St. John's Law Review

Volume 48
Number 1 *Volume 48, October 1973, Number 1*

Article 27

August 2012

# Dole v. Dow Chemical Co.: Recent Developments

St. John's Law Review

## DOLE v. DOW CHEMICAL CO.

Dole v. Dow Chemical Co.: *Recent developments.*

The New York courts continue to struggle with the diverse repercussions of *Dole v. Dow Chemical Co.*[180] Perhaps the most controversial impact of the *Dole* system of equitable apportionment of damages among joint tort-feasors has been in the area of intrafamily torts.

*Hairston v. Broadwater*[181] is the latest in a series of cases[182] involving *Dole* counterclaims against parents for negligent supervision of children. The plaintiff brought an action in the Supreme Court, Nassau County, for derivative damages and as guardian of his eight-year-old daughter who had been hit by the defendant's automobile. The defendants counterclaimed for a *Dole* apportionment of damages alleging parental negligence in supervising the child. The plaintiff moved to strike the counterclaim on the ground that an indirect claim by a child against a parent would erode family unity, would limit the child's recovery and would subject the parent to a liability for which he was not insured. While ultimately dismissing the counterclaim, Judge Harnett ruled that these objections had been put to rest when the Court of Appeals abolished the doctrine of intrafamily immunity in *Gelbman v. Gelbman.*[183] He thereby rejected the reasoning adopted by one New York court[184] that intrafamily immunity survives in suits in which no insurance is available to pay the recovery. Although he conceded that a counterclaim against a parent for negligent supervision "follows facilely under *Dole*"[185] if specific parental omissions are pleaded, Judge Harnett concluded that the defendant's conclusory allegations lacked the "factors of hazard and neglect"[186] necessary to make out a tort.

Perhaps one reason for the controversy surrounding the *Hairston* type counterclaim is that it places the parent in the dilemma of being

---

180 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *noted in* 37 ALBANY L. REV. 154 (1972); 47 N.Y.U.L. REV. 815 (1972); 47 ST. JOHN'S L. REV. 185 (1972).

181 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct. Nassau County 1973) (mem.).

182 *See* Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972) (counterclaim allowed); Holodook v. Spencer, 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973) (counterclaim allowed); Collazo v. Manhattan & Bronx Surface Transit Operating Authority, 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972) (counterclaim disallowed); Marrero v. Just Cab Corp., 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972) (counterclaim disallowed).

183 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

184 *See* Collazo v. Manhattan & Bronx Surface Transit Operating Authority, 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972).

185 73 Misc. 2d at 527, 342 N.Y.S.2d at 791.

186 *Id.* at 533, 342 N.Y.S.2d at 797.

unable to pursue the extrafamilial defendant without risking out-of-pocket liability for part of the damages.[187] Thus, the prospect of a *Dole* counterclaim may either deter the bringing of the suit altogether or cause the parent to hinder the proceedings once the counterclaim is interposed.[188] The result may be that the negligent extrafamilial defendant will go free and the child will go uncompensated. It should be noted that these considerations do not apply to the parent's action in his own behalf for medical expenses and loss of the child's services. The parent's contributory negligence being a total bar to recovery of these damages,[189] there is no threat that the parent will be forced to make an out-of-pocket contribution to the recovery. Furthermore, as Judge Harnett noted in *Hairston,*[190] even in the child's action for pain and suffering where parental hindrance is a possibility, the situation differs little from that presented in the direct intrafamily suits allowed under *Gelbman.*

One commentator has argued that an indirect intrafamily suit via *Dole* counterclaim does differ from a direct intrafamily suit in its effect on family unity.[191] The argument is that in the case of a direct suit, family members themselves have chosen to come into court, either to recover from an insurer or to recover from each other after family unity has already broken down. By contrast, when a *Dole* counterclaim for negligent supervision is successfully interposed, the extrafamilial defendant is allowed to pit family members against each other without their consent. The counterclaim should be disallowed, the commentator asserts, to preserve for the family members their freedom of choice concerning litigation of family controversies. The apparent conclusion is that the extrafamilial defendant should pay all the damages regardless of his relative degree of fault in the interest of preserving amicable relations between parent and child.

