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"COMPARATIVE ANALYSIS OF CONTRACT OF INDEMNITY IN INDIA, THE UNITED KINGDOM AND CANADA."

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Abstract

The Indian Contract Act, 1872, was a statutory provision that was established in the Colonial Era, as a result of which the Act was "largely a codification of the existing English law".[1] However, there was some difficulty in the enforcement of English laws, considering the fact that India was fundamentally different socially and politically, the effects of which inevitably transpired into the legal system. Many of the laws introduced by the British were interpreted differently by the Indian Courts post-independence, which led to a growing differentiation between the application of the law in the two countries. The Canadian legal system, on the other hand, is an amalgamation of both, common law and civil law, adopted from England and France respectively.[2] The province of Quebec follows the civil law tradition, while the rest of the country follows the common law system. Their common law does not exist in the form of any legislation, but is defined by past judgements.[3] This paper seeks to critically examine the principle of contractual indemnity across the jurisdictions of India, the United Kingdom and Canada.

Introduction

The principle of indemnity was established in the English case, *Adamson v. Jarvis*.[4] Thereafter, the meaning of indemnity in English law came to be "a promise to save a person harmless from the consequences of an act".[5] The English definition of indemnity is broad enough to include "a promise of indemnity against loss arising from any cause whatsoever".[6] The meaning of indemnity in Canadian law is not properly established, but it could be interpreted as "a contract between two

1 R. N. Gooderson, English contract problems in Indian code and case law, 16 The Cambridge Law Journal 67–84 (1958).
[2] Department of Justice Canada, CANADA'S SYSTEM OF JUSTICE (1993).
[33] Department of Justice Canada, CANADA'S SYSTEM OF JUSTICE (1993).
4 Adamson v. Jarvis [1827] 4 Bing 66: 29 RR 503.
5 Avtar Singh, Contract of Indemnity, Contract & Specific Relief 591–598 (12 ed. 2020).
6 Avtar Singh, Contract of Indemnity, in Contract & Specific Relief 591–598 (12 ed. 2020).

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parties whereby one agrees to cover any liability, loss or damage sustained by the other from some contemplated act or condition, or damage resulting from a claim or demand of a third person”.[7] The Indian definition of indemnity, on the other hand, says that it is “a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity””.[8]

The English and Canadian law of indemnity is primarily based on case laws, and there is an absence of any statutory provision, unlike India, which has the laws of indemnity thoroughly codified in the Indian Contract Act, 1872. However, the Indian definition and interpretation of indemnity has often been challenged in case laws, which in practice, have altered the application of the principle. Additionally, Indian Courts continue to utilize the principles laid down in English cases to decide Indian cases. “Despite the attainment of independence in 1947, the abolition of appeals from India to the Privy Council in 1950, and the setting up of a Supreme Court in the same year, there does not as yet seem any indication in the change of attitude of the Indian courts towards English decisions in the law of contract”.[9]

The United Kingdom & The English Courts

The concept of indemnity was devised in the United Kingdom, in *Adamson v. Jarvis*, and has since evolved into a broad subject through varying interpretations. Since there is no codified statute to define and lay down the terms of a contract of indemnity, the scope of the concept is much wider than that of Indian law. The English usage of the term includes, “promises to save the promise from harm or loss caused by events or accidents which do not, or may not, depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor”.[10] In the latter case mentioned, a promise of indemnity could be identified from the nature of the transaction between parties. Like Indian law, English law too acknowledges that contracts of indemnity may be express or implied, however, the courts are often slow in deciding matters of implied contracts, as the obligation is onerous and it “goes against commercial logic to so imply without laying down properly defined parameters for the purported indemnity”.[11] The illustrations of implied indemnity in English law include: “where a party accepts an

[7] Penny L. Parker & John Slavich, *Contractual Efforts to Allocate the Risk of Environmental Liability: Is There a Way to Make Indemnities Worth More Than the Paper They Are Written On?*, 44 SW L.J. 1349 (1991).
[8] The Indian Contract Act, 1872, §124.
9 R. N. Gooderson, English contract problems in Indian code and case law, 16 The Cambridge Law Journal 67–84 (1958).
[10] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[11] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).

