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# Retroactivity

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tortfeasors."[404] The Conference Report suggested that since contribution between active intentional tortfeasors joined in an action was not prohibited under the former CPLR 1401, there is no absolute policy bar to contribution in the area of intentional torts.[405] Accordingly, it would seem that there is no justifiable reason for limiting contribution to unintentional torts.

*Retroactivity*

The Court of Appeals, in *Kelly v. Long Island Lighting Co.*,[406] extended the applicability of *Dole* to any litigation pending on the date of that decision.[407] As a result of the subsequent liberal interpretation of *Kelly* by lower courts, defendants have asserted their rights to a *Dole* apportionment at various stages of litigation.[408] Even where the main action was tried pre-*Dole* and no claim for apportionment was asserted until the appellate level, courts have deemed such cases still pending and have remanded them for apportionment of damages among joint tortfeasors.[409]

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404 *Id.* at 1806.

405 *Id.* The report acknowledged that the Revised Uniform Contribution Among Tortfeasors Act does not permit contribution among intentional tortfeasors, but found unpersuasive the reasons offered therein for such a prohibition. *Id.*, *citing* UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) & Comment (rev. 1955).

406 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

407 *Kelly* involved an appeal by an active tortfeasor from the dismissal of his cross-complaint. Between the time of the original dismissal and the appeal, *Dole* was decided. The Court of Appeals reinstated the cross-complaint, stating, "We, of course, . . . give effect to the law as it exists at the time of our decision." *Id.* at 29 n.3, 286 N.E.2d at 243 n.3, 334 N.Y.S.2d at 854 n.3. *See also* Rodgers v. Dorchester Associates, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973); Frey v. Bethlehem Steel Corp., 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972).

408 For a discussion of *Dole's* application to pending cases, see 3 WK&M ¶ 3019.62; Tymann & Samore, *Torts*, in *1973 Survey of New York Law*, 25 SYRACUSE L. REV. 433, 433-34 (1974); Note, Dole v. Dow Chemical Co.: *Recent Developments*, 48 ST. JOHN'S L. REV. 195, 202-03 (1973); Note, Dole v. Dow Chemical Co.: *Recent Developments*, 47 ST. JOHN'S L. REV. 759-60 (1973).

409 *See* Stein v. Whitehead, 40 App. Div. 2d 89, 92, 337 N.Y.S.2d 821, 826 (2d Dep't 1972), wherein the appellate court, in an action commenced prior to *Dole*, noted that "even in the absence of a cross-claim I think the trial court should, *sua sponte*, charge the jury that it should determine the proportionate responsibility of each defendant. . . ." Similarly, in Brown v. City of New York, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972), the First Department apportioned damages among joint tortfeasors despite a prior pre-*Dole* dismissal of the third-party complaint. In Liebman v. County of Westchester, 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (2d Dep't 1973), the court, in granting apportionment, noted that the plaintiff's recovery would be temporarily delayed but considered this to be of minor significance as compared with the predominant consideration of "fairness in the judicial management of the case." *Id.* at 757, 341 N.Y.S.2d at 570, *quoting* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972). Absent apportionment, the possibility of prejudice can be far greater to the joint tortfeasors.

However, the Court of Appeals, in Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), *discussed in The Survey*, 48 ST. JOHN'S L. REV. 202 (1973), refused

Notwithstanding the trend to broadly interpret the term "pending cases," the question remained as to whether *Dole* would apply retroactively where a defendant's previous complaint for indemnification had been dismissed, based on pre-*Dole* law, and the time for appeal of the dismissal had expired. More specifically, the issue involved the use of the doctrine of res judicata to preclude judicial consideration of a similar complaint based on *Dole* principles if the main action was still pending. Lower courts had previously diverged on this question. The Appellate Division, Second Department, permitted a third-party plaintiff to reargue the dismissal of his third-party complaint 17 months after dismissal. The court proceeded to reinstate the complaint in accordance with *Dole* principles.[410] The Supreme Court, Monroe County, however, dismissed a second third-party complaint for indemnity, relying on the doctrine of former adjudication.[411]

