233; *Dunn*, 13 N.W. at 722.

203. See *Hansen v. Anderson, Wilmarth, & Van Der Maaten*, 630 N.W.2d 818, 827 (Iowa 2001) (holding that a negligent tortfeasor has a right of indemnity from a joint intentional tortfeasor); *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 186 (Iowa 1985) (“In allowing indemnity for a breach of an independent duty between the indemnitor and indemnitee, we have . . . made no distinction based on the nature of the liability of the indemnitee.”).

204. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576 (Iowa 2002) (stating that vicarious liability claims are founded on principles of equity).

205. See *Indus. Risk Insurers v. Creole Prod. Servs., Inc.*, 568 F. Supp. 1323, 1329 (D. Alaska 1983) (noting the irony and harshness of this result). Cf. *Alliant*

principles dispenses with the need for parties to fit their cases within the semantic cubicle of primary-secondary liability doctrine,²⁰⁶ an endeavor which has permeated the trial of common-law indemnity cases since the days of Mr. Engle's wandering horse. For whatever reason, the court, as late as 2001, had been unwilling to let go of these tort-based theories,²⁰⁷ despite the abrogation of the rule preventing contribution between joint tortfeasors and the adoption of comparative fault principles²⁰⁸—not to mention, the express abrogation of the active-passive ground.²⁰⁹ To the extent older cases like *Rozmajzl* and *City of Des Moines v. Des Moines Water Co.* suggest that an indemnitee's secondary liability is constructive or vicarious, they have been subsumed within vicarious liability principles.²¹⁰

The common-law theory premised on conduct directed by an indemnitor also has vicarious liability features. This is the lesson of the only Iowa case to adhere to this theory—*Horrabin v. City of Des Moines*.²¹¹ In *Horrabin*, a contractor had relied in good faith on the City of Des Moines to acquire the right-of-way on which he was to construct a bridge.²¹² The city did not acquire the land, but it nonetheless directed Horrabin to build there.²¹³ Both Horrabin and the city were held liable to

Energy-Interstate Power & Light Co. v. Duckett, 732 N.W.2d 869, 881 (Iowa 2007) (acknowledging that an indemnitee in an express indemnity claim would never be able to recover if it had to prove its own liability and yet also prove it was not at fault). This language rings true, however, for indemnitees who do not have the foresight to expressly protect themselves from liability, and who instead must search for a way for a court of equity to imply indemnity. Of course, only a vicariously liable indemnitee can prove both legal liability and freedom from actual fault.

206. See *Chi. & Nw. Ry. Co. v. Chi., Rock Island & Pac. R.R. Co.*, 179 F. Supp. 33, 60 (N.D. Iowa 1959).

207. See *Hansen*, 630 N.W.2d at 823.

208. See *Best v. Yerkes*, 77 N.W.2d 23, 28–29 (Iowa 1956) (abrogating the rule barring contribution between joint tortfeasors). The court adopted comparative fault principles in *Goetzman v. Wichern*, 327 N.W.2d 742, 754 (Iowa 1982), after which the Iowa legislature modified and codified the same. See generally Iowa Code ch. 668 (2009).

209. See *Am. Trust & Sav. Bank v. U.S. Fid. & Guar. Co.*, 439 N.W.2d 188, 190 (Iowa 1989).

210. *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 506 (Iowa 1951); *City of Des Moines v. Des Moines Water Co.*, 175 N.W. 821, 824–25 (Iowa 1920); see also *Sweeny v. Pease*, 294 N.W.2d 819, 823 (Iowa 1980) (adopting the view that secondary liability rests upon either imputed or constructive fault).

211. *Horrabin v. City of Des Moines*, 199 N.W. 988 (Iowa 1924).

212. *Id.* at 989.

213. *Id.*

the landowner, and Horrabin was granted indemnity.²¹⁴ Again, this theory now has no independent significance to the extent it is based on vicarious liability principles. But the theory is clearly broader than that. It was recognized by the authors of the *Restatement of Restitution* in 1937 as an independent ground of indemnity.²¹⁵ In the comments to section 90 of the *Restatement*, the authors note that the indemnitee's reliance need not be innocent.²¹⁶ It may be careless or negligent.²¹⁷ As long as the reliance does not involve conduct that constitutes a reckless disregard for the rights of others, an indemnitee can properly transfer liability.²¹⁸ The Iowa Supreme Court has cited section ninety with approval.²¹⁹ These primary-secondary features, of course, have now been discredited to the point that this theory no longer has any legal validity.²²⁰

This leaves, then, the issue of the legal viability of the breach-of-independent-duty theory. First, the concept itself is a legal misnomer—a party either owes a duty or does not owe a duty. If a duty exists, it may stand in contrast to, or be separate and distinct from, other duties that may be owed by the same party in a particular situation. This is the only significance of “independent duty” in the indemnity context. Courts coined the phrase to reject an employer's argument that a third party's indemnity claim was not actionable because it arose out of a duty owed to an employee, the breach of which is governed exclusively by workers' compensation statutes.²²¹ The courts held that if an employer breached a

214. *Id.*

215. RESTATEMENT OF RESTITUTION § 90 (1937).

216. *See id.* cmt. a.

217. *Id.*

218. *Id.*

219. *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823 (Iowa 2001); *C.F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543, 553–54 (Iowa 1983); *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969).

220. *See Hansen*, 630 N.W.2d at 823 (stating that the court has “abandoned the primary-active versus secondary-passive liability because it is incompatible with” comparative fault); *see also Subcliff v. Brandt Engineered Prods., Ltd.*, 459 F. Supp. 2d 843, 856–57 (S.D. Iowa 2006) (rejecting the theory when workers' compensation exclusivity applies); *Cochran v. Gehrke Constr.*, 235 F. Supp. 2d 991, 1005, 1007 (N.D. Iowa 2002) (stating that the theory is barred by the Iowa Comparative Fault Act and the Iowa Workers' Compensation Act).

221. *See, e.g., Ryan Stevedoring Co. v. Pan-Atl. S.S. Corp.*, 350 U.S. 124, 131 (1956), *superseded by statute*, Pub. L. No. 92-576, 86 Stat. 1251 (1972) (amending 33 U.S.C. § 902), *as recognized in Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 262 (1979); *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 15 N.E.2d 567, 568–69 (N.Y. 1938).

duty to a third party independent of any duty it owed its employees, a right to implied indemnity may lie for a breach of that duty.²²² Thus, the only meaning “independent” has is to articulate the obvious, namely, that to the extent a breach of duty forms the basis of an implied indemnity claim, it must arise out of the relationship between an indemnitee and an indemnitor, a relationship that is independent of one that may exist between an indemnitor and an injured party.²²³

Another confusing characterization of the breach-of-duty theory posits that the theory is tort-based.²²⁴ In Iowa, the theory originated and developed to avoid the common liability requirement, which barred an indemnity action against an employer based on the primary-secondary theory.²²⁵ The breach-of-duty theory arose out of contractual transactions or relationships—manufacturer-distributor, retailer-purchaser, or landlord-tenant.²²⁶ Although the indemnitee could sue for negligence arising out of a breach of contract (*action ex delicto*) as opposed to a simple breach of contract (*action ex contractu*), the legal foundation for the action, which otherwise would not exist, was the parties’ contractual relationship.²²⁷ This is true even in the one case prior to *McNally* in which the court allowed an implied indemnity claim based on a breach of duty at law: but for the contractual dealings between a seller and a purchaser of a business, the attorney accused of misrepresenting facts material to the sale would never have had the opportunity to commit a tort.²²⁸ The court consistently has rejected, however, any attempt to base an indemnity claim on a breach of duty at law that did not arise from a contract. For example, in *Reese v. Werts Corp.*, the plaintiff sued the installer of an elevator

222. See, e.g., *Ryan Stevedoring Co.*, 350 U.S. at 132–35; *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 565 (Iowa 1962); *Westchester Lighting Co.*, 15 N.E.2d at 568–69.

223. See, e.g., *Ryan Stevedoring Co.*, 350 U.S. at 131–34; *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 316–17 (Iowa 1966).

224. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002).

225. See *Sweeny v. Pease*, 294 N.W.2d 819, 821 (Iowa 1980); *Iowa Power & Light Co.*, 144 N.W.2d at 309; *Blackford*, 118 N.W.2d at 562.