Those objecting to the negligent supervision counterclaim on the grounds of possible parental hindrance or disruption of family unity appear oblivious to the substantive rights of the defendant. Under

187 If the parent is held liable for part of the child's damages, he may be compelled to make payments into a separate guardianship or trust account. *See* CPLR 1201, 1206.

188 Judge Harnett listed this as one of the three fears invoked by the prospect of child-parent tort liability. Also listed were the possibilities that the child's rights would be impaired and that the parent would use the child's recovery to pay his own debt. He could see no reason why the *Dole* claim of negligent supervision posed a unique threat in these areas. 73 Misc. 2d at 530-31, 342 N.Y.S.2d at 794-95.

189 *See* Juszczal v. City of New York, 32 App. Div. 2d 824, 302 N.Y.S.2d 375 (2d Dep't 1969) (mem.).

190 73 Misc. 2d at 531, 342 N.Y.S.2d at 759.

191 Dachs, *Seider v. Roth Upstaged by Dole v. Dow Chemical,* 169 N.Y.L.J. 22, Jan. 31, 1973, at 1, col. 5.

*Dole,* one joint tort-feasor is entitled to have other joint tort-feasors pay their fair share of the damages. This right should not be overridden because a close relationship exists between another tort-feasor and the injured party. The parent should be able to foresee the possibility of a *Dole* counterclaim. He is, therefore, free to protect his own family unity by foregoing the action or to proceed against the extrafamilial defendant, assuming the risk of a counterclaim. Should a counterclaim be interposed, procedural means are available to deal with the parent's conflict of interest.[192]

Another fear engendered by the negligent supervision *Dole* claim is that its allowance will result in a flood of counterclaims in infant injury cases.[193] This consideration led one court to hold that the counterclaim is subject to dismissal if it does not allege "special circumstances."[194] This requirement is near to Judge Harnett's possibly overly strict[195] condition that specific "factors of hazard and neglect" be alleged.

Allegations of "hazard and neglect" were not lacking in *Orphan v. Relyea*[196] where an infant was injured when a sauna heater exploded. The infant's mother brought an action in the Supreme Court, Ulster County, against the supplier of propane gas used in the heater. The supplier, in turn, brought a third-party *Dole* action against the infant's father who was allegedly negligent in igniting the stove. As in *Hairston,* the court held that no vestiges of intrafamily immunity barred the *Dole* claim.[197] In *Orphan,* however, the specific allegations of negligence in igniting the heater left no room for a dismissal on the ground of insufficient pleading. The court accordingly allowed the counterclaim despite the father's protestations that he was without liability insurance.

A related issue which has arisen under *Dole* in the context of indirect intrafamily claims involves Insurance Law section 167(3)[198] which provides that no liability insurance policy shall be deemed to insure

---

192 The parent may be given leave to retire as guardian and a new guardian appointed in his place. *See* Sorrentino v. United States, 344 F. Supp. 1308 (E.D.N.Y. 1972).

193 *See* Bilgore v. Rennie, 72 Misc. 2d 639, 340 N.Y.S.2d 212 (Sup. Ct. Monroe County 1973); Marrero v. Just Cab Corp., 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972).

194 Marrero v. Just Cab Corp., 71 Misc. 2d 474, 477, 336 N.Y.S.2d 301, 304 (Sup. Ct. N.Y. County 1972).

195 Dean Joseph M. McLaughlin argues that *Hairston* sets out a stricter standard of particularity than is required in ordinary negligence actions. McLaughlin, *New York Trial Practice,* 169 N.Y.L.J. 92, May 11, 1973, at 1, col. 1.

196 73 Misc. 2d 1098, 343 N.Y.S.2d 537 (Sup. Ct. Ulster County 1973).

197 *Id.* at 1099, 343 N.Y.S.2d at 538.

