St. John's Law Review

Volume 49, Fall 1974, Number 1 Article 22

# Collection of Judgments

St. John's Law Review

policy.[206] By contrast, the notice of defect is an essential ingredient in establishing negligence on the part of the municipality.[207] Since the village may be deemed culpable only after the notice of defect has been received and a reasonable time to repair has elapsed, where no notice is given, it cannot become a tortfeasor.[208] As such, the rule of *Dole*, permitting an apportionment of damages among joint tortfeasors, cannot apply.

The Supreme Court, Erie County, has struck the chord which distinguishes the notice of claim and the notice of defect. While both are conditions precedent, the latter is a key element in defining actionable negligence. Consequently, no liability may rest on the village, be it through a *Dole* apportionment or otherwise, absent compliance with the notice of defect requirements.

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CPLR 1007 basically provides for the right to indemnification by way of impleader.[209] In *Adams v. Lindsay*,[210] the Supreme Court, Mon-

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206 N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965) allows for an extension of time where unyielding insistence on compliance with the ninety-day period would work hardship. The statute provides, in relevant part:

> 5. The court, in its discretion, may grant leave to serve a notice of claim within a reasonable time after the expiration of the time specified in subdivision one of this section in the following cases: (1) Where the claimant is an infant, or is mentally or physically incapacitated, and by reason of such disability fails to serve a notice of claim within the time specified; (2) where a person entitled to make a claim dies before the expiration of the time limited for service of the notice; or (3) where the claimant fails to serve a notice of claim within the time limited for service of the notice by reason of his justifiable reliance upon settlement representations made in writing by an authorized representative of the party against which the claim is made or of its insurance carrier.

Furthermore, compliance with the notice of claim requirements of § 50-e are unnecessary in actions brought in equity. Fontana v. Town of Hempstead, 18 App. Div. 2d 1084, 239 N.Y.S.2d 512, 513 (2d Dep't 1963) (mem.). Additionally, courts have been willing to find a waiver of this condition where a municipality, through its own intransigence, has induced a plaintiff to rely on the sufficiency of an improperly drafted notice of claim until the ninety-day period has expired. Teresta v. City of New York, 304 N.Y. 440, 443, 108 N.E.2d 397, 398 (1952). *See also* Chikara v. City of New York, 21 Misc. 2d 446, 190 N.Y.S.2d 576 (Sup. Ct. Kings County 1959), *rev'd on other grounds*, 10 App. Div. 2d 862, 199 N.Y.S.2d 829 (2d Dep't 1960) (mem.).

*See generally* Note, *Notice of Claim in Negligence Actions*, 22 BKLYN. L. REV. 342 (1956); Note, *Late Filing of Claim Against City Where Claimant is Incapacitated*, 7 SYRACUSE L. REV. 337 (1956); Note, *Renewed Recommendations for Revision of Section 50-e of General Municipal Law*, 24 ST. JOHN'S L. REV. 318 (1950).

207 76 Misc. 2d at 319, 351 N.Y.S.2d at 253.

208 *See* King v. Incorporated Village of Lynbrook, 35 Misc. 2d 75, 229 N.Y.S.2d 840 (Sup. Ct. Nassau County 1962).

209 7B MCKINNEY'S CPLR 1007, commentary at 333 (1963); *see* WK&M ¶ 1007.01. The practice of impleader furnishes the means for a determination of primary and ultimate responsibility in one proceeding, thus avoiding a multiplicity of actions. H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 94 (4th ed. 1973) [hereinafter cited as WACHTELL]. For a discussion of the development of indemnity in New York, see Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 189-200 (1972).

210 77 Misc. 2d 824, 354 N.Y.S.2d 356 (Sup. Ct. Monroe County 1974). For a concise

roe County, considered the question of when a third-party judgment, based on a *Dole* apportionment, could be collected from the third-party defendant. The problem presented to the court in *Adams* was twofold: first, whether payment of the third-party judgment is conditional upon full satisfaction of the principal judgment; and second, in the event of partial payment of the principal judgment, whether the third-party plaintiff is entitled to collect from the third-party defendant the latter's proportionate liability for any amount paid.

