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CPLR Art. 14: New Article Enacted to Deal with Contribution in Light of Dole v. Dow Chemical Co.

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in *Jacox v. Jacox*,[62] reversed *Vanderpool*. The court, in a memorandum opinion, concluded that although CPLR 1102 permitted a court to assign an attorney to a poor person, there was neither "constitutional nor statutory authority"[63] for a court to order a local government to provide compensated counsel or pay the fee of counsel selected by the indigent party. The Second Department observed that, absent statutory authority for ordering compensation of counsel in matrimonial actions, trial courts must assign members of the bar to provide uncompensated representation for the indigent.[64]

Given the reluctance of the Second Department to permit the court-ordered compensation of counsel representing an indigent person in a matrimonial action, it would appear that the time is appropriate for the Legislature to authorize such procedure.[65] Not only would legislation in this area remove a financial burden from assigned counsel, but more significantly, such an arrangement would afford an indigent party in a matrimonial action the opportunity to select his own counsel. Consequently, reliance upon the court to make such a selection would be eliminated.

ARTICLE 14 — CONTRIBUTION

CPLR art. 14: New article enacted to deal with contribution in light of Dole v. Dow Chemical Co.

The Legislature has amended the CPLR to bring it into conformity with the Court of Appeals' decision in *Dole v. Dow Chemical Co.*[66] Newly enacted section 1401[67] allows a claim for contribution be-

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assume the responsibility of paying auxiliary expenses which bar an indigent plaintiff's access to a court in a matrimonial action. *See* cases cited in note 57 *supra*.

62 43 App. Div. 2d 716, 350 N.Y.S.2d 435 (2d Dep't 1973) (mem.). Consolidated for appeal in *Jacox* were three orders of the Supreme Court, Kings County, directing the City of New York to furnish counsel within a specified time to indigent defendants in matrimonial actions. The lower court had further directed that if these orders were not complied with, the defendant in each action could retain counsel. Thereafter, the court would set the attorneys' fee and direct the city to pay the fee. *Id.* at 717, 350 N.Y.S.2d at 436.

63 *Id.*

64 *Id.* at 717, 350 N.Y.S.2d at 437. The court in *Vanderpool* had acknowledged that it lacked a statutory basis for ordering compensation of counsel. 74 Misc. 2d at 123, 344 N.Y.S.2d at 574.

In a recent decision, the Supreme Court, St. Lawrence County, has held that it would be improvident at the present time to impose the expense of compensated counsel upon local government in matrimonial actions. Instead, the court suggested that members of the local bar provide their services without compensation. *See* Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973).

65 Justice Shea, in Bartlett v. Kitchin, 76 Misc. 2d 1087, 352 N.Y.S.2d 110 (Sup. Ct. St. Lawrence County 1973), observed that unless legislative change in this area occurred soon, court-ordered compensation of counsel for indigent parties may be forthcoming.

66 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

67 N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney).

tween two or more individuals subject to liability for the same injury or damage, regardless of whether the plaintiff has initiated an action or received a judgment against the defendant from whom contribution is demanded.[68] The Legislature, in enacting this section, sought to underscore the fact that *Dole* and its successors are properly considered as modifying the contribution doctrine, rather than as overhauling the law of indemnity.[69]

Section 1402[70] provides that the amount of contribution recoverable by a defendant is that sum paid by him in excess of his equitable share as apportioned between the defendants at trial.[71] Such equitable shares are determined according to each tortfeasor's relative culpability.[72] It is anticipated that the effect of this section will be to place the risk of the solvency of the defendants upon the judgment debtor, instead of the plaintiff.[73]

Section 1403[74] states that a claim for contribution may be presented in a separate action as well as by cross-claim,[75] third-party claim,[76] or counterclaim.[77] A separate action may prove to be necessary when the court hearing the primary action is unable to exercise jurisdiction over the person from whom contribution is sought, or when the primary action is too far advanced to initiate a cross-claim.[78]

Section 1404[79] contains saving clauses which safeguard the rights of plaintiffs and defendants. Subdivision (a) provides that nothing in this

[68] *Id.* Previously, a right to contribution only came into existence after a joint judgment had been entered against the defendants. This requirement is now eliminated. *See* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974] 1809 (McKinney).

[69] TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974] 1810 (McKinney).

[70] N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney).