226. See, e.g., *Stowe v. Wood*, 199 N.W.2d 323, 326 (Iowa 1972) (landlord and tenant); *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 6–7 (Iowa 1970) (manufacturer and distributor); *Peters v. Lyons*, 168 N.W.2d 759, 761, 766–68 (Iowa 1969) (retailer and purchaser).

227. See *Iowa Power & Light Co.*, 144 N.W.2d at 314, 317.

228. See *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 821–22, 827 (Iowa 2001).

because of injuries she suffered when the elevator fell from the first floor to the basement.²²⁹ The installer sued the plaintiff's employer for indemnity on the basis that the employer had violated state statutes requiring it to have the elevator registered for state inspection and to keep it in safe operating condition.²³⁰ The court held that the statutes did not create a duty running from the employer to the installer because a violation of the statutes did not constitute an invasion of any right of the installer.²³¹ Similarly, in *Johnson v. Interstate Power Co.*, the court rejected the argument of an electricity seller that its purchaser—the injured party's employer—owed it a duty under the Occupational Safety and Health Act (OSHA) to instruct its employees as to electrical safety.²³² Again, this was because any invasion of the injured employee's rights because of the employer's OSHA violations would not constitute an independent invasion of the seller's rights.²³³ With the court's holding in *McNally* that vicarious liability is an essential condition for the equitable transfer of liability, it appears that tort-based indemnity—other than that based on vicarious liability principles—has no place in the law of implied indemnity.²³⁴

Yet, in a lawyer-misrepresentation case, the court allowed a negligent tortfeasor to state a claim for implied indemnity against an intentional tortfeasor based on a breach of duty that arises under the common law.²³⁵ In *Hansen v. Anderson, Wilmarth & Van Der Maaten*, a law firm was sued for malpractice by its clients who, with the firm's assistance, purchased the assets of a business.²³⁶ The purchase agreement required the seller to provide proper evidence of corporate authority to execute the sales documents.²³⁷ The seller's attorney prepared these documents, but they were false.²³⁸ Nevertheless, he presented them to the buyers' attorneys, knowing they were false and knowing a fellow member of the bar would not question their integrity.²³⁹ The sale was consummated, after which, of

229. *Reese v. Werts Corp.*, 379 N.W.2d 1, 2 (Iowa 1985).

230. *Id.* at 5.

231. *See id.*

232. *See Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 314–15 (Iowa 1992).

233. *See id.*

234. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576–77 (Iowa 2002).

235. *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818 (Iowa 2001).

236. *Id.* at 820–21.

237. *Id.* at 821.

238. *Id.* at 821–22.

239. *Id.* at 822.

course, the true owners of the company appeared on the scene and successfully sued the buyers—the purported new owners—for damages.²⁴⁰ The buyers then brought a suit against their law firm, which promptly cross-petitioned for indemnity against the original “seller’s” attorney for breach of duty arising under the common law.²⁴¹ The district court dismissed the indemnity claim and held there was no legal relationship between lawyers on opposite sides of a commercial transaction that could give rise to an indemnity claim based on a breach of duty.²⁴²

The Iowa Supreme Court reversed. The court held that a lawyer communicating on behalf of a client may not knowingly make a false statement of material fact or law to either a non-client or an opposing lawyer.²⁴³ Stated otherwise, the common law requires a lawyer to refrain from making fraudulent representations to another—it makes no difference whether a statement is made during the course of representing a client in litigation or in non-litigation situations.²⁴⁴ The court held that compliance with this duty “meets social expectations of honesty and fair dealing and facilitates negotiation and adjudication, which are important professional functions of lawyers.”²⁴⁵

The court saw no reason why the breach of this duty, if it could be asserted directly by an injured lawyer, could not also be asserted indirectly as a basis for indemnity.²⁴⁶ The only authority cited by the court for this proposition was the common-law principle that “one who is . . . induced to act by the misrepresentation of [a]nother, is entitled to indemnity for recovery by a third party.”²⁴⁷ The court did not discuss the concept that an indemnitee must not be at fault for the injury in order to transfer liability. In fact, the court assumed the law firm was negligent for not checking the

240. *Id.* at 821. The judgment in *Hansen* was affirmed by the supreme court in *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994).

241. *Hansen*, 630 N.W.2d at 822. A claim for indemnity was also brought under the Iowa Code of Professional Responsibility. *Id.*

242. *Id.* The claim under the Iowa Code of Professional Responsibility was also dismissed on the basis that there was no private cause of action under the Code. *Id.*

243. *Id.* at 824–26.

244. *See id.* at 824–26 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmts. a–c, g (1998)).

245. *See id.* at 826 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 98 cmt. b).

246. *Id.* at 825.

247. *Id.* (quoting KEETON ET AL., *supra* note 26, § 51, at 342).

authenticity of the subject documents.²⁴⁸ This fact alone should have defeated the indemnity claim,²⁴⁹ but it did not. The court fashioned an exception for cases in which the potential indemnitor is an intentional tortfeasor.²⁵⁰ Indeed, the court realized it was allowing a negligent tortfeasor to escape liability completely.²⁵¹ Public policy necessitated this result because shifting the full responsibility for the loss to the intentional tortfeasor deters “conduct which society considers to be substantially more egregious than negligence.”²⁵²

Other than citing *Hansen* as authority for the existence of the four traditional grounds of implied indemnity, the *McNally* court did not mention the case in holding that vicarious liability principles now rule the day.²⁵³ As a result, the question arises whether a negligent tortfeasor may still bring an implied indemnity claim as long as the proposed indemnitor is an intentional tortfeasor. A 2003 decision by the Iowa Supreme Court, in which the *Hansen* parties were yet again before the court, suggested that this is not the case.²⁵⁴ This time, the fight was between the Hansens and their own law firm. After being held liable by the true owners of the corporation on the theory that they aided and abetted a breach of confidential relationship, the Hansen entities had successfully transferred their liability to their law firm.²⁵⁵ The basis of their indemnity claim, as referred to above, was that the firm had breached a duty by not independently verifying the authority of the fraudulent seller’s corporate authority documents.²⁵⁶ The court reversed the Hansens’ indemnity judgment.²⁵⁷ It held that the Hansens’ own intentional misconduct barred, as a matter of law, their attempt to shift the liability onto their attorneys.²⁵⁸ The court relied on section 448 of the *Restatement (Second) of Torts*, which provides in pertinent part that “[t]he act of a third person in committing an

248. *See id.* at 827.

249. *See supra* text accompanying notes 162–79.

250. *See Hansen*, 630 N.W.2d at 827 (quoting *Fleming v. Thresherman’s Mut. Ins. Co.*, 388 N.W.2d 908, 910–11 (Wis. 1986)).

251. *See id.*

252. *Id.* (quoting *Fleming*, 388 N.W.2d at 911).

253. *See McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002) (citations omitted).

254. *See Hansen v. Anderson, Wilmarth & Van De Maaten*, 657 N.W.2d 711, 715 (Iowa 2003).

255. *Id.* at 713.

256. *Id.* at 712.

257. *Id.* at 715.

258. *See id.*

intentional tort . . . is a superseding cause of harm,” although another’s negligent conduct created a situation that afforded an opportunity to that third person to commit such an intentional tort.²⁵⁹

This rule has obvious applicability to a situation in which an allegedly negligent tortfeasor seeks to avoid liability because of the conduct of an intentional tortfeasor. Instead of claiming indemnity on the basis that an intentional tortfeasor breached a duty, a negligent party can assert that the intentional misconduct was a superseding cause of harm to the injured party. For example, the buyers’ attorneys in the original *Hansen* case could have claimed that the conduct of the seller’s attorneys—preparing false corporate authority documents, but representing the same to be authentic—constituted a superseding cause of harm to their clients if, indeed, their clients would not have been guilty of their own intentional misconduct. This is true because the buyers’ attorneys’ negligence only created a situation that afforded an opportunity to commit fraud. An implied indemnity claim based on a breach of duty would have been unnecessary. Yet the same public policy—deterring egregious conduct—would still be furthered through the doctrine of superseding cause.²⁶⁰ This also would be consistent with *McNally*’s holding that vicarious liability is the essential and necessary element of tort-based implied indemnity.²⁶¹ Therefore, the original *Hansen* decision, which empowered a negligent tortfeasor with a right to seek indemnity from an intentional tortfeasor, can now be viewed through the prism of a dispositive superseding cause analysis.²⁶²

259. See *id.* (quoting RESTATEMENT (SECOND) OF TORTS § 448 (1965)).

260. See *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 827 (Iowa 2001) (quoting *Fleming v. Threshermen’s Mut. Ins. Co.*, 388 N.W.2d 908, 911 (Wis. 1986)). In contrast, the authors of the *Restatement (Third) of Torts: Apportionment of Liability*, believe that misconduct of negligent and intentional tortfeasors should be compared, not transferred. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 cmt. e (2000).

261. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576–77 (Iowa 2002).

262. One commentator has suggested that the breach-of-independent-duty theory should be abandoned in favor of a framework in which tortfeasors recover in tort according to the rules of comparative fault and parties to a contract recover in contract according to the rules of special and consequential damages. Stone, *supra* note 1, at 155 n.272. Such a framework, Stone suggests, would be more uniform and simple. *Id.* Putting aside whether this proposal simplifies the arcane rules of the common law, it ignores—at least in the contractual context—the requirement that an indemnitee be morally blameless.

Finally, the focus on a breach-of-duty claim arising out of a contractual relationship has changed. It developed as a means to avoid the common liability requirement of the primary–secondary theory.²⁶³ When enterprising tortfeasors sought reimbursement on the grounds that they were victims of a breach of duty, courts mandated that the duty be specific and defined, not merely the general duty to avoid harming other members of society.²⁶⁴ Now, courts need not engage in analyzing the alleged specifics of a duty if the indemnitee is factually culpable. Moreover, the effect of a successful “independent” contractual duty claim is that a court puts into promissory language its finding that “a party . . . ought to act as if he had made a . . . promise [of indemnity], even though nobody actually thought of it or used words to express it.”²⁶⁵ Indemnity is not so much implied as it is equitably imposed against the guilty party and in favor of the innocent party. A court is not searching for the meaning of contractual terms, nor attempting to divine the mutual intent of the parties—it simply is determining whether it would be fair and equitable to effectively add a provision to their contract that neither of them had the sense or judgment to originally insist on or insert.²⁶⁶

B. *Only the Morally Innocent Need Apply*

McNally radically changed the independent-duty approach. Whatever the nature of the indemnitor’s misconduct, the court made clear that before a transfer of liability is permitted, equity demands that the indemnitee be morally blameless yet legally liable.²⁶⁷ The polestar of implied indemnity is now the indemnitee’s status and conduct, not the theory of liability alleged against an indemnitor. Of course, only one

263. See, e.g., *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 309 (Iowa 1966) (refusal to analyze primary–secondary theory when the only issue was failure to abide by duties arising out of a contract); see also *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 562 (Iowa 1962).

264. See *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 320–21 (Iowa 1992) (requiring a duty of a “specific, defined nature” to support claim of indemnity against an employer); see also *Cochran v. Gehrke Constr.*, 235 F. Supp. 2d 991, 1003–04 (N.D. Iowa 2002) (finding a general duty not to harm others by committing torts not sufficient to constitute a breach of an independent duty).

265. *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987) (citing 3 ARTHUR CORBIN, CORBIN ON CONTRACTS § 561, at 279 (1960)).

266. See *id.*

267. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576–77 (Iowa 2002) (“An indemnitee can be liable to the injured party by operation of legal principles yet not actually contribute to the hazard which caused the injury.”).

concept captures the paradox of “faultless” liability—vicarious liability.²⁶⁸

Further evidence that vicarious liability principles unified the implied indemnity doctrine is found by examining older Iowa indemnity cases in which the indemnitee breached a duty arising out of a contractual relationship and implied indemnity was granted, albeit on the now outdated and discredited primary–secondary liability grounds. In each of these cases, implied indemnity could have been allowed on vicarious liability grounds. For example, in *Horrabin v. City of Des Moines*, the city’s failure to provide the correct right-of-way on which to construct a bridge and approach imposed liability on the innocent bridge contractor;²⁶⁹ in *Rozmajzl v. Northland Greyhound Lines*, a bus driver’s negligence was imputed to a company that sold tickets for the trip in question, but then contracted with the driver’s employer to furnish a bus and driver;²⁷⁰ and in *Weidert v. Monahan Post Legionnaire Club*, a plumber’s failure to properly repair a water leak led to culpability on the part of the innocent tenant who hired him.²⁷¹ Perhaps the best and most explicit example of vicarious liability in a situation arising out of a contractual relationship is the dog-bite case *Peters v. Lyons*.²⁷² The dog owner in *Peters* was legally liable—in fact, absolutely liable under Iowa law—but bore no moral blameworthiness for her dog’s attack.²⁷³ She had acted prudently by attempting to keep the dog from doing harm, and she relied on the merchant’s representation that the chain would restrain her pet.²⁷⁴ Because she was not guilty of a wrong in fact but was liable at law, her insurer was allowed to transfer all of its liability to the merchant.²⁷⁵ In the court’s words, indemnity was “particularly appropriate in a case such as this where it is invoked to protect one who is legally liable but morally innocent against one whose wrongful conduct or omission has caused liability to be imposed on him.”²⁷⁶ Nearly thirty years later, the Iowa Supreme Court acknowledged that

268. See *id.* at 576.

269. *Horrabin v. City of Des Moines*, 199 N.W. 988, 990 (Iowa 1924).

270. *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 505–06, 508 (Iowa 1951).

271. *Weidert v. Monahan Post Legionnaire Club*, 51 N.W.2d 400, 401, 404 (Iowa 1952).

272. *Peters v. Lyons*, 168 N.W.2d 759 (Iowa 1969).

273. See *id.* at 766, 768.

274. See *id.* at 768.

275. See *id.* at 768–69, 771.

276. *Id.* at 767 (quoting *Larson v. City of Minneapolis*, 114 N.W.2d 68, 73 (Minn. 1962)).

Peters, not surprisingly, was a classic case involving vicarious liability.²⁷⁷ What was “particularly appropriate” in 1968 now appears to be specifically required. Vicarious liability is the sole ground on which a party can shift all liability in the absence of an express agreement. Whether the underlying relationship arises out of a sale of equipment between a manufacturer and employer, a distribution of goods between a wholesaler and retailer, a lease of real estate between a landlord and tenant, or any other relationship out of which one is deemed legally liable for the wrongful acts of the other contracting party, only the morally innocent need apply to shift that liability.²⁷⁸ This is true regardless of the source of duty or the theory of recovery.²⁷⁹ In other words, a court of equity is empowered to order restitution on whatever theory is appropriate—breach of contract, breach of warranty, or negligence—as long as the indemnitee is legally liable and factually blameless.²⁸⁰

The authors of the most recent *Restatement* pronouncement on implied indemnity have effectively embraced vicarious liability as its sole justification, albeit not without some redundancy.²⁸¹ Recognizing that the adoption of comparative fault principles undermined the traditional foundations of implied indemnity,²⁸² the authors eliminated all grounds for

277. See *State ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 406 (Iowa 1998).

278. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576 (Iowa 2002); *Peters*, 168 N.W.2d at 767. Non-manufacturers now have some immunity under Iowa Code § 613.18(1) (2009), which contains limitations on products liability of non-manufacturers. See also *infra* note 286 and accompanying text.

279. See *McNally*, 648 N.W.2d at 576.

280. See *id.* at 576–77.

281. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22(a)(2) (2000). Section 22 also acknowledges express or contractual indemnity. *Id.* § 22(a)(1).