In *Adams*, plaintiff sued the driver of an automobile for personal injuries arising from an accident. Pursuant to CPLR 1007,[211] the defendant brought a third-party action against the driver of another automobile, claiming that the second driver was partially responsible for plaintiff's injuries. The two actions were consolidated, with judgments entered on jury verdicts rendered for the plaintiff in the principal action and for the third-party plaintiff in the third-party action. Applying *Dole*, the jury determined the relative fault of the third-party plaintiff to be 70 percent and that of the third-party defendant to be 30 percent. Controversy arose when the third-party plaintiff sought to enforce his claim in full before he had satisfied the main judgment.

On a motion to amend the third-party judgment, the court held that the judgment entered must be revised, with provision inserted that it need not be fully settled until the principal plaintiff receives full satisfaction from the third-party plaintiff. Of greater significance, however, the court ruled that in the event of partial payment to the plaintiff, the third-party plaintiff could enforce his judgment only to the extent that the portion he paid exceeded his apportioned liability.[212]

In requiring full satisfaction of the principal judgment as a condition precedent to a demand for total payment of the third-party judgment, the *Adams* court followed well-settled principles regarding indemnity claims. A cause of action for indemnity does not accrue at the time of commission of the tort, but rather, at the time the party seeking indemnification actually pays the principal judgment.[213] Nevertheless,

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discussion of the *Adams* case, see McLaughlin, *New York Trial Practice*, 171 N.Y.L.J. 115, June 14, 1974, at 4, col. 3.

211 CPLR 1007 reads in pertinent part:

> After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him, by serving upon such person a summons and third-party complaint and all prior pleadings in the action.

212 77 Misc. 2d at 826-27, 354 N.Y.S.2d at 358-59.

213 *See, e.g.*, Emil v. James Felt & Co., 45 App. Div. 2d 677, 356 N.Y.S.2d 303 (1st Dep't 1974); Jenkins v. L.F. Elec. Installations Corp., 168 N.Y.L.J. 3, July 6, 1972, at 2, col. 4 (App. T. 1st Dep't); 3 WK&M ¶ 3019.48. This was also the practice under § 193-a(1) of the CPA. *See* Musco v. Conte, 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964); Satta v. City of New York, 272 App. Div. 782, 69 N.Y.S.2d 653 (2d Dep't 1947).

to avoid a multiplicity of suits,[214] CPLR 1007 has been held to encompass contingent claims of indemnification.[215] As a result, the party seeking indemnity may obtain a conditional third-party judgment in the main action.[216] The potential liability of the third-party defendant is thereby fixed, with payments to be made when the indemnitee sustains an actual loss, *viz.*, payment of the judgment in the principal action.[217]

A right to indemnification, however, may accrue to a third-party plaintiff before he completely satisfies the judgment against him. Thus, the defendant in *Adams* was permitted to enforce his *Dole* claim after, and to the extent to which, he paid in excess of 70 percent of the main judgment. In resolving the partial payment issue, the *Adams* court followed the essential spirit of *Dole*. There, the Court of Appeals held that whenever a third party has been determined to be partially liable for the "negligence for which a defendant is *cast in damages*, the responsibility for that part is recoverable by the prime defendant against the third-party."[218] The court in *Adams* reasoned that the third-party

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Professor M. E. Occhialino has suggested that, as a result of *Dole*, the date of accrual for the indemnity claim should be established when the action is first brought against the defendant. He contends that at this time the defendant is cognizant of his right to institute a *Dole* claim. Accordingly, the determination of apportioned liability would be simplified, and court backlogs would be cut, inasmuch as the defendant would be encouraged to bring together all potentially liable parties in a single lawsuit. *Contribution*, in NINETEENTH ANNUAL REPORT OF THE N.Y. JUDICIAL CONFERENCE 217, 231 (1974).

214 *See* note 209 *supra*. In actual practice, the impleader action is brought before the statute of limitations has begun. *See* Lutz Feed Co. v. Audet & Co., 72 Misc. 2d 28, 337 N.Y.S.2d 852 (Sup. Ct. Delaware County 1972); 7B McKINNEY'S CPLR 3019, supp. commentary at 229 (1972).

215 *See* Krause v. American Guarantee & Liab. Ins. Co., 22 N.Y.2d 147, 239 N.E.2d 175, 292 N.Y.S.2d 67 (1968).

