Dole v. Dow Chemical Co.: Recent Developments

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diction should be no easier to acquire under the RPAPL than under the CPLR. The court's opinion suggests, however, that where substituted service under RPAPL 735 conforms with CPLR 308(2), a money judgment may be recovered despite the absence of personal delivery of process to the respondent.212

**DOLE v. DOW CHEMICAL Co.**

Dole v. Dow Chemical Co.: Recent developments.

On March 22, 1972, the Court of Appeals decided *Dole v. Dow Chemical Co.*,213 thereby abolishing the active-passive test for indemnification and establishing a system of equitable apportionment of damages among joint tortfeasors. The question of its retroactivity was presented in two recent cases.

In *Hain v. Hewlett Arcade, Inc.*,214 a property owner impleaded the contractor which allegedly created the negligent condition that injured the plaintiff. On March 21, 1972, the Supreme Court, Nassau County, directed a verdict against the third-party defendant after the primary action had been settled. The Appellate Division, Second Department, upheld this procedure subject to proof by a third-party plaintiff of the reasonableness of the settlement and liability to the plaintiff permitting recovery over.215 The court, however, remanded the case for a determination of the relative responsibilities of the tort-

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214 60 App. Div. 2d 991, 338 N.Y.S.2d 791 (2d Dep't 1972) (mem.).


In Michelucci v. Bennett, 71 Misc. 2d 347, 335 N.Y.S.2d 967 (Sup. Ct. Washington County 1972), the court allowed the defendant to implead two former co-defendants with whom the plaintiff had settled, since the defendant had not been a party to the release. The question of credit for the settlement payment was not reached. *Accord*, Williams v. Town of Niskayuna, 72 Misc. 2d 441, 339 N.Y.S.2d 888 (Sup. Ct. Schenectady County 1972) (also rejecting argument that plaintiff was entitled to recover only for defendant's proportionate liability after settling with third-party defendant). *Cf.* Vassar v. Jackson, 72 Misc. 2d 652, 340 N.Y.S.2d 151 (Sup. Ct. Dutchess County 1973) (1970 general release executed by defendant in favor of plaintiff-driver barred counterclaim for indemnity as to co-plaintiff-passenger's cause of action).
feasors in light of Dole, holding that Dole "is to be applied retroactively, at least as to any case still in the judicial process."  

In Glomboski v. Baltimore & Ohio Railroad, a tortfeasor's third-party complaint against the plaintiff's employer was dismissed in 1970 under the active-passive dichotomy. After Dole was decided and although the main action was still pending, the Supreme Court, Monroe County, subsequently refused to allow the defendant to seek a Dole apportionment, adopting the general rule applied when reargument is sought after a motion has been decided and the time for appeal has expired.

Clearly, under Kelly v. Long Island Lighting Co., Dole applies to all actions decided at the trial or appellate level after March 22, 1972. The decision as to the earlier Glomboski motion should have been regarded, at best, as the law of the case not binding in the event of an intervening change in the law.

Under Dole, an apportionment of liability among joint tortfeasors is available by impleader or in a separate indemnity action; under Kelly, it is available by cross-claim. Dole counterclaims have also been allowed where a plaintiff sues in a representative capacity.

In Sorrentino v. United States, the United States District Court, Eastern District of New York, allowed a Dole counterclaim against a plaintiff-father for negligent supervision of the infant plaintiff who had been injured by the defendant's vehicle. The initial response to this

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217 Misc. 2d 552, 338 N.Y.S.2d 1004 (Sup. Ct. Monroe County 1972) (mem.).
218 Id. at 554, 338 N.Y.S.2d at 1005-06, citing Deves v. Fabric Fire Hose Co., 14 N.Y.2d 633, 198 N.Y.S.2d 595, 249 N.Y.S.2d 422 (1964) (mem.); 2 Carmony-Wait 2d, § 8: 81, at 100-01 (1965). The Glomboski court suggested that had the plaintiff recovered against the defendant alone, it would have had six years under Dole to sue its co-tortfeasor for indemnity. In effect, the defendant suffered for its earlier diligence in seeking to implead its co-tortfeasor.