198 N. Y. INS. LAW § 167(3) (McKinney 1966).

against liability incurred because of death or injury to the insured's spouse. In *Aetna Casualty & Surety Co. v. Delosh*[199] an insured was operating a motorcycle with his wife as passenger when he collided with a truck. In an action by the insured and his wife against the driver-owner of the truck, each spouse sought damages for personal injuries and derivative damages for injury to the other spouse. The truck driver commenced a third-party action against the husband for a *Dole* apportionment of any damages recovered in the wife's action. This prompted the husband's insurer to bring an action to disclaim the obligation to defend and indemnify the husband in the third-party suit. Denying the insurer's motion for summary judgment, the court reasoned that the intent of section 167(3) is to prevent collusive intrafamily suits.[200] Since both spouses were seeking large recoveries for their own personal injuries and neither spouse's suit would be successful if the extrafamilial defendant's negligence was not proved, the court saw little possibility of fraud.[201] While conceding that the third-party action was literally within Insurance Law section 167(3), the court held that the harsh result of a literal application justified reexamining the legislative intent.[202]

*Aetna* demonstrates the need for the adaptation of insurance provisions to accommodate the indirect intrafamily claims which will pro-

199 73 Misc. 2d 275, 341 N.Y.S.2d 465 (Sup. Ct. St. Lawrence County 1973).

200 *Id.* at 278, 341 N.Y.S.2d at 468, *citing* New Amsterdam Cas. Co. v. Stecker, 3 N.Y. 2d 1, 143 N.E.2d 357, 163 N.Y.S.2d 626 (1957); Employers' Liability Assurance Corp. v. Aresty, 11 App. Div. 2d 331, 205 N.Y.S.2d 711 (1st Dep't 1960), *aff'd mem.*, 11 N.Y.2d 696, 180 N.E.2d 916, 225 N.Y.S.2d 764 (1962); Katz v. Wessel, 207 Misc. 456, 139 N.Y.S.2d 564 (Sup. Ct. N.Y. County 1955).

201 The court distinguished cases where an injured party's recovery depended upon proof of his own spouse's negligence. As examples the court cited Reis v. Economy Hotels and Restaurants Purveyors, Inc., 4 Misc. 2d 146, 155 N.Y.S.2d 713 (Sup. Ct. Queens County 1956); Feinman v. Bernard Rice Sons, Inc., 2 Misc. 2d 86, 133 N.Y.S.2d 639 (Sup. Ct. Bronx County 1954), *aff'd mem.*, 285 App. Div. 926, 139 N.Y.S.2d 884 (1st Dep't 1955) *appeal dismissed,* 309 N.Y. 750, 128 N.E.2d 797 (1955) (mem.); Peka Inc. v. Kaye, 208 Misc. 1003, 145 N.Y.S.2d 156 (Sup. Ct. Bronx County), *rev'd on other grounds,* 1 App. Div. 2d 879, 150 N.Y.S.2d 774 (1st Dep't 1956). In these cases plaintiffs brought actions against the owners of automobiles driven by the plantiffs' spouses. The courts held, under Insurance Law section 167(3), that insurers were not obligated to defend and indemnify the negligent spouses when the owners sought recovery over from them. It is obvious that in this situation the negligent spouse will have a financial interest in losing the lawsuit. *Cf.* Smith v. Employer's Fire Ins. Co., 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972), where the court held section 167(3) applicable in a case identical to *Aetna* except for the fact that the insured husband was not seeking recovery in his own behalf. The rationale in *Aetna* appears to apply with almost equal force to *Smith.* The wife in *Smith* would not be successful unless the defendant in her action was proved negligent. The insured husband against whom the defendant sought recovery over had nothing to gain and much to lose by fraudulently trying to lose the lawsuit.