216 *See* McCabe v. Queensboro Farm Prods., Inc., 22 N.Y.2d 204, 239 N.E.2d 340, 292 N.Y.S.2d 400 (1968); 125 West 45th St. Restaurant Corp. v. Frama Realty Corp., 249 App. Div. 589, 293 N.Y.S. 216 (1st Dep't 1937); First Nat'l Bank v. Bankers' Trust, 151 Misc. 233, 271 N.Y.S. 191 (Sup. Ct. N.Y. County 1934); 3 CARMODY-WAIT 2d § 19:130, at 405 (1968).

217 The Court in McCabe v. Queensboro Farm Prods., Inc., 22 N.Y.2d 204, 239 N.E.2d 340, 292 N.Y.S.2d 400 (1968), recognized that the third-party judgment could be executed only when the third-party plaintiff had satisfied the principal judgment. As a result, it was felt that the allowance of a conditional judgment "conveys no greater rights than could be obtained if the action were brought independently." *Id.* at 208, 239 N.E.2d at 342, 292 N.Y.S.2d at 403.

In several areas of contract indemnification, the collection of the third-party judgment may be allowed prior to payment of the principal judgment. For example, when an insured becomes liable for an excess judgment, actual payment is not a condition precedent to the insurer's obligation to pay. *See* Henegan v. Merchants Mutual Ins. Co., 31 App. Div. 2d 12, 294 N.Y.S.2d 547 (1st Dep't 1968). Other exceptions to the traditional requirement of satisfaction of the underlying judgment generally relate to absolute obligations and not to instances of indemnification against loss. *See* Rector v. Higgins, 48 N.Y. 532 (1872) (lessee covenanted to pay lessor's taxes on realty); Doyle v. New York City Transit Authority, 9 App. Div. 2d 903, 195 N.Y.S.2d 331 (2d Dep't 1959) (contract expressly provided for indemnification against liability, not loss).

218 Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972) (emphasis added).

plaintiff cannot be "cast in damages" until he pays to the plaintiff an amount in excess of that part of the principal judgment for which he is proportionally liable.[219] Consequently, it is only after the third-party plaintiff pays more than his share that it can be said the third-party defendant is obligated to indemnify.

The court found further justification for its conclusion in an analysis of former CPLR 1401.[220] An essential condition in procuring a judgment for contribution had been that one joint tortfeasor pay more than his pro rata share.[221] The *Adams* court concluded that this excess payment theory, underlying CPLR 1401, was equally applicable to indemnification under *Dole*. Although the *Adams* decision only tangentially examined the appropriateness of *Dole* in a contribution setting,[222] the court nonetheless concluded that the form of a judgment for partial

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219 77 Misc. 2d at 827, 354 N.Y.S.2d at 359; *see* 7B McKINNEY'S CPLR 3019, supp. commentary at 232 (1972).

220 77 Misc. 2d at 827, 354 N.Y.S.2d at 360. CPLR 1401 is in derogation of the common law, which did not recognize a right of contribution among joint tortfeasors. However, the plaintiff may still recover all of his damages from any one of the defendants. *See* Jones v. All Boro Car Leasing, Inc., 67 Misc. 2d 567, 325 N.Y.S.2d 535 (N.Y.C. Civ. Ct. Kings County 1971).

Recently, the Legislature amended article 14 of the CPLR, incorporating the *Dole* apportionment theory into the contribution rules. 1 N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney). Contribution is now regarded as a claim for an apportionment of liability. For a discussion of the new article 14, *see* text accompanying notes 66-81 *supra*.

221 At the time of the *Adams* decision, CPLR 1401 provided in part:

> Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his own pro rata share of the entire judgment.

*See* Epstein v. National Transp. Co., 287 N.Y. 456, 40 N.E.2d 632 (1942); Fox v. Western New York Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931); WACHTELL, *supra* note 209, at 100; 3 WK&M ¶ 1401.01.

As amended, CPLR 1401 permits a contribution claim among joint tortfeasors even when the parties subject to liability are not joined in the action. Accordingly, the requirement of a joint judgment has been eliminated. TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CPLR, *as appearing in* 2 N.Y. SESS. LAWS [1974], comment (f), at 1809-10 (McKinney) [hereinafter cited as TWELFTH REPORT]. Nevertheless, the tortfeasor's payment of more than his equitable (apportioned) share is still a prerequisite to an award of contribution. *See* note 223 and accompanying text *infra*.

