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Dole v. Dow Chemical Co.: Recent Developments

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This decision, to be read on its unique facts, is a meritorious application of a court's authority to prevent misuse of summary proceedings.

DOLE v. DOW CHEMICAL CO.

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

In *Dole v. Dow Chemical Co.*,[183] the Court of Appeals revolutionized New York law by eliminating the active-passive test for indemnification and allowing equitable apportionment of damages among joint tortfeasors based on relative responsibility. In *Kelly v. Long Island Lighting Co.*,[184] the Court confirmed that a *Dole* claim can be made by cross-claim against a co-defendant as well as by impleader of an unjoined co-tortfeasor or by a separate indemnity action.[185]

A number of New York courts[186] and one federal court[187] have also permitted defendants to seek a *Dole* apportionment by counterclaim against plaintiffs suing in a representative capacity or in more than one capacity. The decision with the greatest potential impact has

waiver of these proceedings be expressed in writing as a Statute of Frauds protection, not designed to interfere with a court's power to prevent abuse of summary proceedings.

For examples of waiver by a landlord, see Fanchild Investors, Inc. v. Cohen, 43 Misc. 2d 39, 250 N.Y.S.2d 446 (N.Y.C. Civ. Ct. Bronx County 1964); Valentine Gardens Cooperative, Inc. v. Oberman, 237 N.Y.S.2d 535 (Sup. Ct. Westchester County 1963).

183 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 the ramifications of *Dole* by Professor David D. Siegel, see 7B MCKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

184 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

185 For discussion of the problem of the waiver of *Dole* rights, see 7B MCKINNEY'S CPLR 3019, supp. commentary at 230-32 (1972) (strongest case for waiver where tortfeasor fails to cross-claim against co-defendant); Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 208 (1972) (waiver problem should be avoided by resolving all issues arising from breach of duty in one action).

In Henriquez v. Mission Motor Lines, Inc., 72 Misc. 2d 782, 339 N.Y.S.2d 478 (Sup. Ct. N.Y. County 1972), the defendants sought a *Dole* charge based on the service of a notice of "vouching in" after the jury had been selected. Since the plaintiffs received notice of the defendants' claim, the court treated it as a counterclaim, but disallowed it for laches, without prejudice to a subsequent action for *Dole* indemnity.

The common-law device of "vouching in" is "simply a notice that an action is pending, and an offer to the vouchee to come in and defend, in default thereof the voucher will hold him liable." Bouleris v. Cherry-Burrell Corp., 45 Misc. 2d 318, 319, 256 N.Y.S.2d 537, 538 (Sup. Ct. Albany County 1964).

186 Moreno v. Galdorisi, 39 App. Div. 2d 450, 336 N.Y.S.2d 646 (2d Dep't 1972); Meade v. Roberts, 71 Misc. 2d 120, 335 N.Y.S.2d 349 (Sup. Ct. Broome County 1972); Yarish v. Dowling, 70 Misc. 2d 467, 333 N.Y.S.2d 508 (Sup. Ct. Queens County 1972) (mem.); DeLucia v. Bundock, 168 N.Y.L.J. 12, July 19, 1972, at 13, col. 4 (Sup. Ct. Westchester County); Lipson v. Gewirtz, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. Nassau County 1972). In Sanchez v. Hertz Corp., 70 Misc. 2d 449, 333 N.Y.S.2d 698 (Sup. Ct. Kings County 1972) (mem.), the court allowed the defendants' "cross-complaint" against a co-plaintiff.

187 Sorrentino v. United States, 334 F. Supp. 1308 (E.D.N.Y. 1972).

been *Sorrentino v. United States*,[188] wherein the United States District Court for New York's Eastern District allowed a *Dole* counterclaim against the plaintiff-father of an infant plaintiff who had been struck and injured by a vehicle owned by the defendant, the basis of the claim being allegedly negligent parental supervision. The Supreme Court, New York County, however, in *Marrero v. Just Cab Corp.*,[189] recently disallowed the assertion of such a counterclaim, holding that, in the absence of a showing of special circumstances requiring close supervision, "a pleading which makes a charge of negligence against parents of an eight-year-old child, based on unattendance alone, fails to set forth a cause of action for negligence."[190] The court reasoned that mere unattendance is deemed insufficient to prove parental negligence even if the injured child is non sui juris,[191] and that automatic allowance of such a *Dole* counterclaim in accident cases involving infant plaintiffs could inundate the courts.[192]