accommodation bill of exchange upon the drawer's request; where the guarantor provides a guarantee to the creditor upon the debtor's request; and in some cases at least, where one party requests another party to perform some act which turns out to be injurious to the rights of the third party".[12]

English law also recognizes contracts of indemnity that arise out of legal or equitable obligations. This circumstance was approved in *Corporation of Sheffield v. Barclay and Others*, where it was stated, "where a person invested with statutory or common law duty of ministerial character is called upon to exercise that duty on the request, direction and demand of another…, and without any default on his own part acts in a manner which is apparently legal, but is in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty".[13] Further, in *Eastern Shipping Co. Ltd. V. Quah Beng Kee*, Lord Wrenbury said, "a right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in law or in equity there is an obligation upon the one party to indemnify the other. There are for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assured promise by a person to do that which, under the circumstances, he ought to do. The right to indemnity need not arise by contract; it may (to give other instances) arise by statute".[14] The English Courts have utilized the *Sheffield* principle to account for other cases of indemnity, like the "the indemnity from a debtor to a surety, and from a principal to an agent".[15] However, this principle is far too broad and does not cover the specificities of cases.

In English law, it has been held that a person may recover under a contract to indemnify for liability arising out of negligence which is attended by criminal consequences.[16] English Courts have even enforced contracts where the criminal nature of the negligence was aggravated by intoxication, which directly conflicts with the Canadian principles. However, for the most part, English authority favours the view that indemnity is usually contractual. The case, *Corporation*

[12] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[13] Corporation of Sheffield v. Barclay and Others [1905] UKHL 556.
[14] Eastern Shipping Co. Ltd. V. Quah Beng Kee [1924] AC 177.
[15] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
16 Abraham Acker, Contracts of Indemnity. Public Policy. Langley v. Fidelity Insurance Company of Canada, [1935] O. R. 424, 1 The University of Toronto Law Journal 378–379 (1936).

of Sheffield v. Barclay also "ventured a distinction between a contract of indemnity implied by law and a contract of indemnity implied or inferred from the circumstances".[17] The reason for this distinction is not clear; it is possible that the Courts were concerned about the voluntariness of an act of acceptance.[18]

The United Kingdom does have stark differences between India in the field of contract law. For example, 'bailment' in the United Kingdom isn't considered a contractual matter like in India, but falls under the ambit of tort law. Similarly, "the contractual model does not easily fit all cases".[19] Dissatisfaction with the contractual interpretation of cases pertaining to indemnity prompted the Courts to attempt to rationalise indemnity on a different basis.[20] In the matter of the rights of the indemnifier, the English law takes a tortuous approach. For any breach of contract of indemnity, a settlement is provided.

Unlike India, the English Courts first examined the nature of the loss suffered by the indemnified party in order to enforce the indemnity. "The promise to indemnify was usually construed to be a promise to keep the indemnified party harmless against the specified loss".[21] The enforcement of the contract of indemnity typically occurred in the form of awarding damages for breach of contract. This contract would be said to be broken when the indemnified party suffers a loss and it the contract would be said to have been breached when the indemnifier did not keep the indemnified party 'harmless against loss'. If the indemnifier did not indemnify the indemnity holder during a stipulated time period which may have been specified in the contract, he would be liable to compensate the indemnity holder, corresponding to the amount of actual loss suffered.

India & The Indian Courts

The Indian laws of indemnity are contained in the Indian Contract Act, 1872. The term indemnity, in the Indian context, means "recompense for any loss or liability which a person has incurred, such duty arising from an agreement or otherwise",[22] and "a contract by which the promisor

[17] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[18] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[19] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[20] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[21] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[22] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).