222 In *Dole*, the court considered its new rule as "in effect a partial indemnification." 30 N.Y.2d at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386. Yet, 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 rule of apportionment was also referred to as a "refinement of the rule of contribution." *Id.* at 39, 286 N.E.2d at 243, 334 N.Y.S.2d at 855. In fact, the basic premise of the new article codifying the doctrine of apportioned liability is that *Dole* "should be viewed as modifying the doctrine of contribution in New York, rather than as completely revamping the law of indemnity." TWELFTH REPORT, *supra* note 221, comment (e), at 1808. Nevertheless, pro rata contribution ostensibly remains in instances where co-tortfeasors have been joined as parties defendant.

contribution and indemnity should be the same. This understanding is substantially consistent with the subsequently amended CPLR 1402, which precludes the enforcement of a *Dole* claim for contribution until the party has paid more than his apportioned share of liability.[223] Accordingly, *Adams* is not at all incongruous with the practicalities and fairness embodied in the recent modification of section 1402.

*Intrafamily Torts*

In *Lastowski v. Norge Coin-O-Matic, Inc.*[224] and *Ryan v. Fahey*,[225] the Second and Fourth Departments of the Appellate Division endorsed a recent Third Department decision, *Holodook v. Spencer*,[226] concerning intrafamily torts. Considering the question of whether a parent owes a legal duty of supervision to his child, with a cause of action accruing to the injured child upon a breach of such duty, both courts answered in the negative. In light of *Dole*, the conclusion that such a claim is impermissible is of particular importance.[227]

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223 CPLR 1402, as amended, reads as follows:

> Amount of contribution. The amount of contribution to which a person is entitled shall be *the excess paid by him over and above his equitable share of the judgment recovered by the injured party;* but no person shall be required to contribute an amount greater than his equitable share. The equitable share shall be determined in accordance with the relative culpability of each person liable for contribution.

1 N.Y. SESS. LAWS [1974], ch. 742, § 1 (McKinney) (emphasis added). Prior to the enactment of article 14, the Supreme Court, Kings County, in Mazelis v. Wallerstein, 77 Misc. 2d 335, 353 N.Y.S.2d 633 (Sup. Ct. Kings County 1974), held that to the extent one of the defendants pays more than his apportioned share of liability, he may bring an action for contribution. *Id.* at 340, 335 N.Y.S.2d at 639.

224 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974).

225 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't 1974).

226 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), *discussed in The Survey*, 48 ST. JOHN'S L. REV. 611, 650 (1974). In *Holodook*, a four-year-old infant, while running between parked cars, was struck by the defendant's automobile. The Supreme Court, Columbia County, denied a motion to dismiss the defendant's counterclaim against the infant's father and a third-party action against the infant's mother, both of which involved requests for *Dole* apportionments. 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973). With one judge dissenting, the Appellate Division, Third Department, reversed, holding the *Dole* claims to be legally insufficient. 43 App. Div. 2d at 137, 350 N.Y.S.2d at 206.

In a companion case, Graney v. Graney, 43 App. Div. 2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973), the Third Department affirmed a trial court order dismissing a direct child-parent suit based upon a claim of negligent supervision.

227 Where negligent supervision of an infant is alleged, the claimant is essentially arguing that the parent had failed to supervise and protect the injured infant, thereby contributing to his injury. The existence of such a theory has been the subject of a great deal of judicial scrutiny. *See, e.g.*, Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972) (claim allowed); Northrop v. Hogstyn, 75 Misc. 2d 486, 348 N.Y.S.2d 106 (Sup. Ct. Ontario County 1973) (claim disallowed); Searles v. Dardani, 75 Misc. 2d 279, 347 N.Y.S.2d 662 (Sup. Ct. Albany County 1973) (claim allowed). *See generally* Dachs, Seider v. Roth *Upstaged by* Dole v. Dow Chemical, 169 N.Y.L.J. 22, Jan. 31, 1973, at 1, col. 5; McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 92, May 11, 1973, at 1, col. 1.