Whether *Dole* is fully retroactive remains unsettled. Clearly, under *Kelly*, it applies to all actions decided at the trial or appellate level after March 22, 1972, the date of the *Dole* decision.[193] The Appellate Division, Second Department, followed this in *Moreno v. Galdorisi*,[194] when it unanimously allowed the defendants in an automobile negligence action to amend their answer to include a counterclaim for *Dole* indemnity against a co-plaintiff-driver.[195] The court did not reach "the question as to the application of *Dole* to trials concluded or in which judgment has already been entered."[196]

If *Dole* is held to apply to cases previously decided, an independent action for *Dole* indemnity will be available and free from the bar

188 *Id.*

189 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972).

190 *Id.* at 477, 336 N.Y.S.2d at 304. *Accord*, Collazo v. Manhattan & Bronx Surface Transit Operating Authority, 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972) (5½-year-old infant plaintiff). The Court of Appeals abolished the doctrine of intrafamily immunity for nonwillful torts in Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). The *Collazo* court also argued that the primary rationale of *Gelbman* — that the existence of compulsory automobile insurance means that, in many suits between parent and child, the insurer is the real party in interest — is inapplicable to the *Sorrentino-Marrero* context.

191 *Id.* at 476, 336 N.Y.S.2d at 303, *citing* Ryczko v. Klenotich, 204 App. Div. 693, 198 N.Y.S. 473 (3d Dep't 1923).

192 *Id.* at 477, 336 N.Y.S.2d at 304.

193 Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 29 n.3, 286 N.E.2d 241, 243 n.3, 334 N.Y.S.2d 851, 854 n.3 (1972) ("We, of course, give effect to the law as it exists at the time of our decision.").

194 39 App. Div. 2d 450, 336 N.Y.S.2d 646 (2d Dep't 1972).

195 The *Dole* counterclaim against the driver applies to his co-plaintiff passenger's cause of action. His own cause of action would be defeated by a showing of negligence on his part.

196 *Id.* at 453, 336 N.Y.S.2d at 649.

of the statute of limitations if commenced within six years after satisfaction of the original judgment.[197]

Prior to *Dole*, a tortfeasor lacked standing to appeal a dismissal of the complaint as to a co-defendant.[198] The rationale for this rule was that the tortfeasor had not lost any right to contribution under CPLR 1401 since he had not paid more than his pro rata share of a joint judgment. The Appellate Division, Second Department, in *Stein v. Whitehead*,[199] has now unanimously held that under *Dole* and *Kelly* a defendant "is a party aggrieved by a dismissal of the complaint against a codefendant and he consequently has standing to appeal from such a determination."[200] The court reasoned that a defendant's right to a *Dole* adjudication exists at the time of trial; this right is not inchoate until his payment of a joint judgment.[201]

Another immunity has come under scrutiny as a result of *Dole*. *Mills v. Gabriel*[202] permits an absentee vehicle owner to recover his own damages without imputation of his driver's negligence pursuant to the vicarious liability statute.[203] In *Cadran v. Fanni*,[204] a defendant-owner and a defendant-driver sought to counterclaim for *Dole* indemnity against a plaintiff-owner and a plaintiff-driver. The Suffolk County District Court held that there was "no legal basis to compel contribution from the plaintiff absentee owner [for any liability of his driver as joint tortfeasor indemnitor] although he may be liable for damages to the absentee defendant owner,"[205] citing the *Mills* immunity and

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197 The statute of limitations for contract actions is six years from the time the cause of action accrues. CPLR 213. An indemnity action accrues when the original judgment is paid. Musco v. Conte, 22 App. Div. 2d 121, 125-26, 254 N.Y.S.2d 589, 595 (2d Dep't 1964); Lutz Feed Co. v. Audet & Co., 72 Misc. 2d 28, 30, 337 N.Y.S.2d 852, 855 (Sup. Ct. Delaware County 1972).