282. See *id.* § 22 reporters’ note to cmt. a. Like the tradition that existed in Iowa, the emphasis of the *Restatement (Third) of Torts* had been on identifying primary and secondary tortfeasors by means of an *in pari delicto* analysis. See *supra* notes 24–96 and accompanying text. This practice dates back to 1937, when implied indemnity made its black-letter debut, fittingly, in the *Restatement of Restitution*. In that treatise, the authors catalogued the specific occasions in which courts had implied an equitable right of indemnity in the face of the general rule which prohibited indemnity between joint tortfeasors. See RESTATEMENT OF RESTITUTION §§ 86–98, § 86 introductory n. (1937). The authors remarked that courts had been “increasingly astute” in finding these exceptions in order to advance the goal of preventing one party from being unjustly enriched at the expense of the other. See *id.* § 86 introductory n. Indemnity was implied and restitution allowed if a court adjudged that one tortfeasor’s fault, duty, or status was secondary or inferior to the others. As identified by the original

the equitable transfer of liability save two: vicarious liability and those occasions in which a seller of a defective product is not independently liable.²⁸³ These two grounds, however, are one and the same because the only legal basis on which liability for the sale of a defective product may be imposed on a product supplier who is not independently culpable is vicarious.²⁸⁴ That is to say, liability is imputed to a supplier—most often a wholesaler or retailer—for the sale of a defective product although they do not themselves render a product defective and are not even in a position to prevent defects from occurring.²⁸⁵ Simply stated, a commercial seller of a defective product who neither manufactures or designs the product, nor places warnings and instructions on the product, can be held responsible for the acts or omissions of the manufacturer or designer in spite of the lack of personal fault.²⁸⁶ Legal liability in the absence of personal fault—

Restatement of Restitution formulation, those who were cloaked with the equitable right to shift all of their liability included a person who acts at the direction of and in justifiable reliance on the other; a retailer who sells or leases a defective chattel of a supplier or manufacturer; a person who fails to discover or remedy a dangerous or unsafe condition caused by the other; a person whose conduct toward a claimant is negligent as opposed to those who act recklessly or commit an intentional tort; and those who are vicariously liable. *See id.* §§ 87, 90, 93, 95, 97.

The concept of *in pari delicto* still reigned supreme over forty years later when the hornbook principles of implied indemnity were refined, this time in the *Restatement (Second) of Torts*. In the words of the authors, if the indemnitee's conduct "[is] not as blameworthy" as the indemnitor's, "then the parties not being *in pari delicto*," liability may be successfully transferred. RESTATEMENT (SECOND) OF TORTS § 886B cmt. a (1979). Restitution was thereby accomplished because the indemnitor was not unjustly enriched at the expense of the indemnitee by the latter's original discharge of liability to the injured party. *See id.* cmt. c. Although the rules of implied indemnity remained largely the same as in 1937, the authors simplified the language and consolidated them into one section. *See id.* § 886B(2)(a–f). The rules, as expressed in 1979 were vicarious liability; actions undertaken at the direction of another which are reasonably believed to be lawful; justifiable reliance on another's misrepresentations; innocent or negligent failure to discover another's misconduct in supplying defective property or in performing defective work; innocent or negligent failure to discover another's creation of a dangerous condition on land or chattels; and breach of a duty to protect against liability to a third person. *See id.* These rules remained in operation until the publication of the *Restatement (Third) of Torts: Apportionment of Liability* in 2000. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22 (2000).

283. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22(a)(2).

284. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1 cmt. e, 2 cmt. o (1998).

285. *See id.*

286. *See id.* Many states, however, have immunized non-manufacturing sellers and distributors by statute if the manufacturer is subject to the jurisdiction of the court

independent culpability—is, of course, synonymous with vicarious liability.²⁸⁷

Why the *Restatement* authors felt it necessary to add a specific provision for product sellers when only their vicarious liability justifies a remedy for implied indemnity is unclear. It is unnecessary and duplicative. The authors certainly did not feel compelled to specifically address the implied indemnity rights of employers who, like wholesalers and retailers of products, can be held either personally liable for their own culpable acts or vicariously liable for the negligent acts of independent contractors.²⁸⁸ Common examples of the latter include a possessor of land being held accountable to invitees for the negligent acts of independent contractors in not properly maintaining premises,²⁸⁹ and an employer of a building contractor being held liable for the negligent manner in which the contractor performs inherently dangerous work.²⁹⁰ These breaches of non-delegable duties—in which the possessor of land or employer is not personally or independently culpable—have long served as the basis for an implied indemnity action by the vicariously liable possessor or employer against the actual wrongdoer.²⁹¹ The same holds true for the innocent

of plaintiff's domicile and the manufacturer is not insolvent. *See id.* § 1 cmt. e. Iowa is one of those states. *See* IOWA CODE § 613.18 (2009).

287. *See* 57 AM. JUR. 2D *Negligence* § 1096 (2004); *see also* State v. Casey's Gen. Stores, Inc., 587 N.W.2d 599, 601 (Iowa 1998) (holding that vicarious liability occurs when a person is made liable, without personal fault, for the misconduct of another); DAN B. DOBBS, *THE LAW OF TORTS* § 333, at 906 (2000) ("Vicarious liability is not based upon the defendant's own fault. Rather, it is based upon the principle that he must stand good for the wrong of another.").

288. *See* RESTATEMENT (SECOND) OF TORTS, §§ 416–29, introductory n. (1979) (distinguishing sections of the *Restatement* in which employer liability rests on the personal negligence of the employer and sections in which employer liability is based on vicarious liability for the negligence of an independent contractor, irrespective of whether the employer was at fault). The Iowa Supreme Court has cited this *Restatement* note with approval and recognizes its distinction between personal culpability and vicarious liability. *See* Kragel v. Wal-Mart Stores, Inc., 537 N.W.2d 699, 703 (Iowa 1995); *see also* Goebel v. Dean & Assocs., 91 F. Supp. 2d 1268, 1274–75 (N.D. Iowa 2000).

289. *See* Kragel, 537 N.W.2d at 702–04; RESTATEMENT (SECOND) OF TORTS § 425.

290. *See* Giarratano v. Weitz Co., 147 N.W.2d 824, 833–34 (Iowa 1967); RESTATEMENT (SECOND) OF TORTS § 427.

291. *See* RESTATEMENT OF RESTITUTION § 96 cmt. a (1937); RESTATEMENT (SECOND) OF TORTS § 886B cmt. e; *see also* Peters v. Lyons, 168 N.W.2d 759, 766 (Iowa 1969). One commentator recently concluded that contribution, not indemnity, is the appropriate remedy for an employer found vicariously liable for the negligent acts of

product supplier. There was no need for the *Restatement* authors to single them out as a special class of indemnitees who can seek restitution in the absence of their own independent culpability. They already possess that right for those instances in which they are held vicariously liable.²⁹² Accordingly, the *Restatement* authors should have unequivocally declared that the equitable remedy of implied indemnity now protects only one class of indemnitees—those who are vicariously liable.²⁹³

But then the Iowa Supreme Court decided *Wells Dairy, Inc. v. American Industrial Refrigeration, Inc.*, in March of 2009, a decision which fundamentally altered the landscape of implied indemnity law.²⁹⁴ Vicarious liability as a unifying principle has been banished to the sidelines, and restitution is no longer the polestar of the doctrine.

IV. STEPPING INTO THE ABYSS

On March 27, 1999, an explosion rocked a Wells Dairy ice cream plant in Le Mars, Iowa, resulting in a fire and shutdown of the facility.²⁹⁵ Pillsbury sued Wells Dairy for failure to fulfill production obligations, and Wells Dairy sought indemnity on an implied basis from the equipment designer and supplier of its refrigeration system.²⁹⁶ Almost ten years to the day from the explosion, the Iowa Supreme Court issued a decision which radically changed the direction of implied indemnity law.²⁹⁷ If this case were cause, as the court noted, for “peer[ing] into the abyss of indemnity law,” the court succeeded.²⁹⁸ The vicarious liability concept the court had adopted in *McNally* to unify the *Ke-Wash* and *Woodruff Construction*

an independent contractor. See Stone, *supra* note 1, at 147. This conclusion flies in the face of the *Restatement* comments and the *Peters* case cited in this footnote. As the supreme court held in *Peters*, a nondelegable duty runs to the injured party; it does not affect the nature of the controversy between claimed wrongdoers—one who is legally liable but morally innocent, and the other who is not. See *Peters*, 168 N.W.2d at 766–67.

292. See *supra* notes 284–87 and accompanying text.

293. See AVCP Reg'l Hous. Auth. v. R. A. Vranekaert Co., 47 P.3d 650, 658 (Alaska 2002) (holding that in order to recover damages on an implied indemnity theory, the indemnitee must not itself have been liable, except vicariously).

294. Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 762 N.W.2d 463 (Iowa 2009).

295. Brief of Appellant Wells Dairy, Inc. at 12, Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 762 N.W.2d 463 (Iowa 2009) (No. 06-1018).

296. See *Wells Dairy*, 762 N.W.2d at 468.

297. See *infra* Part IV.B.

298. See *Wells Dairy*, 762 N.W.2d at 467.

holdings—thereby narrowing the grounds on which implied indemnity could be obtained—has been gutted.²⁹⁹ Factually culpable indemnitees may again transfer all liability, and breaches of duties at law between non-contracting parties may now serve as the basis for indemnification.³⁰⁰ The court has also formally molded a new vocabulary for the theories of implied indemnity recovery.³⁰¹ A Gordian knot of confusion which had enveloped the core of implied indemnity until the adoption of an expanded version of vicarious liability in 2002 has now been retied, and it is as intractable as ever.³⁰²

A. *A Formalized Lexicon*

Wells Dairy makes and produces ice cream and other frozen dessert products.³⁰³ In 1991 it contracted with American Industrial Refrigeration, Inc. (AIR) “to design and install a multi-million dollar refrigeration system at its South Ice Cream Plant” in Le Mars, Iowa.³⁰⁴ AIR agreed “to supply a total systems engineering and turnkey proposal, including ammonia refrigeration.”³⁰⁵ It also agreed to provide service-related labor on the system and to troubleshoot any problems.³⁰⁶ Refrigeration Valves and Systems Corp. (RVS) was the supplier for much of the refrigeration equipment, including the piping, pressure vessels, and check valves.³⁰⁷ There was no written contract per se between Wells Dairy and RVS, but on the “blueprints and engineering specifications prepared by RVS, the client is described as ‘AIR/Well’s South Plant.’”³⁰⁸

In January of 1999, Wells Dairy entered into a contract with Pillsbury in which it agreed to manufacture certain frozen dessert products to be marketed by Pillsbury.³⁰⁹ The terms of the contract included minimum levels of production.³¹⁰ These products were to be manufactured by Wells

299. See *infra* notes 335–39, 356 and accompanying text.

300. See *infra* notes 356–95 and accompanying text.

301. See *Wells Dairy*, 762 N.W.2d at 470 (explaining the court’s use of the new terms “implied contractual indemnity” and “equitable indemnity”).

302. See *infra* notes 347–51, 377–84 and accompanying text.

303. *Wells Dairy*, 762 N.W.2d at 468.

304. *Id.*

305. *Id.*

306. See *id.*

307. *Id.* at 469.

308. *Id.*

309. *Id.* at 468.

310. *Id.*

Dairy only at its South Ice Cream Plant.³¹¹ Two months later, the South Ice Cream Plant was no more.³¹² The explosion at the plant “resulted from the catastrophic failure of a check valve in a pipeline of the ammonia refrigeration system.”³¹³ This failure allowed “liquid ammonia to spill onto the floor of the plant,” and “[a]n electrical charge subsequently caused the explosion” and fires, which resulted in the immediate and complete shutdown of the plant.³¹⁴

Pillsbury eventually sued Wells Dairy for failure to meet its production requirements under the contract.³¹⁵ Wells Dairy, in turn, provisionally sought indemnity from AIR and RVS on implied indemnity theories.³¹⁶ Against AIR, Wells Dairy claimed that indemnity should be implied from AIR’s contractual duties to provide safety devices and to inspect and service the refrigeration equipment.³¹⁷ With respect to RVS, Wells Dairy argued that the blueprints, specifications, and sales invoices amounted to a contract from which should be implied the duty to provide safety features for the components it provided, as well as a duty to inspect its work and recommend necessary repairs or modifications.³¹⁸ From these implied contractual duties, Wells Dairy argued that a corresponding and implied duty to indemnify arose.³¹⁹ In addition, Wells Dairy asserted that AIR and RVS breached professional duties independent of their contractual obligations, which gave rise to a duty to indemnify in the event Pillsbury’s claim was successful.³²⁰

The district court rejected Wells Dairy’s arguments and granted summary judgment to AIR and RVS.³²¹ The Iowa Supreme Court

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *See id.*

316. *See id.* The contract between Wells Dairy and AIR apparently did not contain any express indemnification language that governed the parties’ liabilities in the event of system failure and subsequent damage. *See id.* at 472 n.1.

317. *See id.* at 472.

318. *Id.* at 475.

319. *Id.*

320. *See id.* at 473, 475.

321. *See id.* at 469. The district court also granted summary judgment to Wells Dairy on the underlying claim brought by Pillsbury. *Id.* The implied indemnity claims were resurrected as a result of the court’s decision in 2008 reinstating Pillsbury’s claim. *See Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 441 (Iowa 2008). This decision, which had not been handed down at the time the implied indemnity appeal was

affirmed in part and reversed in part.³²² The court agreed with the district court that a duty to indemnify could not be implied from the alleged breaches of contract.³²³ The court held AIR's duty to provide safety devices did not rise to the level of a "specific and defined" duty as contemplated by *Johnson v. Interstate Power Co.*, and that its service obligations did not create an implied duty to indemnify by virtue of Wells Dairy having day-to-day control of the equipment.³²⁴ The implied contractual indemnity claim against RVS was summarily rejected.³²⁵ The court found that the blueprints and sales invoices between AIR and RVS did not create a contract between Wells and RVS.³²⁶ Without a contract, of course, there was nothing from which to imply indemnity.³²⁷ The court held, however, that Wells Dairy had properly stated a claim for "equitable indemnity" against both AIR and RVS based on claims of professional negligence.³²⁸ In addition, the court concluded that Wells Dairy had stated a viable claim for equitable indemnity against AIR for allegedly violating warranties arising under the Uniform Commercial Code.³²⁹

Central to the court's conclusions was its adoption of a bifurcated model of implied indemnity.³³⁰ The court felt such a model would alleviate the confusion that had surrounded the doctrine and bring clarity and precision to its nomenclature.³³¹ The two separate branches of implied indemnity that now exist are "implied contractual indemnity and equitable indemnity."³³² The former includes "indemnity claims (other than express indemnity) arising out of contractual relations" while the latter encompasses "indemnity claims which arise from non-contractual legal relationships between the indemnitor and indemnitee."³³³ Contrary to

briefed, plays a pivotal role in the outcome of the equitable indemnity claim. *See infra* notes 367–80 and accompanying text.

322. *Wells Dairy*, 762 N.W.2d at 476.

323. *See id.* at 472–73, 475.

324. *See id.* at 472–73 (citing *Johnson v. Interstate Power Co.*, 481 N.W.2d 310, 319–20 (Iowa 1992)).

325. *Id.* at 475.

326. *Id.*

327. *Id.*

328. *Id.* at 473, 475–76.

329. *Id.* at 474.

330. *See id.* at 470.

331. *See id.* at 469–70.

332. *Id.* at 470.

333. *Id.* The term "equitable indemnity" appears to have originated, at least in Iowa, in *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 824 (Iowa

bringing clarity to the world of implied indemnity, the court's new analytical framework has created confusion and inconsistencies with prior court approaches and holdings.³³⁴

B. *The Wells Dairy Analytical Framework*

Two declarations made by the court in its fresh articulation of implied contractual indemnity principles are particularly perplexing. The most obvious one is the court's statement that "[i]t is not necessary that a party seeking indemnity under a theory of implied contractual indemnity be blameless in connection with the incident."³³⁵ What is necessary, according to the court, is that a duty arising from the contract has been violated and that damages flow directly from a breach of that duty.³³⁶ Remarkably, this is the same kind of argument the court rejected just seven years earlier in *McNally*. As discussed previously, the court in *McNally* made clear that in order for an indemnitee to recover under a theory of implied contractual indemnity, the indemnitee must "not actually contribute to the hazard

2001). The court in *Hansen* did not ascribe any independent meaning to the concept, and in fact equated it with common-law indemnity and the traditional grounds for recovery. See *id.* at 823–24. This description is consistent with Professor Furnish's characterization. See Furnish, *supra* note 1, at 36. Although it did not use the phrase "equitable indemnity," the court in *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 570 n.1 (Iowa 2002), employed a similar term—"tort-based indemnity"—to describe the four traditional common-law grounds of implied indemnity.