202 The court noted that the effect of permitting the husband's insurer to disclaim liability might be to discourage the wife from attempting to collect her full damages. The court doubted that the Legislature intended such a result.

liferate under *Dole*. The *Gelbman-Dole-Kelly* revolution is "notification to the legislature and state insurance officials that time has marched on in familial situations, and the need is at hand to review and revise socially unresponsive institutional practices."[203]

By creating a procedural means whereby one joint tort-feasor can bring another joint tort-feasor into an action, *Dole* has shaken various immunities from direct negligence suits previously enjoyed by certain types of parties. One example is the supposed post-*Gelbman* intrafamily immunity unsuccessfully raised by parents in the previously discussed *Hairston* and *Orphan* cases. Another is the immunity created by the ninety-day notice of claim requirement of General Municipal Law section 50-e. The question raised in the 50-e context is analogous to that posed by indirect intrafamily claims. When a plaintiff commences a malpractice action against both a county and a private hospital and the action against the county hospital is discontinued because of the plaintiff's failure to give the required ninety-day notice of claim, may the private hospital implead the county hospital for a *Dole* apportionment of damages? In *Zillman v. Meadowbrook Hospital*,[204] the Supreme Court, Nassau County, answered affirmatively. Prior to *Dole*, the Court of Appeals ruled in a similar situation[205] that a third-party action for total indemnification was not barred by the failure of the original plaintiff to give the required notice of claim. Judge Harnett reasoned in *Zillman* that the same rule should apply to a *Dole* claim for partial indemnification.

A different type of immunity which may be weakened as a result of *Dole* arises out of the rule set down in *Gochee v. Wagner*.[206] Under *Gochee*, when *O* is the owner of and is a passenger in a vehicle driven by *D* which collides with a vehicle driven by a stranger (*S*), the negligence of *D* is imputed to *O* in *O*'s action against *S*. In *Ayton v. Acosta*,[207] *O* brought an action against *S* for personal injury and property damages. *S* brought a third-party action against *D* seeking a *Dole* apportionment of any damages which might be recovered by *O*. The New York City Civil Court dismissed the third-party complaint, correctly reasoning that under *Gochee* such a claim is superfluous. Any negligence on *D*'s part would be imputed to *O* thus defeating *O*'s

---

203 Hairston v. Broadwater, 73 Misc. 2d 523, 531, 342 N.Y.S.2d 787, 795 (Sup. Ct. Nassau County 1973) (mem.).

204 73 Misc. 2d 726, 342 N.Y.S.2d 302 (Sup. Ct. Nassau County 1973).

205 Valstrey Service Corp. v. Board of Elec., 2 N.Y.2d 413, 141 N.E.2d 565, 161 N.Y.S.2d 52 (1957).

206 257 N.Y. 344, 178 N.E. 553 (1931).

207 — Misc. 2d —, 342 N.Y.S.2d 295 (N.Y.C. Civ. Ct. Queens County 1973).

claim. If *D* were at all at fault, there would be no recovery to apportion. However, the court acknowledged the possibility that if *O* had initially sued *D*, *D* might then achieve a *Dole* apportionment of damages by impleading *S*.[208] This indirect action against *S* would present a severe challenge to the *Gochee* rule. In ruling on the permissibility of *D*'s impleader action, a court would be faced with a choice between *D*'s rights under *Dole* and *S*'s right to claim the *Gochee* immunity. In all probability, *Dole* would prevail, particularly in a case where *S* was largely at fault. If *Gochee* can indeed be circumvented in this way, its future vitality is certainly in doubt.[209]

While the question of *Dole's* applicability to a personal injury action based on breach of warranty or strict tort liability is not settled, recent cases indicate that it will be extended to these areas.[210] In a typical product liability case, the injured user of the defective product brings a combined negligence and breach of warranty action against his immediate retail seller, the manufacturer, and sometimes intermediate distributors or wholesalers.[211] In the pre-*Dole* era, each of the defendant enterprises in the chain of distribution was entitled to full indemnity from its immediate seller, if that seller was found to have breached a warranty. Full indemnity was available on a warranty theory even when the enterprise seeking to be indemnified was itself guilty of negligence.[212] The ultimate result was that the full loss was born by the first enterprise in the chain to breach a warranty. The transformation which *Dole* promises in the strict liability area is as radical as that effected in the negligence field. Rather than placing the full loss on the enterprise at the top of the distribution chain, a court applying *Dole* would distribute liability among several enterprises in accordance with relative fault.