198 Price v. Ryan, 255 N.Y. 16, 173 N.E. 907 (1930). *Cf.* Hughes v. Parkhurst, 284 App. Div. 757, 134 N.Y.S.2d 798 (4th Dep't 1954) (tortfeasor lacked standing to seek to have verdict in favor of a co-defendant set aside). Baidach v. Togut, 7 N.Y.2d 128, 164 N.E.2d 373, 196 N.Y.S.2d 67 (1959), established the rule that a tortfeasor who paid a joint judgment after a reversal as to a co-defendant lacked standing to appeal. CPLR 1402(a) allows a tortfeasor who has paid a joint judgment to oppose an appeal by a co-defendant and to contest an appeal from any reversal or modification. CPLR 1402(b) overturned the *Baidach* rule.

199 40 App. Div. 2d 89, 337 N.Y.S.2d 821 (2d Dep't 1972).

200 *Id.* at 92, 337 N.Y.S.2d at 825. "Under *Dole*, each of the tortfeasors should have full appellate rights against the others without regard to whether there has been a joint judgment or not." 7B McKINNEY'S CPLR 3019, supp. commentary at 229 (1972).

201 40 App. Div. 2d at 91-92, 337 N.Y.S.2d at 825.

202 259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't), *aff'd*, 284 N.Y. 755, 31 N.E.2d 512 (1940).

203 N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).

204 72 Misc. 2d 1, 338 N.Y.S.2d 532 (Dist. Ct. Suffolk County 1972).

205 *Id.* at 6, 338 N.Y.S.2d at 537. *See* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1972) ("Nor, for example, are we concerned with issues involving vicarious liability, to which the active-passive dichotomy classically and appropriately belonged.").

adopting the analogy of complete employer immunity under the Workmen's Compensation Law in the absence of an independent tort liability constituting a basis for indemnification.

The effect of *Dole* on settlement rights was the subject of *Michelucci v. Bennett*.[206] During the course of trial, the plaintiff settled with two defendants, reserving the right to continue against the remaining defendant, who subsequently impleaded the ex-defendants for a *Dole* apportionment. The Supreme Court, Washington County, denied a motion to dismiss the third-party complaint since the defendant was "not a party to the release nor bound by its terms. . . ."[207] The court noted that the issue of the third-party defendant's right to credit for the settlement sum is properly raised in the third-party action or a subsequent action.[208]

Similarly, Professor David D. Siegel has argued that a discontinuance by the plaintiff against one tortfeasor should not bar a cross-claim by a co-defendant for a *Dole* apportionment.[209] In *Evans v. City of New York*,[210] the plaintiff discontinued his negligence action with prejudice against one defendant, which stipulated that it continued as a party as to its co-defendant's cross-claim. After a $150,000 verdict was rendered against the co-defendant, the Supreme Court, Kings County, shifted 90% of the liability to the severed defendant on the cross claim. Questioning the plaintiff's motives and finding the verdict contrary to the weight of the evidence, the court stated that it would have set aside the verdict were a *Dole* apportionment unavailable.[211]

Dole established a comparative negligence rule among defendants, but its direct impact on the plaintiff is not so readily discernible. Each tortfeasor remains jointly and severally liable to the plaintiff.[212] In

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206 71 Misc. 2d 347, 335 N.Y.S.2d 967 (Sup. Ct. Washington County 1972).

207 *Id.* at 349, 335 N.Y.S.2d at 969-70.

208 *Id.*, 335 N.Y.S.2d at 970. Professor David D. Siegel has noted that a defendant who settles should require the plaintiff to agree to indemnify him for any *Dole* liability in excess of the settlement sum. "Indeed, unless such an agreement is made, what motive has [a tortfeasor] to settle at all?" 7B McKINNEY'S CPLR 3019, supp. commentary at 224 (1972).

209 7B McKINNEY'S CPLR 3019, supp. commentary at 227 (1972). Professor Siegel cautions that the court should allow a discontinuance only where the severed defendant agrees to continue as to his co-defendant's cross-claim.

210 72 Misc. 2d 216, 338 N.Y.S.2d 538 (Sup. Ct. Kings County 1972).

211 *Id.* at 221, 338 N.Y.S.2d at 542.