[71] This has no effect on the rule that the plaintiff's contributory negligence operates as a complete bar to recovery. If the Legislature adopts a comparative negligence doctrine, § 1402 will not have to be amended to reflect such a change. *Id.* at 1810.

[72] The Judicial Conference anticipated that percentages would be used in determining relative degrees of culpability. *Id.* at 1811. *See also* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 273 N.E.2d 316, 324 N.Y.S.2d 464 (1972).

[73] *See* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974] 1811-12 (McKinney).

[74] N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney).

[75] *See* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 273 N.E.2d 316, 324 N.Y.S.2d 464 (1972).

[76] *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

[77] *See, e.g.*, Meade v. Roberts, 71 Misc. 2d 120, 335 N.Y.S.2d 349 (Sup. Ct. Broome County 1972).

[78] There are, however, several disadvantages to allowing a separate action. They are: (1) additional burden to crowded courts; (2) possibility of inconsistent verdicts; and, (3) increased difficulty in assessing equitable shares when one of the tortfeasors was not involved in the original action. *See* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974] 1812 (McKinney).

[79] N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney).

article will preclude the plaintiff from asserting any other rights related to the damages claimed at trial.[80] Subdivision (b) contains the same type of protection concerning the defendants' rights of indemnification and subrogation.[81]

ARTICLE 31 — DISCLOSURE

CPLR 3101: Defendant-doctor may be compelled by plaintiff to give expert testimony during an examination before trial.

Recently, the Supreme Court, Nassau County, in *Kane v. Randt*,[82] held that a plaintiff could compel a defendant-doctor to give expert testimony during an examination before trial in an action where a medical standard was in issue, notwithstanding the fact that the plaintiff had shown no inability or lack of intention to call another expert to testify at trial. In *Kane*, a malpractice action against two doctors, plaintiffs claimed that defendants had improperly diagnosed a tumor in the plaintiff-wife's spinal cord as multiple sclerosis. Pursuant to CPLR 3101 (a),[83] which provides for discovery both before and during trial, the plaintiffs sought to elicit expert testimony from the defendants during a pre-trial examination and their request was granted.

Prior to passage of the CPLR, an expert's opinion generally was inadmissible in a pre-trial disclosure proceeding.[84] However, in 1966, the Supreme Court, Rensselaer County, in *Kennelly v. St. Mary's Hospital*,[85] held that CPLR 3101 allows the admission of an expert's opinion in an examination before trial where the expert is also the defendant. The *Kennelly* holding was based upon *McDermott v. Manhattan Eye,*

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80 This is to assure that article 14 is interpreted consistently with the Court of Appeals decisions concerning the joint and several liability of joint tortfeasors. 2 N.Y. SESS. LAWS [1974] 1813 (McKinney). Meachem v. New York Cent. R.R., 8 N.Y.2d 293, 169 N.E.2d 913, 206 N.Y.S.2d 569 (1960); Barrett v. Third Ave. Ry., 45 N.Y. 628 (1871).

81 Since *Dole* is limited to affecting the laws of contribution, this subdivision provides that in those situations in which the Court of Appeals would apply indemnification or subrogation, article 14 is not to be interpreted as affecting those rights. *See* TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974] 1813 (McKinney).

82 77 Misc. 2d 173, 352 N.Y.S.2d 394 (Sup. Ct. Nassau County 1974).

83 CPLR 3101(a) provides, in part, that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by: (1) a party, or the officer, director, member, agent or employee of a party . . . ."

84 *See* Reif v. Gebel, 246 App. Div. 776, 284 N.Y.S. 98 (2d Dep't 1935) (plaintiff entitled to examine doctor as to the nature of injury for which he treated plaintiff, but not as to cause of injury since such questioning called for an expert opinion); Bartlett v. Sanford, 244 App. Div. 722, 278 N.Y.S. 578 (2d Dep't 1935); Pfaudler Permutit, Inc. v. Stanley Steel Serv. Corp., 28 Misc. 2d 388, 212 N.Y.S.2d 106 (Sup. Ct. Monroe County 1961); Murphy v. New York Cent. R.R., 17 Misc. 2d 1026, 188 N.Y.S.2d 247 (Sup. Ct. Erie County 1959). *See generally* 3A WK&M ¶ 3101.05.

85 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966).