The first case to take this approach appears to have been *Walsh v. Ford Motor Co.*[213] wherein the plaintiff, injured as a result of a defec-

---

208 The *Gochee* imputation does not apply when the owner-passenger sues his own driver. *See* Lamoureaux v. Crowe, 6 App. Div. 2d 930, 176 N.Y.S.2d 22 (3d Dep't 1958) (mem.); Urquhart v. McEvoy, 204 Misc. 426, 126 N.Y.S.2d 539 (Sup. Ct. Monroe County 1953). *D* has the right under *Dole* to implead other tort-feasors responsible for *O's* injuries.

209 *See* Schwab, *Dole v. Dow Chemical Co.: A Preliminary Analysis*, 45 N.Y. ST. B.J. 144, 159 (1973).

210 *See* Coons v. Washington Mirror Works, Inc., 344 F. Supp. 653 (S.D.N.Y. 1972); Rubel v. Stackrow, 72 Misc. 2d 734, 340 N.Y.S.2d 691 (Sup. Ct. Albany County 1973).

211 Warranty actions against wholesalers and manufacturers by consumers became possible when the Court of Appeals abolished the requirement of privity in Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

212 *See* Schwartz v. Macrose Lumber & Trim Co., 50 Misc. 2d 547, 270 N.Y.S.2d 875, 50 Misc. 2d 1055, 272 N.Y.S.2d 227 (Sup. Ct. Queens County 1966), *rev'd on other grounds*, 29 App. Div. 2d 781, 287 N.Y.S.2d 706 (2d Dep't 1968), *aff'd*, 24 N.Y.2d 856, 248 N.E.2d 910, 301 N.Y.S.2d 91 (1969) (mem.).

213 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (mem.).

tive automobile carburetor, recovered a judgment in both negligence and warranty against Ford and one of its dealers. The dealer sought full indemnity from Ford by cross-claim on two theories. First, the dealer argued that its negligence in failing to inspect the automobile was only passive as opposed to Ford's active negligence in manufacture. The court denied this claim, finding that the dealer had been guilty of active negligence. Second, the dealer sought full indemnity based on Ford's breach of warranty. The court took the novel step of denying full indemnity on the warranty theory also and apportioning damages in accordance with relative fault as determined in the negligence action. The court reasoned as follows:

> Even though the Dole case was concerned only with a negligence action, the principle developed in that case should also be and is applied to these implied warranty causes of action because they arose only because of defendant's negligence.[214]

Thus, in *Walsh* it was the adjudication of negligence which justified and formed the basis for the apportionment of damages.

The *Walsh* court was able to apportion damages in accordance with relative fault because a jury had found the defendants negligent and because the defendants had stipulated for a court determination of the dealer's cross-claim. What of the case where the plaintiff fails to prove negligence and recovers solely in breach of warranty? Is an apportionment mandated despite the absence of any proof of negligence or relative fault and, if so, what is the basis for such an apportionment? This issue was presented recently in *Noble v. Desco Shoe Corp.*[215] The plaintiff therein recovered a judgment for personal injury damages against the retailer, supplier and manufacturer of a defective pair of shoes. Recovery was predicated solely on breach of warranty, the trial court having dismissed the negligence counts in the complaint. The trial court granted the retailer full indemnity on its cross-claim against the supplier. On appeal, the Appellate Division, First Department, remanded the case to the trial court for an apportionment under *Dole,* holding that "no distinction should be drawn between actions grounded in negligence and those based on breach of warranty."[216] The court gave no hint, however, of how the trial court would arrive at such an apportionment after having dismissed the plaintiff's negligence action, presumably on a finding that no defendant had been proved prima facie negligent. Perhaps in such cases a second trial will be necessary with co-defendants presenting evidence on the issue of relative fault.

---

214 *Id.* at 1033, 335 N.Y.S.2d at 114.
215 41 App. Div. 2d 908, 343 N.Y.S.2d 134 (1st Dep't 1973).
216 *Id.* at 910, 343 N.Y.S.2d at 136.