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to apply the law as it then existed when a pre-*Dole* settlor sued for apportionment of damages in a pending action. The Court reasoned that "it would be inappropriate on these facts to undo what has been done and, on the basis of present law, to nullify actions taken by parties in reliance on the law as it then stood." 32 N.Y.2d at 344, 298 N.E.2d at 629-30, 345 N.Y.S.2d at 471. *But see* Lampila v. Harrington, 76 Misc. 2d 423, 351 N.Y.S.2d 345 (Sup. Ct. Albany County 1974), *discussed in The Survey*, 48 ST. JOHN'S L. REV. 657 (1974), wherein the court permitted a third-party action by a defendant who had settled pre-*Dole* after a verdict had been rendered against him on the trial level. *Codling* was distinguished on the ground that it involved a "voluntary" settlement and not one, as here, coerced by entry of an unfavorable verdict.

Although the Court of Appeals has never held *Dole* inapplicable to cases concluded prior to *Dole*, such a result could be implied from the Court's holding *Dole* applicable to cases pending on the date of that decision. *See* notes 406-08 and accompanying text *supra*. *Codling* would appear to support such reasoning. In such a case, it would be inappropriate to apply *Dole* because of the substantial impact its application would have on current court caseloads. For example, it would re-open cases concluded as long as twenty-six years ago. This result obtains from New York decisions which hold that a defendant's right to a *Dole* contribution accrues at the date he pays the judgment rather than at the date the judgment is rendered. A defendant, therefore, who is not pressed for payment until almost twenty years after the judgment in the main action is docketed against him (*see* CPLR 211(b) (McKinney 1972), allowing a twenty-year period to enforce a money judgment), has an additional six years to commence his third-party action. (A *Dole* claim is treated as one for indemnity, to which the six-year statute of limitations of CPLR 213 applies.) Moreover, prejudice would result to those who relied on past law and are no longer in a position to obtain the evidence necessary to properly defend themselves in an action to determine their relative responsibility. *See* Welborn v. DeLeonardis, 168 N.Y.L.J. 3, July 6, 1972, at 2, col. 4 (Sup. Ct. N.Y. County) (court refused to apportion damages in an action brought for contribution under CPLR 1401). *But see* Lampila v. Harrington, 76 Misc. 2d 423, 351 N.Y.S.2d 345 (Sup. Ct. Albany County 1974) (allowing an independent action for apportionment among co-defendants and a third party where the main action had been settled after an adverse judgment but before *Dole*). *See generally* Occhialino, *Contribution*, in NINETEENTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE 219, 247-59 (1974) [hereinafter cited as *Contribution*]; 7B MCKINNEY'S CPLR 3019, supp. commentary at 246-47 (1974).

[410] Mosca v. Pensky, 41 App. Div. 2d 775, 342 N.Y.S.2d 76 (2d Dep't 1973) (mem.); *accord*, Glicksman v. Smith, 168 N.Y.L.J. 108, Dec. 7, 1972, at 2, cols. 2-3 (Sup. Ct. N.Y. County) (third-party plaintiff allowed to serve second complaint).

[411] Glomboski v. Baltimore & O.R.R., 72 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct.

Recently, the Court of Appeals, in *Slater v. American Mineral Spirits Co.*,[412] resolved the conflict by holding that although the main action is currently pending, *Dole* does not apply retroactively to issues that have been judicially concluded.

In *Slater*, a third-party complaint for indemnification had been dismissed on the then-applicable law which barred one active tortfeasor from impleading another. The dismissal was not appealed and an order dismissing the complaint was entered. After the decision in *Dole*, a second complaint was served by the defendant, the main action having not as yet come to trial. The Court of Appeals, in a four-to-three decision, held that since the first dismissal was a final disposition on the merits, the doctrine of res judicata foreclosed any attempt to reopen the issues based upon a subsequent change in decisional law.[413] The majority distinguished *Kelly* since an appeal from the original dismissal in the present action had not been made. Consequently, the order was conclusive as to the rights between the parties.[414] Judge Jasen, however, writing for the dissent, urged that the effect of *Dole* is so fundamental that it "warrants retroactive application in a pending case even in which, as here, the effect may be to defeat the purposes underlying the doctrine of former adjudication . . . ."[415]

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Monroe County 1972) (mem.). The court compared the second complaint to a motion for reargument after a motion has been decided and the time to appeal has expired. In striking down the complaint, it cited 2 CARMODY-WAIT 2d § 8:81, at 100-01 (1965), which concludes that leave to reargue will ordinarily be denied despite an intervening change in case law. *But see* 3 WK&M ¶ 3019.62, which approved of the *Glicksman* resolution to the problem and urged that *Glomboski* not be followed.