334. See *infra* notes 347–51, 377–84 and accompanying text.

335. *Wells Dairy*, 762 N.W.2d at 470. In support of this proposition, the court cited *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 317 (Iowa 1966). According to the court, the employer in *Iowa Power & Light Co.* that was negligent toward its own employee was able to recover on an implied contractual indemnity theory when the indemnitor breached its contractual obligation to notify the employer of construction activity around power lines. *Wells Dairy*, 762 N.W.2d at 470. That is not quite accurate. Iowa Power, the indemnitee in that case, was not negligent toward its own employee, but was found negligent in a personal injury action brought by an employee of Abild Construction. See *Iowa Power & Light Co.*, 144 N.W.2d at 305. Iowa Power then pursued an implied indemnity claim against Abild. See *id.* at 306. In any event, Iowa Power had been found guilty of negligence of its own, which the court, using the lexicon of the day, characterized as active or primary. In other words, Iowa Power had "actually contribute[d] to the hazard which caused the injury." *McNally*, 648 N.W.2d at 577. Accordingly, *Iowa Power & Light Co.* was no longer good law (after *McNally* but before *Wells Dairy*) to the extent it holds that an indemnitee, who is factually and independently culpable, may state a viable implied contractual indemnity claim.

336. See *Wells Dairy*, 762 N.W.2d at 470.

which caused the injury.”³³⁷ The court in *McNally* made clear that whatever theory of implied indemnity was advanced—implied contractual or tort-based—the same foundational rules of legal liability and moral innocence, i.e., vicarious liability, would be required.³³⁸ Otherwise, as the court emphasized, an inconsistency in the law would be created and a fundamental unfairness would result if an indemnitee could avoid the requirement of moral innocence by simply choosing a contract-based theory of implied indemnity over a tort-based theory.³³⁹ Have the doors of implied contractual indemnity now been thrown open to factually culpable tortfeasors who must prove only damages flowing from the breach of a specific and defined duty? It appears so.

The second questionable assertion by the court pertains to an apparent intent requirement. Characterizing “[t]he standard for implying a contractual indemnity obligation . . . [a]s generally quite high,” the court declared that an “unmistakable intent” to indemnify must be present.³⁴⁰ The authority the court cites for this proposition is a 1977 New York case, the quoted language of which relates to what must be present before an express indemnity clause is construed to allow protection for one’s own negligence.³⁴¹ But the fact is that in an implied contractual indemnity situation, neither party gives indemnity a moment’s thought before entering into the contract.³⁴² If a party had, there would be actual language in the contract to that effect or, at least, antecedent negotiations or other surrounding circumstances from which a court could divine such an intent. If a court of equity is really engaged in a search for an unmistakable mutual intent to indemnify, it is only on a hypothetical basis. What a court is really weighing is whether it is equitable to order one party to act as if it had made an explicit promise to indemnify, even though nobody actually thought about it.³⁴³ That is why courts in Iowa—at least until *Wells Dairy*—have allowed indemnity to be implied from a contractual arrangement only if there has been an assumption and performance of

337. *McNally*, 648 N.W.2d at 569, 577.

338. *See id.* at 576–77.

339. *See id.*

340. *Wells Dairy*, 762 N.W.2d at 470.

341. *See Hogeland v. Sibley, Lindsay & Curr Co.*, 366 N.E.2d 263, 266 (N.Y.1977) (holding that agreement between tenant and landlord obligated tenant to indemnify landlord absent unmistakable intent to the contrary).

342. *See Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987).

343. *See supra* notes 264–65 and accompanying text.

specific and defined duties on which the other party has relied and was factually blameless.³⁴⁴ In these circumstances, the liability of the indemnitee is vicarious, or—as the court phrased it in *Woodruff Construction*—“technical.”³⁴⁵ Equity commands that the guilty party in these circumstances reimburse the innocent one, as if he had made a promise to indemnify before the incident occurred.³⁴⁶

The court’s analytical framework for its newly minted doctrine of implied contractual indemnity is troublesome. How will an unmistakable mutual intent to indemnify be proven when neither party actually thinks of the concept before contracting? Has not “an inconsistency in our law”³⁴⁷ been created by declaring, in the face of *McNally*, that an indemnitee’s factual culpability does not bar recovery?³⁴⁸ Is *McNally* still viable? If so, what principle of law bridges the chasm between *McNally* and *Wells Dairy* on the competing and inconsistent role that an indemnitee’s fault plays on the ability to transfer liability on an implied basis? Can an indemnitee now contend, like Woodruff Construction Company, that if blame or fault does not stand in the way of an implied indemnity recovery, the law now implies a duty to indemnify it in full, even if it were ninety-nine percent at fault?³⁴⁹ Is that not the consequence of a doctrine which appears to focus on whether a contractual duty has been violated and, if so, what damages flow directly from that violation?³⁵⁰ These questions and others likewise flow from the court’s promulgation in *Wells Dairy* of the second branch of implied indemnity—equitable indemnity.³⁵¹

According to the court, equitable indemnity is “a murky doctrine based on notions of fairness and justice,” not on the intentions of the parties as is the case with implied contractual indemnity.³⁵² It arises either from the relationship of the parties or from a violation of noncontractual

344. See *Woodruff Constr. Co.*, 406 N.W.2d at 785–86.

345. See *id.* at 786 (quoting 2A LARSON, *supra* note 8, § 76.92(b), at 14-761–63).

346. *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 577 (Iowa 2002).

347. See *id.* at 576–77.

348. See *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 470 (Iowa 2009).

349. See *Woodruff Constr. Co.*, 406 N.W.2d at 785; see also *Wells Dairy*, 762 N.W.2d at 470 (holding that a party need not be blameless to claim indemnity).

350. See *Woodruff Constr. Co.*, 406 N.W.2d at 785.

351. See *Wells Dairy*, 762 N.W.2d at 471.

352. *Id.* at 470.

duties.³⁵³ The former encompasses such traditional vicarious roles as principal-agent and employer-employee.³⁵⁴ The latter encompasses “independent duties” at law.³⁵⁵ In a remarkable admission, the court recognized that independent duty equitable indemnity does not further the traditional restitutionary goal of the avoidance of unjust enrichment.³⁵⁶ Rather, it allows a judge—guided by general notions of fairness—the discretion to transfer tort liability from one party in a legal relationship to another if a legal duty has been violated, irrespective of whether the party seeking indemnity is also at fault.³⁵⁷ The court acknowledged that it had recognized such a concept in only one other case—*Hansen*—and that it had “not had the opportunity to develop this branch of equitable indemnity in great detail.”³⁵⁸ It also acknowledged its past criticisms of formulating an equitable indemnity doctrine based solely on fairness, citing the *Woodruff Construction* court’s recognition of the need for stability.³⁵⁹ Notwithstanding these issues, the court boldly struck new ground. It held that claims of professional negligence are the types of violations of independent duties at law which can support a claim for equitable indemnity.³⁶⁰ Central to the court’s holding was its belief—supported by a 1992 Vermont case³⁶¹—that a viable equitable indemnity doctrine could dissolve the murkiness inherent in the doctrine if it were based “upon a tort involving a special relationship between [a] licensed professional and a client.”³⁶² The Vermont case does not, however, support the court’s conclusion. That case, *Peters v. Mindell*, arose out of a damages action by home buyers against the sellers after discovering that the septic system for their home was defective.³⁶³ The sellers sought implied indemnity from the engineer with whom they had contracted to design and certify the septic

353. *See id.*

354. *See id.*

355. *See id.* at 471–72.

356. *See id.* at 471.

357. *See id.* at 472.

358. *See id.*; *see also* *Hansen v. Anderson, Wilmuth & Van Der Maaten*, 630 N.W.2d 818, 824–27 (Iowa 2001) (holding that breach of an attorney’s independent duty can support a claim of equitable indemnity).

359. *See Wells Dairy*, 762 N.W.2d at 472 (citing *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785–86 (Iowa 1987)).

360. *See id.* at 473–74.

361. *See Peters v. Mindell*, 620 A.2d 1268 (Vt. 1992) (holding that a legal relationship between sellers and engineers created an obligation of indemnity if sellers were held liable to purchasers).

362. *Wells Dairy*, 762 N.W.2d at 472.