In *Codling v. Paglia*,[217] the Court of Appeals faced a hybrid of the *Walsh* and *Noble* cases. In *Codling*, a two-car accident case, the plaintiffs brought an action against the driver and manufacturer of the defective automobile with which they had collided. After settling their negligence action against the defendant driver prior to trial, the plaintiffs recovered against the manufacturer solely in breach of warranty. Although the defendant driver had settled with the plaintiffs, he had reserved a cross-claim seeking full recovery over from the manufacturer. This cross-claim was successful in the trial court but was dismissed prior to the *Dole* decision by the Appellate Division, Third Department.[218] The dismissal was appealed to the Court of Appeals, *Dole* having been decided in the interim. The appeal presented the possibility of a *Dole* apportionment between two defendants, one whose liability arose from negligence and another who had been held liable solely in breach of warranty.[219] Unfortunately, the Court opted not to avail itself of this opportunity, choosing not to apply *Dole* retroactively in this particular case. In light of the defendant driver's pre-*Dole* settlement 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 the parties in reliance on the law as it then stood."[220]

It is hoped that the Court will soon have a more appropriate opportunity to clarify procedures for apportionment of damages in strict liability cases. Strict product liability is designed to place the costs of consumer goods manufacturing on an enterprise able to bear them. In many cases, the distribution of liability achieved by invoking the *Dole* rule of apportionment will further this purpose by spreading the loss among several enterprises. At the same time, the plaintiff will retain his right to recover on a strict liability basis without having to prove negligence.

The Court of Appeals' refusal to apply *Dole* retroactively in *Codling* must be attributed to the peculiar circumstance there present of a private settlement entered into in reliance on prior law. Prior to *Codling* the Court of Appeals had held *Dole* applicable to cases pending at the date of the *Dole* decision.[221] The most widely held view

217 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

218 38 App. Div. 2d 154, 327 N.Y.S.2d 978 (3d Dep't 1972).

219 A *Dole* apportionment was made in this situation in Coons v. Washington Mirror Works Inc., 344 F. Supp. 653 (S.D.N.Y. 1972).

220 32 N.Y.2d at 334, 298 N.E.2d at 630, 345 N.Y.S.2d at 471.

221 *See* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S. 2d 851 (1972); Frey v. Bethlehem Steel Corp., 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972) (mem.).

among the lower courts appears to be that "[t]he Dole decision was intended to be remedial in nature and is applicable retrospectively."[222] The Appellate Division, Second Department, aligned itself with this view by upholding *Dole*'s retroactivity in two recent cases. In *Liebman v. County of Westchester*,[223] third-party plaintiffs appealed the dismissal of their third-party complaint served in response to the *Dole* decision after the liability segment of a bifurcated trial was completed. The Second Department reinstated the third-party complaint, holding that *Dole* applies to cases which were still in the judicial process on the date of the *Dole* decision. A third-party complaint was similarly reinstated in *Mosca v. Pensky*[224] where a third-party plaintiff, seeking to take advantage of the *Dole* decision, moved to reargue a motion to dismiss his third-party complaint which had been granted seventeen months earlier. In affirming the lower court's reinstatement, the Second Department made no mention of *Glombaski v. B. & O. R.R.*[225] where the Supreme Court, Monroe County, refused to reinstate a third-party complaint in similar circumstances.

The finality achieved by the pre-*Dole* settlement in *Codling* should not be taken as a touchstone for future settlements. The substantive rights given the defendant by *Dole* have undermined the finality of partial settlements in multi-defendant negligence actions. A defendant seeking to settle an action should be aware that a co-defendant not joined in a settlement can force a *Dole* apportionment by cross-claim. Any settlement which leaves this possibility open fails in its purpose. This point was underscored in *Michelucci v. Bennett*[226] where a plaintiff sued three defendants in an automobile accident case. Two separate settlements were entered into, the first between two defendants and the plaintiff and the second between two co-defendants. Although all the parties had been privy to at least one of the settlements, the court on two separate motions[227] refused to dismiss third-party claims seeking *Dole* apportionments because neither of the settlements included all co-defendants.

