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Insurance Law § 167(3)

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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."[223] 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*.[224]

In *State Farm Mutual Automobile Insurance Co. v. Westlake*,[225] 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,[226] 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.[227] Reading the statute broadly, however, the

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

224 *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).

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

226 *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).

227 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

court held that the policy did not cover the third-party claim and therefore the insurer had no duty to defend or indemnify its insured. A further basis for the decision was that a finding of liabilty would extend the contract beyond the original contemplation of the parties.

A case involving similar facts in the Supreme Court, Westchester County, yielded a contrary result. *United States Fidelity & Guaranty Co. v. Franklin*[228] was also an action by an insurer for a declaration regarding coverage. In a prior action by a husband-driver-insured and his wife-passenger, the defendants had counterclaimed against the husband for *Dole* apportionment. The court characterized the right of indemnity against the insured as an independent right based upon the fact that the insured, by his negligence, had imposed upon the defendants the burden of bearing more than their fair share of damages. Section 167(3) was thus deemed inapplicable on the theory that the defendants' right to relative contribution was not based upon the insured's "liability" as the term is used in that section. Moreover, since there is little likelihood of collusion in this situation, the statute was not indirectly circumvented.[229] The opinion analogized to the workmen's compensation area; as *Dole* itself illustrates, a right to indemnity against the employer exists in favor of the defendant third-party although a direct suit by the employee against his employer is unavailable.[230]

The *Franklin* decision is the more salutary one. The overriding policies favoring compensation for injuries despite the financial condition of the wrongdoer[231] and equitable apportionment of damages should control where there is little or no opportunity for collusion, the prevention of which is the essential purpose of section 167(3). The fortuitous circumstance that an injured plaintiff is the spouse of the

in "throwing the lawsuit" and section 167(3) of the Insurance Law applies to prevent fraud. *See, e.g.*, Reis v. Economy Hotels and Restaurants, Inc., 4 Misc. 2d 146, 155 N.Y.S.2d 713 (Sup. Ct. Queens County 1956); General Acc. Fire & Life Assurance Corp. v. Katz, 3 Misc. 2d 328, 150 N.Y.S.2d 667 (Sup. Ct. Kings County 1956).

228 74 Misc. 2d 506, 344 N.Y.S.2d 251 (Sup. Ct. Westchester County 1973).

229 *See* note 227 *supra*.

230 *See* Westchester Lighting Co. v. Westchester County Estates, 278 N.Y. 175, 15 N.E.2d 567 (1938). The weakness of this analogy is that a right of action by an employee against his employer is barred by N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965), whereas interspousal suits are still available and all section 167(3) of the Insurance Law does is absolve the insurer from liability in the action. McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 109, Dec. 8, 1972, at 5, col. 2. But the thrust of the analogy is that the claim over in each case is purely for indemnity, and therefore any impediments to a direct suit between the plaintiff and third-party defendant should not apply.

231 344 Misc. 2d at 512, 344 N.Y.S.2d at 256, citing as evidence of this policy N.Y. INS. LAW § 312 (McKinney 1966) (which provides for broad compulsory automobile liability insurance coverage) and N.Y. INS. LAW art. 17-A (McKinney 1966) (which created the Motor Vehicle Accident Indemnification Corporation).

other driver, whose negligence contributed to the accident, should not strip the defendant of his right to obtain apportionment. While it is of course true that a *Dole* claim against the other driver individually is still available, the absence of insurance may effectively make this an empty right. Where the defendant's own liability insurance coverage is exceeded by the amount of the plaintiff's judgment, he will be forced to pay from his own pocket more than he would have if the automobile with which he collided were occupied by an unmarried couple.

Dole and its progeny have necessitated a complete re-examination of section 167(3) by the Legislature. In the interim, however, the courts should be sensitive to the fact that apportionment of damages among wrongdoers on the basis of their relative fault is now an important right in the law of negligence and should be available unless stronger policy considerations would be frustrated.

Gochee v. Wagner *abandoned*

A long-standing and oft-criticized doctrine whose vitality was questioned after *Dole*[232] is the *Gochee v. Wagner*[233] rule of imputed contributory negligence in vehicular collision cases. The essense of the doctrine is that "[t]he driver's negligence will be imputed to the passenger to defeat his action whenever the passenger has the exclusive authority to control the operation of the vehicle, except in a case where the driver himself is the defendant."[234]

The Court of Appeals, in *Kalechman v. Drew Auto Rental, Inc.*,[235] has abandoned the *Gochee* rule on the ground that it is a "pure legal fiction, which . . . conflicts with public policy."[236] In the classic *Gochee* situation, a passenger-owner's action against the driver of the second car was barred by the imputation to him of his driver's negligence. This result could, however, be avoided if he initially sued his own driver, who could then implead the other driver under *Dole*. *Kalechman* involved a slight variation of these facts. In this case, the passenger (*P*) was an employee of the lessee of the defendant's car, which the passenger's father-in-law (*D*) was driving. *P* was killed when the car collided with a truck and an action was commenced on behalf of his

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232 *See* Schwab, Dole v. Dow Chemical Co.: *A Preliminary Analysis*, 45 N.Y. St. B.J. 144, 159 (1973) [hereinafter cited as Schwab]; Munn v. Morris, 42 App. Div. 2d 545, 546, 345 N.Y.S.2d 20, 23 (1st Dep't 1973) (mem.) (Kupferman, J., dissenting).

233 257 N.Y. 344, 178 N.E. 553 (1931).

234 Kalechman v. Drew Auto Rental, Inc., — N.Y.2d —, — N.E.2d —, — N.Y.S.2d — (1974).

235 *Id.*

236 *Id.* at —, — N.E.2d at —, — N.Y.S.2d at —.