

## Intrafamily Torts

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authority theory, finding that the insurer had done nothing to mislead the partnership into believing that the limited agent's actions were authorized.<sup>202</sup>

Admittedly, the *Ford* case "test[s] the very outer limits of due process."<sup>203</sup> In view of the desirability of protecting New York insureds, however, the Court might have searched further for the "minimum contacts"<sup>204</sup> necessary to sustain jurisdiction. The fact that an agent is not acting within the scope of his authority does not necessitate a holding that his acts may not be attributed to his principal for jurisdictional purposes.<sup>205</sup> Where an insurer does business through an agent of its own choosing, the New York activities of the latter, although they may not ultimately be held legally binding, should provide the jurisdictionally required forum contacts.

#### DOLE V. DOW CHEMICAL CO.

##### *Intrafamily torts*

The rule of *Dole v. Dow Chemical Co.*<sup>206</sup> is forcing the New York courts to re-examine intrafamily tort law. One of the most controversial topics appears to be the negligent supervision *Dole* claim.<sup>207</sup> This claim

<sup>202</sup> *Id.* at 473, 299 N.E.2d at 664, 346 N.Y.S.2d at 245.

<sup>203</sup> 39 App. Div. 2d at 571, 331 N.Y.S.2d at 868, citing *Hanson v. Denckla*, 357 U.S. 235 (1958); *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 209 N.E.2d 68, 261 N.Y.S.2d 8, cert. denied, 382 U.S. 905 (1965), discussed in *The Quarterly Survey*, 40 ST. JOHN'S L. REV. 122, 133 (1965).

<sup>204</sup> The requirement of "minimum contacts" was first enunciated in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). The Court therein applied a flexible test of fairness and reasonableness in determining jurisdiction.

<sup>205</sup> In *Ford*, the Court seemingly made no distinction between the threshold question of jurisdiction and the merits of the claim. Compare *Elman v. Belson*, 32 App. Div. 2d 422, 302 N.Y.S.2d 961 (2d Dep't 1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 532, 540 (1970), where the question presented was whether the activities of an attorney could be attributed to an Illinois domiciliary defendant, the court stated

[t]here is . . . a genuine and fundamental difference between the court's power to entertain an action and the determination of the action itself. Whether the defendant became obligated to the plaintiffs as a result of his attorney's proceedings conceivably could be decided in any forum having jurisdiction over the parties but the preliminary question which must be resolved is whether the forum invoked by the plaintiffs to make that decision has jurisdiction over the parties.

*Id.* at 424, 302 N.Y.S.2d at 963. While the court found that the acts upon which jurisdiction was predicated were within the attorney's implied authority, it based its decision on more flexible considerations of fairness. "The final standard for jurisdiction is reasonableness—whether the defendant is unfairly burdened by the compulsion to contest a suit in a forum outside his domicile." *Id.* at 426, 302 N.Y.S.2d at 965, citing *International Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945).

<sup>206</sup> 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). For an extended discussion of *Dole* by Professor David D. Siegel see 7B MCKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

<sup>207</sup> The question of the permissibility of such claims has been the subject of a great deal of litigation. See *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972) (claim

most frequently arises when the parent of an infant who has been struck by an automobile<sup>208</sup> brings an action in both a representative and individual capacity against the negligent driver. The driver then attempts to counterclaim against the parent individually, demanding a *Dole* apportionment of any damages recoverable by the child. In certain situations, an apportionment may also be sought by way of impleader.<sup>209</sup> In either case, the theory behind the claim is that the parent has failed to supervise and protect the infant, thus contributing to his injury.

The negligent supervision *Dole* claim has met with varied responses at the trial level. One point of view is that it is barred by intra-family immunity. Although this doctrine is widely considered to have been abolished by the Court of Appeals in *Gelbman v. Gelbman*,<sup>210</sup> some courts have taken the position that it persists as to intrafamily suits where the parties are not protected by liability insurance.<sup>211</sup> In another line of cases, *Dole* claims against the parents of injured children have been disallowed for failure to allege some "special circumstances"<sup>212</sup> requiring the parent to exercise unusual care in supervision.