221 In City of New York v. Tirone, 72 Misc. 2d 831, 340 N.Y.S.2d 656 (Sup. Ct. Kings County 1973), the court allowed the plaintiff to maintain a separate apportionment action although the defendant had recovered against it in the main action after Dole was decided. For discussion of the waiver of Dole rights, see 7B McKinney's CPLR 3019, supp. commentary at 280 (1972); Note, Dole v. Dow Chemical Co.: A Revolution in New York Law, 47 St. John's L. Rev. 185, 208 (1972).
tortfeasor and parent—subject to a “pragmatic consideration” of the infant’s age and individual capacity.231

The courts which have refused to allow defendants to plead Dole claims against parents appear to have acted prematurely and “rob[bed] the defendant of an opportunity to present the facts which might make out a case against the parent.”232

Another frequent Dole claim seeks an apportionment of liability between a defendant-driver and the driver of the vehicle in which the plaintiff was a passenger. When the other driver is the plaintiff’s spouse; a question arises as to the obligation of his insurance company to defend and indemnify him against the claim in light of Insurance Law section 167(3),233 which provides that no liability insurance policy shall be deemed to insure against liability incurred because of death of or injury to one’s spouse. In Smith v. Employer’s Fire Insurance Co.,234 the Supreme Court, Tompkins County, held that section 167(3) absolves an insurer from defending such a Dole claim, citing an old line of cases which so held as to third-party indemnity actions by an employer against a husband after the wife had sued the employer.235

The anti-collusion rationale of Insurance Law section 167(3), however, appears to be irrelevant in many Dole situations, as for example, when a defendant counterclaims against a co-plaintiff spouse.

An instructive analogy may be that of the Workmen’s Compensation Law, which provides the employee’s exclusive remedy against his employer.236 This has not precluded recovery over from the employer by a third-party co-tortfeasor sued by an employee.237 Hence, the Dole claim by the defendant against the plaintiff’s spouse could be construed as one purely for indemnity and not an intraspousal claim, thus requiring the insurer to defend and indemnify the spouse.238

“While Dole was a negligence case, it logically should also apply

231 Id. at 183, 340 N.Y.S.2d at 313.
233 N.Y. Ins. Law § 167(3) (McKinney 1966).
236 N.Y. WORKMEN’S COMP. LAW § 11 (McKinney 1965).
development was negative, as typified by the decision of the Supreme Court, New York County, in Marrero v. Just Cab Corp. The court disallowed such a Dole counterclaim on the ground that an allegation of parental negligence based on unattendance alone does not state a cause of action even if the injured child is non sui juris. Two recent cases reached opposite conclusions when presented with counterclaims against parents for improper supervision of their injured children.

In Collazo v. Manhattan & Bronx Surface Transit Operating Authority, the Supreme Court, Bronx County, followed the Marrero rationale. Additionally, the court examined Gelbman v. Gelbman, the 1969 Court of Appeals decision which abolished the doctrine of intrafamily immunity for nonwillful torts. Interpreting Gelbman as applying primarily in the automobile negligence context where an insurer is the real defendant in interest in intrafamily suits, the Collazo court held that the Dole-Kelly-Gelbman revolution "cannot be held to encompass a counterclaim against a parent for negligent supervision of an infant injured while crossing, playing or bicycling in the city's streets, in an action brought to recover for such injuries."

The Supreme Court, Columbia County, in Holodook v. Spencer, rejected this view as violative of the holding in Gelbman. The court held that under Gelbman a child may recover against a parent for "conduct, passive as well as active, that proximately exposes his child to danger and injury by the conduct of a third person . . .", and that Dole and Kelly allow apportionment of responsibility between co-

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224 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct. N.Y. County 1972) (eight-year-old infant plaintiff).

225 The court acknowledged that special circumstances, e.g., mental or physical disability of the child, may require close parental supervision so that a Dole counterclaim would be appropriate. Id. at 477, 336 N.Y.S.2d at 304.

