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The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this installment of the *Survey*, significant developments in the expansion of *Dole v. Dow Chemical Co.* are considered. Among the

* The following abbreviations will be used uniformly throughout the *Survey:*
New York Civil Practice Law and Rules ....CPLR
New York Civil Practice Act ....CPA
New York Rules of Civil Practice ....RCP
New York City Civil Court Act ....CCA
Uniform District Court Act ....UDCA
Uniform Justice Court Act ....UJCA

cases treated is *Adams v. Lindsay,* wherein a lower New York court deemed full satisfaction of the main judgment to be a condition precedent to collection of a third-party claim. In *Lastowski v. Norge Coin-O-Matic, Inc.* and *Ryan v. Fahey,* both the Second and Fourth Departments of the Appellate Division refused to recognize negligent supervision as a tort where asserted against a parent as a third-party defendant.

Other cases discussed herein include *Rivera v. Berkeley Super Wash, Inc.,* an Appellate Division, Fourth Department, decision construing *Codling v. Paglia* as having recognized a separate cause of action in strict tort liability and applying to it the tort statute of limitations, running from the date of injury; *Jacox v. Jacox,* wherein the Second Department overruled *Vanderpool v. Vanderpool* which had held that an indigent defendant in a matrimonial action had a constitutional right to counsel; and *Kane v. Randt,* which extended the rule of *McDermott v. Manhattan Eye, Ear and Throat Hospital* to require a defendant-physician to testify as an expert witness at an examination before trial. Additionally, the *Survey* notes New York's continued response to the mandates of the United States Supreme Court in the field of creditor prejudgment remedies. In *Long Island Trust Co. v. Porta Aluminum Corp.,* the Appellate Division, Second Department, using the test of *Fuentes v. Shevin,* sustained the constitutionality of CPLR 7102 in the face of renewed attack.

The *Survey* sets forth in each installment those cases which are deemed to make the most significant contribution to New York's procedural law. Due to limitations of space, however, many other less im-

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Uniform City Court Act ....UCCA
Real Property Actions and Proceedings Law ....RPAPL
Domestic Relations Law ....DRL
WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE (1973) ....WK&M
The Biannual Survey of New York Practice .... *The Biannual Survey*
The Quarterly Survey of New York Practice ....*The Quarterly Survey*
The Survey of New York Practice ....*The Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. LEG. DOC. No. 6(b) ....FIRST REP.
1958 N.Y. LEG. DOC. No. 13 ....SECOND REP.
1959 N.Y. LEG. DOC. No. 17 ....THIRD REP.
1960 N.Y. LEG. DOC. No. 80 ....FOURTH REP.
1961 FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE ....FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committees:

1961 N.Y. LEG. DOC. No. 15 ....FIFTH REP.
1962 N.Y. LEG. DOC. No. 8 ....SIXTH REP.

portant, but, nevertheless, significant cases cannot be included. It is hoped that the *Survey* nonetheless accomplishes its basic purpose, *viz.*, to key the practitioner to significant developments in the procedural law of New York.

ARTICLE 1 — SHORT TITLE, APPLICABILITY AND DEFINITIONS

CPLR 105(j): Age of majority changed to eighteen.

The Legislature has added a new subdivision (j) to CPLR 105. This subdivision defines the words "infant" and "infancy" when used within the context of the CPLR. Under the new definitions, an infant is one who has not yet attained the age of eighteen.[1]

ARTICLE 2 — LIMITATIONS OF TIME

CPLR 214: Tort statute of limitations adopted for strict products liability.

The scope of recovery for personal injury and property damage caused by a defective product has been greatly expanded since *MacPherson v. Buick Motor Co.*[2] eliminated the requirement of privity in negligence actions. Although this right of recovery predicated upon negligence is well settled, it may provide inadequate protection in certain instances.[3] Therefore, the New York Court of Appeals has seen fit

[1] N.Y. SESS. LAWS [1974], ch. 924, § 1 (McKinney).

[2] 217 N.Y. 382, 111 N.E. 1050 (1916). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

[3] Recovery predicated upon a negligence theory may be had only if the following elements can be proven: (1) the plaintiff is within the category of persons to whom the manufacturer owes a duty of reasonable care, *see* MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916); (2) the manufacturer did not use such care; and (3) the negligently caused defect was the proximate cause of the plaintiff's injury. *See* W. PROSSER, LAW OF TORTS 143, 641 (Hornbook ed. 1971) [hereinafter cited as PROSSER]. The plaintiff may rely on res ipsa loquitur as an aid in proving negligence, but such proof may be difficult, or even impossible, particularly where a manufacturer can demonstrate that he generally used reasonable care throughout the manufacturing process. Wade, *On the Nature of Strict Tort Liability for Products*, 612 INS. L.J. 141, 142 (1974). *See also* Velez v. Craine & Clark Lumber Corp., 33 N.Y.2d 117, 305 N.E.2d 750, 350 N.Y.S.2d 617 (1973) (per curiam) (plaintiff's suit dismissed in negligence but upheld on the theory of strict products liability); Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973), *discussed in The Quarterly Survey*, 48 ST. JOHN'S L. REV. 616 (1974) (jury found manufacturer free from negligence, but rendered verdict for the plaintiff on the theory of extended breach of warranty).

An even greater burden is imposed upon a plaintiff choosing, instead, to rely on the traditional cause of action for breach of warranty. He must prove: (1) contractual privity between himself and the seller; (2) the contract contained express or implied warranties not effectively disclaimed; (3) the defect causing the injury was a breach of the warranty; and (4) the defect proximately caused the injury. *See* N.Y.U.C.C. §§ 2-314, 2-315 (McKinney 1964). Broad disclaimers and adherence to privity requirements serve to limit the effectiveness of these Code provisions in protecting the consumer.