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Gochee v. Wagner Abandoned

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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 —.

distributees against the owner-lessor.[237] The complaint was dismissed by the Appellate Division, Second Department, on the theory that *D*'s negligence is imputable to *P* since *P* had dominion and control over *D*.[238] The Court of Appeals unanimously reversed and reinstated the complaint.

While *Dole* could not have been used to circumvent *Gochee* in *P*'s action against the owner-lessor, Judge Wachtler adverted to the fact that this would be the case in the more usual *Gochee* situation,[239] and presented other cogent bases for the Court's rejection of this anachronistic rule. He noted that when it developed during the "horse-and-buggy" days, actual control of the driver by the passenger was a possibility; today, an attempt to exercise control would generally not only be unsuccessful but dangerous.[240] Furthermore, the trend of the law has been to eliminate immunities based upon some special relationship[241] and *Gochee* contravenes this policy. Thus, the Court held that "the plaintiff passenger [is entitled] to recover for negligent operation of the vehicle — no matter what his relationship to the driver may be — unless it is shown that his own personal negligence contributed to the injury."[242] With this statement, the Court has reaffirmed its allegiance to the contributory negligence rule, and has once again declined to adopt a full comparative negligence system.[243] But its elimination of the antiquated doctrine of imputed contributory negligence is a long-overdue and sensible adaptation of the law to reality, and was in any event inevitable in light of *Dole*.[244]

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237 *See* N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).

238 38 App. Div. 2d 974, 331 N.Y.S.2d 711 (2d Dep't 1972) (mem.).

239 — N.Y.2d at — n.1, — N.E.2d at — n.1, — N.Y.S.2d at — n.1; *see* Schwab, *supra* note 232, at 159.

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

241 *See* Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (intrafamily immunity); N.Y. GEN OBLIG. LAW § 3-313 (McKinney 1964) (interspousal immunity).

242 — N.Y.2d at —, N.E.2d at —, — N.Y.S.2d at —.

243 *See* Codling v. Paglia, 32 N.Y.2d 330, 298 N.E.2d 622, 345 N.Y.S.2d 461 (1973).

244 The abandonment of *Gochee* is also significant in the fact that it will increase the number of situations in which section 167(3) of the Insurance Law will be brought into play. *See* text accompanying notes 223-31 *supra*. Even before the demise of *Gochee*, the owner-passenger had a right of action against his own driver. Kleinman v. Frank, 34 App. Div. 2d 121, 309 N.Y.S.2d 651 (2d Dep't 1970), *aff'd without opinion*, 28 N.Y.2d 603, 268 N.E.2d 648, 319 N.Y.S.2d 852 (1971). Since it was often the case that the passenger and driver were spouses, the former would often refrain from suing because section 167(3) eliminated insurance coverage. Now that the bar to his suit against the other driver has been removed, the incidence of *Dole* claims in the face of section 167(3) will multiply. This further intensifies the urgency for a resolution of the question of the section's applicability in *Dole* contexts.