412 33 N.Y.2d 443, 310 N.E.2d 300, 354 N.Y.S.2d 620 (1974).

413 *Id.* at 446-47, 310 N.E.2d at 301-02, 354 N.Y.S.2d at 622-23. The majority relied on earlier cases in which the question of retroactivity had been raised. Spindell v. Brooklyn Jewish Hosp., 29 N.Y.2d 888, 278 N.E.2d 912, 328 N.Y.S.2d 678 (1972) (prior adjudication that the action is barred by the statute of limitations bars a subsequent action following a change in the law); *In re* Huie, 20 N.Y.2d 568, 232 N.E.2d 642, 285 N.Y.S.2d 610 (1967) (motion for reargument should not be permitted following a United States Supreme Court decision once the time for appeal has expired); and Deeves v. Fabric Fire Hose Co., 14 N.Y.2d 633, 198 N.E.2d 595, 249 N.Y.S.2d 423 (1964) (motion for reargument must be denied even though the law was changed to allow an action against the manufacturer for a breach of warranty). Each of these cases is distinguishable, however, since each involved a request for relief on the identical theory that had earlier been rejected. In *Slater*, all that had been determined was that the third-party plaintiff was actively negligent and therefore had no claim for common law indemnification. *See* notes 416-19 and accompanying text *infra*.

414 33 N.Y.2d at 447, 310 N.E.2d at 302, 354 N.Y.S.2d at 623. Unlike the dissent, the majority attached no significance to the difference between a final order, as was the case in *Slater*, and a final judgment. *See* note 415 *infra*.

415 *Id.* at 448, 310 N.E.2d at 303, 354 N.Y.S.2d at 624 (Jasen, Rabin and Stevens, J.J., dissenting). The dissent also noted that since a defendant's right to indemnification theoretically accrues at the time he pays the judgment, the third-party plaintiff is denied his rights before his cause of action accrues. *Id.* at 449, 310 N.E.2d at 303, 354 N.Y.S.2d at 625, *citing* Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964). The

Regretfully, neither the majority nor dissenting opinion dealt with what would seem to be the most significant question, *viz.*, whether both complaints were, in fact, based upon the same cause of action.[416] The Court of Appeals has itself noted that *Dole* did not change the rule of common law indemnification but was instead a "refinement of the law of contribution."[417] Thus, it would appear that the prior dismissal of the indemnity claim, resulting from the active negligence of the third-party plaintiff, should not serve to bar a subsequent claim for "relative contribution."[418] Certainly, before *Dole*, a defendant, despite dismissal of his request for indemnification, could recover against a joint defendant under former CPLR 1401 after paying more than his pro rata share of the judgment.[419] If *Dole* was intended to refine and expand former CPLR 1401, the fact that the third-party defendant in *Slater* was not a party to the main action should not alter the result.

In view of the prior liberal application of *Dole* in other pending cases, the *Slater* decision seems strikingly harsh. Had an appeal of the

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dissent also viewed the order as merely the law of the case and not res judicata, as would be a final judgment.

416 Schuylkill Fuel Corp. v. B&C Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929); Perry v. Dickerson, 85 N.Y. 345 (1881). Whether two causes of action are to be regarded as identical depends upon whether a contrary result in the second would impair rights established in the first. Andrews v. Merrywood Country Club, Inc., 28 App. Div. 2d 865, 281 N.Y.S.2d 922 (2d Dep't 1967).

417 Although the *Dole* court spoke in terms of "partial indemnification," in Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972), the apportionment was described as a "refinement of the rule of contribution" and the action one for "relative contribution." *Id.* at 39, 286 N.E.2d at 243, 334 N.Y.S.2d at 855. In Rogers v. Dorchester Associates, 32 N.Y.2d 533, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973), the Court again distinguished between a *Dole* apportionment and full indemnification. One commentator has indicated "that *Dole*, while working in the framework of implied indemnity, actually varied [and expanded] the rule of contribution." *Contribution*, *supra* note 409, at 242.