Accord, Bilgore v. Rennie, 72 Misc. 2d 659, 340 N.Y.S.2d 212 (Sup. Ct. Monroe County 1973) (14-year-old infant plaintiff). Both Bilgore and Marrero expressed the fear that a contrary holding would flood the courts with Dole claims against parents.


227 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). The Gelbman Court noted several anomalies in the application of the intrafamily immunity doctrine—it did not apply to willful torts or if the child was of legal age—and saw the jury system as the major protection against collusive suits. It concluded that compulsory automobile insurance "effectively removes the argument favoring continued family harmony as a basis for prohibiting this suit." Id. at 438, 245 N.E.2d at 193-94, 297 N.Y.S.2d at 531.

228 72 Misc. 2d at 950, 339 N.Y.S.2d at 813.


230 Id. at 182, 340 N.Y.S.2d at 312.
in the strict liability and breach of warranty areas, where liability is imposed without fault.\textsuperscript{239} In \textit{Rubel v. Stackrow},\textsuperscript{240} the Supreme Court, Albany County, applied \textit{Dole} to an action based on a statute imposing strict liability. The plaintiff sued four tavern owners under the Dram Shop Act\textsuperscript{241} for injuries caused by an intoxicated person to whom they had dispensed liquor. The court allowed one defendant to cross-claim against its co-defendants for a \textit{Dole} apportionment, reasoning that this would not impair the plaintiff's remedy under the statute nor interfere with the statute's strict liability rule.\textsuperscript{242}

\textit{Bartlett v. State}\textsuperscript{243} raised a significant point as to the application of \textit{Dole} in the Court of Claims. A driver and a passenger filed claims against the state after a collision with a state-owned truck. The Appellate Division, Fourth Department, affirmed a recovery by the passenger and the Court of Claims' omission to apportion liability between the state and the contributorily negligent claimant-driver, reasoning that to have done so "would [have denied] claimant his right to a jury trial in the State's action against him."\textsuperscript{244}

The absence of uniform trial procedures for handling \textit{Dole} claims for apportionment was the subject of a recent report submitted to the Board of Justices of the Supreme Court, Nassau County, by Justices Harnett, Oppido, and Widlitz.\textsuperscript{245} Their major recommendation was increased use by trial judges of the written, special verdict under CPLR 4111 to expedite such claims.\textsuperscript{246} Ordinarily, three questions would be submitted to the jury: (1) Which defendants are liable to the plaintiff? (2) What is their proportionate liability? (3) What are the plaintiff's damages?\textsuperscript{247} By trying the liability and apportionment issues together, only one charge would be required, and the special verdict would guide the jurors.

\textit{Dole} established a comparative negligence rule among defendants in the interest of fairness. Its impact on the contributory negligence

\textsuperscript{240} 72 Misc. 2d 734, 340 N.Y.S.2d 691 (Sup. Ct. Albany County 1973).
\textsuperscript{242} 72 Misc. 2d at 735-36, 340 N.Y.S.2d at 693.
\textsuperscript{243} 40 App. Div. 2d 267, 340 N.Y.S.2d 63 (4th Dep't 1973) (per curiam).
\textsuperscript{244} Id. at 269, 340 N.Y.S.2d at 64, citing Horoch v. State, 286 App. Div. 303, 143 N.Y.S.2d 327 (3d Dep't 1955).
\textsuperscript{246} See 7B McKinney's CPLR 3019, supp. commentary at 215 (1972).
\textsuperscript{247} In a bifurcated trial, the first two questions would be submitted during the liability phase, the third during the damages phase.}
rule is still open, although Dole reflects the Court of Appeals' recent
dissatisfaction with that archaic and unjust rule, and its reasonableness is a compelling argument for the adoption of full comparative
negligence in New York. In Long v. Zientowski, the Dunkirk City Court became at least the third lower court to hold that Dole has
already achieved such a result. The court allowed the plaintiff to re-
cover two-thirds of his small property claim arising out of an auto-
mobile accident with the defendant, reasoning that it could not "believe
that the Court of Appeals will not also provide for apportionment of
negligence between plaintiff and defendant when a proper case reaches
it. Any other result would be inequitable."