363. *See Peters*, 620 A.2d at 1269.

system.³⁶⁴ The Supreme Court of Vermont held that the implied indemnity claim was viable because the contract between the sellers and the engineer “created a legal relationship sufficient to impose an obligation of indemnity.”³⁶⁵ The Vermont high court did not refer to a special relationship between professionals and clients, let alone base its holding on such a relationship.³⁶⁶ Rather, much like the situations in *Blackford* and *Woodruff Construction*, the court held the architect could be held accountable if he breached the implied duty of due care arising from the performance of his contractual duties.³⁶⁷ Moreover, and again much like the court’s holding in *McNally*, the Vermont Supreme Court conditioned any indemnity obligation on the part of the architect on the sellers being legally liable to the buyers, yet free from actual fault or negligence.³⁶⁸

The Iowa Supreme Court imposed no such condition despite the holding of *McNally*, and despite AIR’s specific argument that it was not possible, given Pillsbury’s theory of liability, for Wells Dairy to be both legally liable and factually blameless.³⁶⁹ The factual predicate for AIR’s argument was the force majeure clause in the contract between Pillsbury and Wells Dairy which, ironically, was interpreted by the Iowa Supreme Court in 2008 to allow Pillsbury to proceed with its claims against Wells Dairy.³⁷⁰ In that 2008 decision, the court reversed a summary judgment ruling for Wells Dairy, and held that the force majeure clause did not immunize Wells Dairy from liability if Pillsbury could prove that Wells Dairy acted negligently by not taking appropriate action to prevent the explosion.³⁷¹ Therefore, AIR contended, any equitable indemnity claim by Wells Dairy should fail because it would have to be premised on a finding of actual culpability on the part of Wells Dairy.³⁷² Although not citing

364. *See id.*

365. *Id.* at 1271.

366. *See id.* at 1271–72.

367. *See id.* at 1271 (noting that an implied duty of care accompanies every contract); *see also* *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 786–87 (Iowa 1987) (implied duty of care arises only when proposed indemnitee is not at fault); *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 565 (Iowa 1962) (cross-petition based on “breach of an implied contract to do the work safely”).

368. *See Peters*, 620 A.2d at 1270–71.

369. *See* Brief of Appellee at 40, *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463 (Iowa 2009) (No. 06-1018).

370. *Id.* at 40–41; *see also* *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 441 (Iowa 2008) (denying summary judgment to Wells Dairy).

371. *See Pillsbury Co.*, 752 N.W.2d at 441.

372. *See* Brief of Appellee, *supra* note 369, at 41.

Woodruff Construction or *McNally*, AIR relied on a similar case from New York which had limited implied or equitable indemnity claims only to situations in which the indemnitee was vicariously liable.³⁷³ In addition, it argued that *Peters*—the case in which a dog owner successfully sought implied indemnity on a breach-of-warranty theory—supported the proposition that an indemnitee must be factually blameless.³⁷⁴ In an interesting twist, the Iowa Supreme Court refused to reach the merits of AIR’s argument, stating that AIR had “failed to assert any legal authority on the proper interpretation of the force majeure clause.”³⁷⁵ The court discussed *Peters*, but only as authority that equitable indemnity could be based on a breach of warranty, not on whether a victim of such a breach must be morally innocent to recover.³⁷⁶

In Iowa, an equitable indemnity claim may now be stated based on allegations of a breach of professional duties. Upon proof that a professional’s negligence was a proximate cause of damages in an event or incident in which a client has been held liable to another for a breach of contract or for negligence, a professional may now be compelled to fully assume the client’s fault or breach and underwrite the resulting loss or damage.³⁷⁷ As with the court’s analysis of implied contractual indemnification, several questions arise. If claims of professional negligence are truly independent of underlying contractual obligations, what is to prevent the court from expanding equitable indemnity to the breach of non-professional duties?³⁷⁸ Why did the court turn its back on the restitutionary justification for implied indemnity, effectively

373. See *id.* at 43–44 (citing 17 Vista Fee Assoc. v. Teachers Ins. & Annuity Ass’n. of Am., 693 N.Y.S.2d 554, 557–60 (N.Y. App. Div. 1999)). Other cases decided by New York appellate courts are to the same effect. See, e.g., *Rogers v. Dorchester Assocs.*, 300 N.E.2d 403, 408 (N.Y. 1973) (holding that one who is held liable for breach of a non-delegable duty may seek implied indemnity against the party with whom it had contracted to fully perform that duty); *Trs. of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 492 N.Y.S.2d 371, 375 (N.Y. App. Div. 1985) (explaining that “one who is held vicariously liable solely on account of the negligence of another [can] shift the entire burden of the loss to the actual wrongdoer” under a theory of implied indemnity).

374. See Brief of Appellee, *supra* note 369, at 36–37.

375. *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 473 n.2 (Iowa 2009).

376. See *id.* at 474–76 (holding that the breach of warranty claim was viable against AIR but not against RVS due to the remoteness of damages).

377. See *id.* at 473–76.

378. See *id.* at 473.

immunizing a blameworthy indemnitee from responsibility?³⁷⁹ Have we turned the clock back to the days prior to comparative fault when two factually culpable tortfeasors tried to pin all the blame on one another?³⁸⁰ Why did the court not address AIR's argument that Wells Dairy necessarily had to be at fault to recoup equitable indemnity?³⁸¹ How can Wells Dairy pass on its entire risk on an implied basis when doing so is not allowed under an express indemnity agreement unless provided for in clear and unequivocal language?³⁸² Even if *Hansen* were deemed to be precedent for equitable indemnity, why did the court not limit such indemnity to situations in which the indemnitor was an intentional tortfeasor?³⁸³ At least then a causally negligent indemnitee's fault could be excused by the greater public policy of deterring the more egregious intentional misconduct—a concept the court seemed to explicitly embrace in *Hansen*.³⁸⁴

In any event, implied indemnity is now available to a factually culpable tortfeasor upon proof of another's: (1) breach of a specific and defined contractual duty from which a mutual intent to indemnify can be implied, or (2) breach of a professional duty.³⁸⁵ The concept and expansion of independent duty has driven the restitutionary foundation of implied indemnity off track. It originated as a way to hold factually culpable employers accountable without violating the exclusive-remedy defense of workers' compensation.³⁸⁶ Any breach of duty to a third-party indemnitee by an employer was independent of the duties owed to an employee.³⁸⁷ A duty to indemnify was, therefore, implied from that breach of independent duty.³⁸⁸ It made no difference whether the third party sued for breach of

379. See *id.* at 470–71.

380. See *supra* notes 34–87 and accompanying text.

381. See *Wells Dairy*, 762 N.W.2d at 473 n.2.

382. See *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987) (citing *Payne Plumbing & Heating Co. v. Bob McKiness Excavating & Grading, Inc.*, 382 N.W.2d 156, 160 (Iowa 1986)).

383. See *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 827 (Iowa 2001) (citing *Fleming v. Threshermen's Mut. Ins. Co.*, 388 N.W.2d 908, 909–11 (Wis. 1986)).

384. See *id.* (quoting *Fleming*, 388 N.W.2d at 910–11).

385. See *Wells Dairy*, 762 N.W.2d at 470–76 (noting that breach of warranty claims can also serve as a basis for implied indemnity if the indemnitee is in privity with the indemnitor).

386. See *supra* notes 98–122 and accompanying text.

387. See *id.*

388. See *id.*

contract or in tort for a breach of duty arising out of the performance of contractual duties.³⁸⁹ The objective was the same—equitably transfer the loss to the culpable employer so the employer would not be unjustly enriched at the expense of the third party.³⁹⁰ The court in both *Woodruff Construction* and *McNally* confirmed the restitutionary nature of the remedy by mandating that a third-party indemnitee had to be morally blameless.³⁹¹ From these beginnings and developments, we now have an implied indemnity remedy which is not linked to furthering the goal of restitution, but rather is tied only to proof that a breach of certain kinds of duty caused damage, irrespective of the fault of the indemnitee.³⁹²

In effect, the court has elevated legal form over equitable substance. Implied indemnity is not a cause of action—it is an equitable remedy designed to achieve the goal of restitution.³⁹³ The form or means by which that goal is achieved is through a cause of action sounding in either contract or tort.³⁹⁴ As a result of the court's analytical framework in *Wells Dairy*, causes of action have taken on a life of their own. Each now has its own set of determinants—for implied contractual indemnification, implied mutual intent to indemnify; and for equitable indemnity, notions of fairness based on the special relationship between a licensed professional and a client.³⁹⁵ By focusing on these causes of action and their respective controlling considerations to the exclusion of any examination of the factual culpability of the indemnitee, the court has diminished, if not eliminated, the restitutionary character of the remedy. What heretofore required clear and unequivocal language to recover indemnity attributable

389. See *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 186 (Iowa 1985); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 314, 316–17 (Iowa 1966); *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 564–65 (Iowa 1962).