212 *See, e.g.*, Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1972) (*Dole* "does not apply to or change the plaintiff's right to recover against any joint tort-feasor in a separate or common action the total amount of his damage suffered and not compensated."); Liebman v. County of Westchester, 71 Misc. 2d 997, 1003, 337 N.Y.S.2d 164, 172 (Sup. Ct. Westchester County 1972) ("[S]ince the tenor of these pronouncements is to benefit defendants as among themselves, neither [*Dole*] nor *Kelly* may be read as limiting plaintiff's opportunities for judgment."). The *Liebman* court noted that many judges are initially charging the jury as to liability. If the jury

New York State Electric & Gas Corp. v. Waldron,[213] the Supreme Court, Broome County, upheld the plaintiff's freedom to seek recovery against the defendant of his choice. The negligence of two defendants was established in their prior action against two present co-defendants whose freedom from negligence was established therein. Holding that the prior judgment was conclusive as to the two defendant's negligence[214] and noting that they had not cross-claimed,[215] the court granted the plaintiff's motion for summary judgment against them and severed the action from any *Dole* adjudication as to all the defendants.

The Supreme Court, Delaware County, apparently extended the reach of *Dole* in *Lutz Feed Co. v. Audet & Co.*[216] by allowing the impleader of a third party not on the indemnity basis of liability to the defendants for all or part of the plaintiff's claim against them, but for an alleged breach of duty owed to the plaintiff. When the plaintiff sued its insurance agents for negligence and breach of contract in failing to notify it of the expiration of an insurance policy which they had agreed to maintain, the defendants alleged that the third-party defendants had acted for the plaintiff and had negligently failed to advise their principal that the policy would not be renewed. The court held that "[s]ince the respective third-party plaintiffs and third-party defendants are deemed to be joint tortfeasors, it follows under [*Dole*] that the third-party complaint states a cause of action."[217]

In *Berenger v. Gottlieb*,[218] the New York City Civil Court, Kings County, became at least the second court[219] to discern an immediate impact of *Dole* on the plaintiff. After surveying the history of the contributory negligence rule and examining the import of *Dole*, the court concluded that "the doctrine of contributory negligence has not survived the Court of Appeals decision in *Dole*."[220] Thus, it refused the defendants' motion to set aside a verdict requiring the plaintiff to bear 20% of his loss.

The Supreme Court, Westchester County, reluctantly disapproved

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decides in favor of recovery, it is instructed to make a percentage allocation of fault. The damages phase of such a split trial follows this liability-apportionment phase. *Id.* at 1005-06, 337 N.Y.S.2d at 174.

213 72 Misc. 2d 78, 338 N.Y.S.2d 248 (Sup. Ct. Broome County 1972).

214 *Id.* at 80, 338 N.Y.S.2d at 250.

215 *Id.*, 338 N.Y.S.2d at 251.

216 72 Misc. 2d 28, 337 N.Y.S.2d 852 (Sup. Ct. Delaware County 1972).

217 *Id.* at 30, 337 N.Y.S.2d at 855.

218 *Id.* 349, 338 N.Y.S.2d 319 (N.Y.C. Civ. Ct. Kings County 1972).

219 *See* Murray v. Lidell, Index No. 1221-69 (N.Y.C. Civ. Ct. Richmond County, September 27, 1972) (jury was instructed to decide the comparative negligence of plaintiff and defendant).

220 72 Misc. 2d at 353, 338 N.Y.S.2d at 324.

such a holding in *Carhart v. Albright*,[221] where it denied the defendant's counterclaim against the plaintiff for his contributory negligence, stating:

> [T]he defendant misconceives the doctrine formulated by the Court of Appeals in *Dole* . . . although he has undoubtedly discerned the trend, and inevitable result, of its holding, i.e., the ultimate adoption of the rule of comparative negligence in this State.[222]

Dole v. Dow Chemical Co. has proved to be a challenging test of the ingenuity of the New York courts. Most decisions applying it have reflected the flexibility and simplicity inherent in the *Dole* decision. "Justice and equity triumph under *Dole*."[223] Its legacy will be a fairer and more realistic tort system, which should ultimately include a comparative negligence rule.

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221 *Id.* 23, 338 N.Y.S.2d 274 (Sup. Ct. Westchester County 1972).

222 *Id.* at 24, 338 N.Y.S.2d at 275.

223 Evans v. City of New York, 72 Misc. 2d 216, 222, 338 N.Y.S.2d 538, 543 (Sup. Ct. Kings County 1972).