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undertakes an original and independent obligation to indemnify, as distinct from a collateral contract in the nature of a guarantee by which the promisor undertakes to answer for the default of another person who is to be primarily liable to the promisee".[23] The Indian legal system acknowledges the validity of both, express and implied contracts of indemnity, as well as obligations of the parties to each other, "if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify or by statute".[24] A contract of indemnity is an independent contract, separate from the main contract, which classifies it as a special contract.[25]

The Indian Contract Act does not exhaustively deal with the concept, but only a particular kind of indemnity, "which arises form a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not, or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier".[26] One unique feature of the Indian laws on this matter, is that the Indian Courts recognizes the enforceability of a contract of indemnity before the actual loss has occurred. It was held in *Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri*, that the indemnity holder need not suffer an actual loss to sue on his indemnity.[27]

Unlike Canada, the right to indemnify is not limited to express contractual agreements, and may arise from both, express and implied contracts. The case, *Lala Shanti Swarup v. Munshi Singh and Ors.*, the Court held that the contract of indemnity does not necessarily need to be express; it could be implied from the circumstances of the case as well.[28] One landmark judgement pertaining to implied indemnity in the Indian legal system is *Secretary of State for India in Council v. Bank of India, Limited*. The main legal issue of this case was "whether the appellant is debarred from relying on an indemnity implied under the common law of India, which in this respect is identical with that of England".[29] The High Court of Bombay relied on the precedent set by Lord Halsbury in *Sheffield Corporation v. Barclay* that there is a contract of indemnity implied by law, by the person making the "request to keep indemnified the person having the duty against any liability

[23] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[24] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[25] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[26] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[27] Gajanan Moreshwar Parelkar v. Moreshwar Madan Mantri [1942] AIR Bom 302.
[28] Lala Shanti Swarup v. Munshi Singh and Ors [1967] AIR SC 1315.
[29] Secretary of State for India in Council v. Bank of India, Limited [1938] 40 BomLR 868.

which may result from such exercise of the supposed duty",[30] and set aside a statutory provision in the Indian Securities Act, 1920, in order to allow implied contracts of indemnity in India. Additionally, the Law Commission's recommended that the words 'expressly or impliedly' after 'promises' be added in Section 124.[31]

The right to indemnify may also arise beyond a contract, in cases where "the relation between the parties is such that, either in law or equity, there is an obligation upon one party to indemnify the other".[32] It can also arise out of a legal or equitable duty in certain circumstances, the liability for which is based on an implicit contract. The principle of indemnity is also applicable in cases where an individual who is invested with a statutory or common law duty has been ordered to exercise that duty on the request, direction or demand of another person, or if the person desiring indemnity is acting in the exercise of his free discretion.[33] The Indian Contract Act leaves the issue of commencement and extent of liability undefined, so in these matters, English principles are followed.

Indian law draws a clear distinction between indemnity and damages, despite inevitable overlaps. "While the right of indemnity is given by the original contract , the right to damages arises in consequences of breach of that contract".[34] The confusion between these two remedies is caused due to the coinciding of a claim of damages and indemnification.

Canada & The Canadian Courts

Like the United Kingdom, there is no legislation in Canada that pertains to the restriction or prohibition of indemnification. The term 'indemnity' in the Canadian context is characterized as a "compensation paid for loss or injury which can include, among other methods of compensation, cash payments, repairs, replacement, and reinstatement".[35]

The Canadian common law, unlike the other jurisdictions, does not provide a right to indemnity, and instead allows for the creation of a right to be indemnified, which may arise by way of a

[30] Corporation of Sheffield v. Barclay and Others [1905] UKHL 556.
[31] Wayne Courtney, *Indemnities and the Indian Contract Act 1872*, 27 National Law School of India Review 66–88 (2015).
[32] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[33] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
[34] Sir Frederick Pollock & Dinshah Fardunji Mulla, The Indian Contract Act, 1872 (2018).
35 Nick Kangles et al., Risk allocation provisions in energy industry agreements: Are we getting it right?, 49 Alberta Law Review 339–367 (2011).