390. See *McNally & Nimergood v. Neumann-Kiewit Constructors, Inc.*, 648 N.W.2d 564, 576–77 (Iowa 2002).

391. See *id.* (stating that indemnification is only implied if indemnitee did not negligently contribute to the hazard); *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 786 (Iowa 1987) (refusing to indemnify a proposed indemnitee who aided in the creation of the hazard).

392. See *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 470, 473, 475–76 (Iowa 2009) (stating that the indemnitee need not be blameless).

393. See *McNally*, 648 N.W.2d at 570; *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 823–24 (Iowa 2001); *Henning v. Sec. Bank*, 564 N.W.2d 398, 401 (Iowa 1997); *Peters v. Lyons*, 168 N.W.2d 759, 767 (Iowa 1969).

394. See *McNally*, 648 N.W.2d at 570.

395. See *Wells Dairy*, 762 N.W.2d at 470–72.

to one's own negligence³⁹⁶ can now be satisfied on an implied basis if the requisite hypothetical mutual intent to indemnify or breach of professional duty is shown.³⁹⁷ The latter approach deems an intent to indemnify irrelevant, while the former purports to ascertain intent despite the parties' failure to give indemnity a moment's thought before consummating their contractual arrangement.³⁹⁸

Moreover, the distinction the court has drawn between implied contractual indemnity and equitable indemnity is illusory. Traditionally, cognizable implied indemnity cases (other than the older and now abrogated active-passive negligence variety) were incident to some form of contractual transaction between the indemnitee and indemnitor.³⁹⁹ Even those the court characterized as tort-based or equitable, such as the sale of chemicals in *Ke-Wash* and the misrepresentations made by one lawyer to another in *Hansen*, arose out of some contractual dealings.⁴⁰⁰

Why should the nature of the breach of duty alleged in these dealings—contractual or at law—be dispositive in the determination of whether an indemnitee can transfer legal liability? What is essential—and is the lesson of *McNally*'s vicarious liability holding—is that an indemnitor have full or exclusive responsibility for the performance of duties that cause loss to an injured party and resulting legal liability to an otherwise

396. See *McNally*, 648 N.W.2d at 571; *Woodruff Constr. Co.*, 406 N.W.2d at 785.

397. See *Wells Dairy*, 762 N.W.2d at 470–72.

398. See *id.* at 470–71.

399. See *Farmers Coop. Co. v. Stockdales' Corp.*, 366 N.W.2d 184, 185 (Iowa 1985) (concerning a building permit); *Stowe v. Wood*, 199 N.W.2d 323, 326–27 (Iowa 1972) (concerning a real estate lease); *Peters v. Lyons*, 168 N.W.2d 759, 761, 767 (Iowa 1969) (concerning the retail sale and purchase of a dog chain); *Iowa Power & Light Co. v. Abild Constr. Co.*, 144 N.W.2d 303, 314, 317 (Iowa 1966) (concerning an oral contract to notify); *Blackford v. Sioux City Dressed Pork, Inc.*, 118 N.W.2d 559, 560 (Iowa 1962) (concerning a cleaning and service contract); *Weidert v. Monahan Post Legionnaire Club*, 51 N.W.2d 400, 401 (Iowa 1952) (concerning a contract to repair a water heater); *Rozmajzl v. Northland Greyhound Lines*, 49 N.W.2d 501, 503 (Iowa 1951) (concerning a contract to drive a bus); *Horrabin v. City of Des Moines*, 199 N.W. 988, 989 (Iowa 1924) (concerning a construction contract). In addition, respondeat superior liability, such as principal-agent or master-servant, likewise arises out of some contractual arrangement.

400. See *Hansen v. Anderson, Wilmarth & Van Der Maaten*, 630 N.W.2d 818, 821–22 (Iowa 2001); *Ke-Wash Co. v. Stauffer Chem. Co.*, 177 N.W.2d 5, 7 (Iowa 1970); but see *Wells Dairy*, 762 N.W.2d at 475 (illustrating a notable exception which is, of course, the claim by Wells Dairy against RVS).

innocent party.⁴⁰¹ It is the moral innocence of people like Mrs. Lyons, Mr. Horrabin, and institutions like the Monahan Post Legionnaire Club—parties who find themselves being held liable for the mistakes of others with whom they have dealt and on whom they have relied—which motivates a court of equity to shift the entirety of their loss.⁴⁰² Otherwise, the wrongdoers in these relationships are unjustly enriched by having an innocent party shoulder their offenses or transgressions. Equity demands that they be made to act as if they had made an explicit promise to indemnify, even though the contractual terms on this issue are silent.⁴⁰³ In short, it is an indemnitee's legal liability and lack of independent factual culpability which powers the train of implied indemnity, not a particular cause of action, which merely provides the lubricant. A theory of recovery for implied indemnity may vary depending on the source and nature of the alleged breach of duty, but the one necessary constant which transcends the particular vehicle of enforcement is the moral innocence of the indemnitee.⁴⁰⁴

V. CONCLUSION

The principle of vicarious liability established by the court in *McNally* mandated a focus on an indemnitee's status and conduct.⁴⁰⁵ The concept was simple and straightforward—if a factually blameless indemnitee is held legally liable for another's breach of a specific and defined duty, implied indemnity is warranted.⁴⁰⁶ If, however, the indemnitee is independently and factually culpable notwithstanding the other's breach of such a duty, indemnity will not be implied.⁴⁰⁷ With the adoption of this principle in 2002, the court dissolved the *in pari delicto* cloud which had been looming over Iowa implied indemnity law for decades.⁴⁰⁸ The days of squeezing

401. See *McNally*, 648 N.W.2d at 576–77.

402. See *Peters*, 168 N.W.2d at 768; *Weidert*, 51 N.W.2d at 400–01, 404; *Horrabin*, 199 N.W. at 990.

403. See *Woodruff Constr. Co. v. Barrick Roofers, Inc.*, 406 N.W.2d 783, 785 (Iowa 1987).

404. See *McNally*, 648 N.W.2d at 576 (holding that while different sources of duty require different theories of recovery, “the concept of shifting responsibility for loss from one who is secondarily liable to one who is primarily liable remains the same”).

405. See *id.* at 576–77.

406. See *id.*

407. See *id.* at 576.

408. See *supra* Part II.A.

implied indemnity into “semantic cubicles” were over.⁴⁰⁹ The authors of the *Restatement (Third) of Torts* embraced this concept as well.⁴¹⁰

Wells Dairy changes this. The foundation of implied indemnity doctrine—restitution—and its mortar—vicarious liability—have been shaken and cracked. Breach of duty and resulting damages are now the cornerstones of the equitable remedy;⁴¹¹ the factual culpability of the indemnitee is irrelevant.⁴¹² The banishment of vicarious liability from its station as a unifying principle for implied indemnity brings us back one step closer to the precipice of what the court characterizes as “the abyss of indemnity law.”⁴¹³

409. See *Chi. & Nw. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co.*, 179 F. Supp. 33, 60 (N.D. Iowa 1959) (explaining Iowa’s struggle for a coherent implied indemnity doctrine and the frequent use of indemnity “semantic cubicles” to make a case stick).

410. See RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 22(a)(2) (2002) (stating that indemnity is available when the indemnitee is only vicariously liable or is only liable as a seller of a product supplied by the indemnitor).

411. See *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 762 N.W.2d 463, 470 (Iowa 2009) (holding that the pivotal question in determining implied contractual indemnity is whether a contractual duty has been violated and what damages, if any, flow from that breach).

412. See *id.* at 470, 474–76.

413. See *id.* at 467.