418 *See* note 413 *supra*. Dismissal of a complaint for indemnification merely determines that the defendant was actively negligent and his sole remedy, if available, is for statutory contribution. *See* note 419 *infra*.

419 Indemnity and contribution have always been regarded as separate and distinct remedies. *See* Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 308, 178 N.E. 289, 290 (1931); Perlbinder v. D'Aquilla Bros. Contracting Corp., 12 Misc. 2d 790, 177 N.Y.S.2d 878 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 7 App. Div. 2d 968, 183 N.Y.S.2d 988 (1st Dep't 1959); Bonadonna v. City of Buffalo, 156 Misc. 225, 281 N.Y.S. 343 (Sup. Ct. Erie County 1935). Under pre-*Dole* common law principles, a defendant would be entitled to full indemnity if he were "passively" negligent; where "actively" negligent, contribution was his sole remedy. Contribution, however, was available only against one or more co-tortfeasors who were subjected to a joint judgment and only after the defendant had paid more than his pro rata share of that judgment. CPLR 1401 (McKinney 1963), *as amended*, N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney). Baidach v. Togut, 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959) (construing CPA 211-a, the predecessor to CPLR 1401). For an explanation of the "active-passive" dichotomy, see McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1962). *See generally* Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185 (1972).

dismissal by the third-party plaintiff been pending on the date *Dole* was decided, his complaint would have been reinstated upon reaching the appellate level.[420] Alternatively, had he made no complaint theretofore, he would be permitted to do so now.[421] Even under *Slater*, he would not be barred from serving a complaint on another tortfeasor who could then obtain apportionment against the third-party defendant.[422]

Though *Slater* represents a new clarification on the issue of *Dole's* retroactivity, it can be construed as only a narrow limitation. As noted by the majority, it does not disturb the application of *Dole* to pending cases where no final judgment or order on the issue of indemnity has been entered.[423] Furthermore, it leaves unanswered the question of whether a tortfeasor against whom a judgment was docketed before *Dole* can now seek apportionment.[424] Admittedly, it would seem anomalous to allow such a tortfeasor recovery while denying it, as in *Slater*, to a defendant in an action that has not yet come to trial. Still, considering the emphasis placed on the finality of the unappealed order, it appears that *Slater* alone would not preclude such a tortfeasor from acquiring an apportionment of damages provided the issue of indemnification between the two parties had not been finally determined.

*Undertakings*

CPLR 5519(a)(2) grants an appellant who has filed an undertaking guaranteeing full payment of a judgment entered against him a stay of enforcement of the judgment pending the outcome of the

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420 *See* Brown v. City of New York, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972).

421 *See* Glomboski v. Baltimore & O.R.R., 72 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct. Monroe County 1972) (mem.), *cited in* 7B McKINNEY'S CPLR 3019, commentary at 303 (1974).

422 33 N.Y.2d at 446, 310 N.E.2d at 301, 354 N.Y.S.2d at 622.

423 *Id.* at 447, 310 N.E.2d at 302, 354 N.Y.S.2d at 623.

424 Such an application of *Dole* was considered in Lampila v. Harrington, 76 Misc. 2d 423, 351 N.Y.S.2d 345 (Sup. Ct. Albany County 1974), wherein a tortfeasor who had satisfied the judgment against him before *Dole* was allowed apportionment against another tortfeasor who had not been in the original action. With respect to joint tortfeasors against whom there was a judgment pre-*Dole*, see Welborn v. DeLeonardis, 168 N.Y.L.J. 3, July 6, 1972, at 2, col. 4 (Sup. Ct. N.Y. County 1972), limiting the co-defendants to contribution under CPLR 1401 as then enacted. For a discussion of this question, see Farrell & Wilner, Dole v. Dow Chemical Co.: *A Leading Decision—But Where?*, 39 B'KLYN L. REV. 330, 335-39 (1972), wherein the authors urge retroactivity to judgments within a six-year statute of limitations period except with respect to defendants subject to joint judgments where contribution under CPLR 1401 would apply. Professor David D. Siegel urges retroactivity even between tortfeasors against whom there is a common judgment. 7B McKINNEY'S CPLR 3019, commentary at 303-04 (1974).