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contract or through legislative means.[36] The Canadian principles of indemnity are also established through various case laws. Due to the absence of any statutory provision or legislation, interpreting a case of indemnity is challenging for Canadian courts. As a general rule, "Canadian courts will seek the true construction of an agreement to determine the parties' intentions, and conceivably the parties' reasonable expectations".[37]

As mentioned in the previous section, English law provides for a right to indemnify for a liability arising out of negligence. In the Canadian legal system, the case which serves as an absolute precedent in these matters is *Canada Steamship Lines Limited v. The King*, which applied a three part test, now known as the "Canada Steamship Test".[38] This case also laid down the doctrine of *contra proferentem*. *Contra proferentem* provides that "the interpretation of an unclear or ambiguous provision is to be strictly construed against the party that drafted it".[39] The Privy Council in this case also noted, "liability for the negligence of others must surely be imposed by very clear words, if it is to be imposed at all".[40] This test is used for "interpreting an indemnity provision under which the Crown made a claim of indemnity for losses arising from the negligence of its own servants".[41] The test examines cases pertaining to contractual indemnity while paying attention to the following three factors;

i. "If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequences of the negligence of his own servants, effect must be given to that provision".[42]
ii. "If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*".[43] If a doubt arises, it must be resolved against the *proferens* in accordance with Article 1019 of the Civil Code of Lower Canada, which states, "In cases

36 Nick Kangles et al., Risk allocation provisions in energy industry agreements: Are we getting it right?, 49 Alberta Law Review 339–367 (2011).
[37] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[38] Canada Steamship Lines Limited v. The King [1952] UKPC 1.
[39] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[40] Canada Steamship Lines Limited v. The King [1952] UKPC 1.
[41] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[42] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[43] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).

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of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation".[44]

iii. If the wording is ambiguous enough for the above purpose, the Court must consider whether "the head of damage may be based on some ground other than that of negligence".[45]

The third part of the Canada Steamship test requires the Courts to review and determine the intention of the parties, to which the approach is "to ask whether the alternative head of damage was one within the contemplation of the parties".[46] The doctrine of *contra proferentum* is also applied in the case, *Alderslade v. Hendon Laundry, Ltd.*, where the basis of the application of the doctrine was laid down by the Court. In the decision of the case, Lord Greene, MR, stated that if a contracting party wishes, "to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not to liability based on negligence".[47] It was then held as a necessity in the Canadian courts, that the liability for the negligence of other parties must be clearly and explicitly imposed in the wordings of the relevant contracts.

It can therefore be concluded that the Canadian legal system does not recognize implied contracts of indemnity, and only considers expressed contracts of indemnity as valid.

Conclusion

Through an examination of various case laws and scholarly work, it can be concluded that, although the origins of the concept on indemnity are the same across these three jurisdictions, they have evolved to be vastly different in practice. Even still, they are very similar, years after the conception of the idea.

The analysis across these jurisdictions can also help one to ascertain that the Indian legal system is arguably the most efficient in matters pertaining to the contract of. Indemnity, thanks to the Indian Contract Act, 1872, which provides structure and a basic framework for the law, while still

[44] The Civil Code of Lower Canada, 1867, §1019.
[45] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[46] Nick Kangles et al., *Risk allocation provisions in energy industry agreements: Are we getting it right?*, 49 ALBERTA LAW REVIEW 339–367 (2011).
[47] Alderslade v. Hendon Laundry Ltd. [1945] KB 189.

relying on past cases and precedents. Canada on the other hand, does not deal with the issue of indemnity very comprehensively, and seems to be quite regressive, owing to their err in deeming implied contracts of indemnity as invalid. Perhaps recognizing implied indemnity in the Courts could extend the accessibility of justice pertaining to such problems, and would provide for a simpler way to settle matters of implied indemnity. The English legal system, having numerous precedents, seems to be flourishing, even without a legislative provision to deal with the issue comprehensively.

All that can be hoped for the future is that the Indian Contract Act, 1872, undergoes a series of amendments, so that it can cover issues more exhaustively.