Recently in *Holodook v. Spencer*,<sup>213</sup> the Appellate Division, Third Department, undertook the most thorough analysis to date of the issue.

allowed); *Northrop v. Hogestyn*, 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); *Kiernan v. Jones*, 73 Misc. 2d 829, 342 N.Y.S.2d 873 (Sup. Ct. Nassau County 1973) (claim disallowed); *Hairston v. Broadwater*, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct. Nassau County 1973) (claim disallowed); *Fake v. Terminal Hardware*, 73 Misc. 2d 39, 341 N.Y.S.2d 272 (Sup. Ct. Albany County 1973) (claim disallowed); *Collazo v. Manhattan & Bronx Surface Transit Operating Authority*, 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972) (claim disallowed); *Bilgore v. Rennie*, 72 Misc. 2d 639, 340 N.Y.S.2d 212 (Sup. Ct. Monroe County 1973) (claim disallowed); *Marrero v. Just Cab Corp.*, 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972) (claim disallowed). Commentators have expressed differing views on the issue. See *Dachs*, *Seider v. Roth Upstaged by Dole v. Dow Chemical Co.*, 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.

<sup>208</sup> Although most of the cases involve automobile accidents, the negligent supervision *Dole* claim may arise in other factual situations. See *Northrop v. Hogestyn*, 75 Misc. 2d 486, 348 N.Y.S.2d 106 (Sup. Ct. Ontario County 1973) (child injured while using defendant's lawn mower).

<sup>209</sup> The defendant may proceed by third party claim against one or both parents who are not parties to the action. See *Fake v. Terminal Hardware*, 73 Misc. 2d 39, 341 N.Y.S.2d 272 (Sup. Ct. Albany County 1973); *Bilgore v. Rennie*, 72 Misc. 2d 639, 340 N.Y.S.2d 212 (Sup. Ct. Monroe County 1973).

<sup>210</sup> 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

<sup>211</sup> See *Kiernan v. Jones*, 73 Misc. 2d 829, 342 N.Y.S.2d 873 (Sup. Ct. Nassau County 1973); *Collazo v. Manhattan & Bronx Surface Transit Operating Authority*, 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972).

<sup>212</sup> See, e.g., *Marrero v. Just Cab Corp.*, 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972).

<sup>213</sup> 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973).

This case involved negligent supervision *Dole* claims against the parents of a four-year-old infant who was struck by the defendant's automobile while running from between parked cars. The trial court had denied a motion to dismiss the claims,<sup>214</sup> holding that an action for *Dole* apportionment should lie "as of right where the infant is *non sui juris* as a matter of law,"<sup>215</sup> and that in other cases the infant's ability to care for himself should be the subject of proof. The Appellate Division reversed over one dissent and dismissed the *Dole* claims as legally insufficient.

In its well-reasoned opinion, the Third Department postulated that no *Dole* apportionment claim based upon negligent parental supervision would lie unless a direct child-parent suit could be maintained on the same ground.<sup>216</sup> Since failure to supervise does not give rise to liability outside of the family setting, the court concluded that such a suit could not be maintained. In this connection the court observed that ". . . *Gelbman* did not create new torts. Had it done so, the very family relationship which had previously constituted merely a defense, would have become a basis for classifying as torts acts or omissions which could not create any liability to the world at large."<sup>217</sup> Accordingly, in a case decided contemporaneously with *Holodook*, *Graney v. Graney*,<sup>218</sup> the court affirmed an order dismissing a direct child-parent suit based on negligent supervision.

Commenting further on the scope of *Gelbman*, the court in *Holodook* rejected as too narrow the theory that intrafamily immunity has been abolished only where liability insurance is present.<sup>219</sup> The court suggested, rather, that *Gelbman* be read as removing the shield of immunity with respect to all acts which are considered torts as between strangers. Such acts were contrasted with parental acts involving the exercise of discretion or authority. These, the court held, should not give rise to liability,<sup>220</sup> even where "special circumstances" such as a child's physical or mental defect are shown.<sup>221</sup> Emphasis was placed upon the difficulty in formulating legal standards of reasonableness in the exercise of parental functions.<sup>222</sup>

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<sup>214</sup> 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973).