For all its flexibility, the *Dole* rule does have some limitations on

222 Meade v. Roberts, 71 Misc. 2d 120, 122, 335 N.Y.S.2d 349, 352 (Sup. Ct. Broome County 1972). *See, e.g.*, Hain v. Hewlett Arcade, Inc., 40 App. Div. 2d 991, 338 N.Y.S.2d 791 (2d Dep't 1972) (mem.); Brown v. City of New York, 40 App. Div. 2d 785, 337 N.Y.S.2d 685 (1st Dep't 1972); Moreno v. Galdorisi, 39 App. Div. 2d 450, 336 N.Y.S.2d 646 (2d Dep't 1972); Sanchez v. Hertz Rental Corp., 70 Misc. 2d 449, 333 N.Y.S.2d 699 (Sup. Ct. Kings County 1972).

223 41 App. Div. 2d 756, 341 N.Y.S.2d 567 (2d Dep't 1973) (mem.).

224 41 App. Div. 2d 775, 342 N.Y.S.2d 76 (2d Dep't 1973) (mem.).

225 72 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct. Monroe County 1972) (mem.).

226 73 Misc. 2d 621, 341 N.Y.S.2d 837 (Sup. Ct. Washington County 1973).

227 The first motion appears at 71 Misc. 2d 347, 335 N.Y.S.2d 967.

its applicability. As *Dole* applies to joint tort-feasors there may be no basis for a *Dole* apportionment when defendants commit separate and successive acts of negligence. In *Szarewicz v. Alboro Crane Rental Corp.*,[228] a plaintiff brought an action against defendants whose negligence allegedly caused his original injury at a construction site and against doctors for subsequent malpractice. The Supreme Court, Bronx County, disallowed the doctors' *Dole* cross-claim against the other defendants, reasoning that there was no legal basis upon which the doctors could be held liable for damages caused by other tort-feasors prior to the alleged malpractice. As the court noted, *Dole* applies where a "third party is found to have been responsible for a part, but not all of the negligence for which the defendant is cast in damages . . . ."[229] At the same time, the court allowed the defendants allegedly responsible for the original injury to cross-claim against the doctors for that portion of damages attributable to the malpractice. Such an apportionment was allowed even prior to *Dole* because, under established tort principles, a tort-feasor is responsible for all damages flowing from his wrongful act.[230]

The law of negligence in New York presently exists in a curious state of limbo, halfway between the former strict rule forbidding all apportionments and the system of comparative negligence certain to come in the future. While defendants are given the right to share liability with others responsible for the plaintiffs' damages, the plaintiff is forced to bear his whole loss if he is at all at fault. A number of lower New York courts have found this incongruity insupportable and have held that the Court of Appeals had abolished the contributory negligence rule in the *Dole* case.[231] These decisions came prior to the Court of Appeals' recent reaffirmance of the doctrine in *Codling v. Paglia*.[232] While acknowledging the judicial origins of contributory negligence and the severe criticism surrounding it, the Court found itself "not prepared at this time to substitute some formula of comparative negligence."[233] For the time being, the Court has left this task to the Legislature.

---

228 73 Misc. 2d 232, 341 N.Y.S.2d 153 (Sup. Ct. Bronx County 1973).

229 *Id.* at 234, 341 N.Y.S.2d at 156, *quoting* Dole v. Dow Chemical Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

230 Derby v. Prewitt, 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962); Milks v. McIver, 264 N.Y. 267, 190 N.E. 487 (1934).

231 Dixon v. Knickerbocker Drivurself, Inc., 72 Misc. 2d 1025, 341 N.Y.S.2d 150 (City Ct. Albany County 1973); Long v. Zientowski, 73 Misc. 2d 719, 340 N.Y.S.2d 652 (Dunkirk City Ct. 1973); Berenger v. Gottlieb, 72 Misc. 2d 349, 338 N.Y.S.2d 319 (N.Y.C. Civ. Ct. Kings County 1972); Murray v. Lidell, Index No. 1221-69 (N.Y.C. Civ. Ct. Richmond County, Sept. 27, 1972).

232 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

233 *Id.* at 345, 298 N.E.2d at 630, 345 N.Y.S.2d at 472.