<sup>215</sup> *Id.* at 183, 340 N.Y.S.2d at 313.

<sup>216</sup> 43 App. Div. 2d at 131, 350 N.Y.S.2d at 201.

<sup>217</sup> *Id.* at 133, 350 N.Y.S.2d at 202.

<sup>218</sup> 43 App. Div. 2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973).

<sup>219</sup> 43 App. Div. 2d at 132, 350 N.Y.S.2d at 202.

<sup>220</sup> *Id.* at 134, 350 N.Y.S.2d at 204, *citing* *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

<sup>221</sup> 43 App. Div. 2d at 137, 350 N.Y.S.2d at 206.

<sup>222</sup> *Id.* at 135, 350 N.Y.S.2d at 204-05.

The *Holodook* decision is based upon a policy against increasing the burdens of parenthood. In view of the many difficulties encountered in raising children, a court is naturally reluctant to impose a monetary liability on a parent who fails to protect a child from injury. Such a liability seems all the more undesirable in the case of a parent of a mentally or physically defective child. Nothing should be done to increase the already enormous burdens of such parents. It is hoped that the otherwise beneficial *Dole* rule will not have this unfortunate effect. *Holodook* promises that it will not.

### *Insurance Law § 167(3)*

Conflicting decisions continue as to the effect of section 167(3) of the Insurance Law in the context of a *Dole* claim for indemnity against the plaintiff's spouse. The section provides that no liability insurance policy "shall be deemed to insure against any liability of an insured because of death or injury to his or her spouse."<sup>223</sup> The line of division between the cases has been whether or not the intent of section 167(3) should be re-examined in light of *Dole*.<sup>224</sup>

In *State Farm Mutual Automobile Insurance Co. v. Westlake*,<sup>225</sup> the Supreme Court, Nassau County, refused to do so. In this case, the defendants against whom the insured and his spouse had brought suit instituted a third-party action against the insured for apportionment of his spouse's damages. The insurer thereupon sought a declaration of its liability under the policy. The court acknowledged that the intent of section 167(3) was to protect insurance companies from collusive actions between spouses,<sup>226</sup> and that the possibility of collusion is virtually nonexistent in this situation because the insured spouse would have to succeed in her action before the defendant's indemnity claim against the insured arose.<sup>227</sup> Reading the statute broadly, however, the

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<sup>223</sup> N.Y. INS. LAW § 167(3) (McKinney 1966).

<sup>224</sup> Compare *Aetna Cas. & Sur. Co. v. Delosh*, 73 Misc. 2d 275, 341 N.Y.S.2d 465 (Sup. Ct. St. Lawrence County 1973) (holding section 167(3) inapplicable) with *Perno v. Exchange Mut. Ins. Co.*, 73 Misc. 2d 346, 342 N.Y.S.2d 298 (Sup. Ct. Monroe County 1973), and *Smith v. Employer's Fire Ins. Co.*, 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972) (holding section 167(3) applicable).

<sup>225</sup> 74 Misc. 2d 604, 344 N.Y.S.2d 67 (Sup. Ct. Nassau County 1973).

<sup>226</sup> *Id.* at 605, 344 N.Y.S.2d at 68, quoting *New Amsterdam Cas. Co. v. Stecker*, 3 N.Y.2d 1, 7, 143 N.E.2d 357, 360, 163 N.Y.S.2d 626, 631 (1957).

<sup>227</sup> Where both spouses are suing on their own behalf, the one against whom indemnity is sought generally has nothing to gain by deliberately losing the lawsuit because, although he may be bolstering his spouse's claim, he is defeating his own. It may, however, be worthwhile to do so where his injuries are minor and his spouse's are extensive. See *McLaughlin, New York Trial Practice*, 168 N.Y.L.J. 109, Dec. 8, 1972, at 5, col. 1-2.

This is, however, distinguishable from the situation in which the spouse against whom indemnity is sought is not a party-plaintiff to the action. In this case, he has an interest