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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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212 *Cf.* 1405 Realty Corp. v. Napier, 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y.C. Civ. Ct. Bronx County 1971), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 148, 184 (1972) (implying that rent may be recovered in a summary proceeding if service fulfills the requirements of CPLR 308(4)). *But see* Leven v. Browne's Business School, Inc., 71 Misc. 2d 842, 843, 337 N.Y.S.2d 307, 309 (Dist. Ct. Nassau County 1972) (dictum), *discussed in The Quarterly Survey*, 47 ST. JOHN'S L. REV. 580, 606 (1973) (rent is recoverable only where process is personally delivered to respondent).

213 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).

214 40 App. Div. 2d 991, 338 N.Y.S.2d 791 (2d Dep't 1972) (mem.).

215 *Id.*, 338 N.Y.S.2d at 793, *citing* Colonial Motor Coach Corp. v. New York Cent. R.R., 131 Misc. 891, 228 N.Y.S. 508 (Sup. Ct. Jefferson County 1928). The third-party defendant in *Hain* did not challenge the reasonableness of the settlement.

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."[216]

In *Glomboski v. Baltimore & Ohio Railroad*,[217] 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.[218]

Clearly, under *Kelly v. Long Island Lighting Co.*,[219] *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.[220]

Under *Dole*, an apportionment of liability among joint tortfeasors is available by impleader or in a separate indemnity action;[221] under *Kelly*, it is available by cross-claim. *Dole* counterclaims have also been allowed where a plaintiff sues in a representative capacity.[222]

In *Sorrentino v. United States*,[223] 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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216 40 App. Div. 2d at 991, 338 N.Y.S.2d at 793, *citing* Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

217 72 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* Deeves v. Fabric Fire Hose Co., 14 N.Y.2d 633, 198 N.E.2d 595, 249 N.Y.S.2d 423 (1964) (mem.); 2 CARMODY-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.

The *Glomboski* court also cited Spindell v. Brooklyn Jewish Hosp., 35 App. Div. 2d 962, 317 N.Y.S.2d 963 (2d Dep't 1970), *aff'd mem.*, 29 N.Y.2d 888, 278 N.E.2d 912, 328 N.Y.S.2d 678 (1972), where the cause of action had expired long before a change in the law.

219 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

220 *See* McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 47, Mar. 9, 1973, at 4, col. 3.

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 230 (1972); Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 208 (1972).

222 *E.g.*, 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).

223 344 F. Supp. 1308 (E.D.N.Y. 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

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231 *Id.* at 183, 340 N.Y.S.2d at 313.

232 McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 29, Feb. 9, 1973, at 4, col. 2.

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

234 72 Misc. 2d 524, 340 N.Y.S.2d 12 (Sup. Ct. Tompkins County 1972).

235 *E.g.*, Barson v. General Acc. Fire & Life Assur. Corp., 41 Misc. 2d 1033, 246 N.Y.S.2d 868 (Sup. Ct. N.Y. County 1964); Peka, Inc. v. Kaye, 208 Misc. 1003, 145 N.Y.S.2d 156 (Sup. Ct. Bronx County 1955), *rev'd on other grounds*, 1 App. Div. 2d 879, 150 N.Y.S.2d 774 (1st Dep't 1956); Feinman v. Bernard Rice Sons, 2 Misc. 2d 86, 133 N.Y.S.2d 639 (Sup. Ct. Bronx County 1954), *aff'd mem.*, 285 App. Div. 926, 139 N.Y.S.2d 884 (1st Dep't 1955). *See* General Acc. Fire & Life Assur. Corp. v. Katz, 3 Misc. 2d 328, 150 N.Y.S.2d 667 (Sup. Ct. Kings County 1956).

236 N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965).

237 *See* Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Westchester Light Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E.2d 567 (1938).

238 *See* McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 109, Dec. 8, 1972, at 5, col. 2.

development was negative, as typified by the decision of the Supreme Court, New York County, in *Marrero v. Just Cab Corp.*[224] 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.[225] 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*,[226] the Supreme Court, Bronx County, followed the *Marrero* rationale. Additionally, the court examined *Gelbman v. Gelbman*,[227] 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."[228]

The Supreme Court, Columbia County, in *Holodook v. Spencer*,[229] 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 . . . ,"[230] 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 639, 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.

226 72 Misc. 2d 946, 339 N.Y.S.2d 809 (Sup. Ct. Bronx County 1972) (5½-year-old infant plaintiff).

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.

229 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973) (four-year-old infant plaintiff).

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."[239] In *Rubel v. Stackrow*,[240] the Supreme Court, Albany County, applied *Dole* to an action based on a statute imposing strict liability. The plaintiff sued four tavern owners under the Dram Shop Act[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 *Dole* apportionment, reasoning that this would not impair the plaintiff's remedy under the statute nor interfere with the statute's strict liability rule.[242]

Bartlett v. State[243] raised a significant point as to the application of *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."[244]

The absence of uniform trial procedures for handling *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.[245] Their major recommendation was increased use by trial judges of the written, special verdict under CPLR 4111 to expedite such claims.[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?[247] By trying the liability and apportionment issues together, only one charge would be required, and the special verdict would guide the jurors.

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

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239 Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 206 (1972). *See* Walsh v. Ford Motor Co., 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (applying *Dole* to warranty area).

240 72 Misc. 2d 734, 340 N.Y.S.2d 691 (Sup. Ct. Albany County 1973).

241 N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1964).

242 72 Misc. 2d at 735-36, 340 N.Y.S.2d at 693.

243 40 App. Div. 2d 267, 340 N.Y.S.2d 63 (4th Dep't 1973) (per curiam).

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).

245 B. HARNETT, A. OPPIDO, & P. WIDLITZ, DOLE v. DOW CHEMICAL CO.—AN OUTLINE OF CONSIDERATIONS AND RECOMMENDED TRIAL PROCEDURE (1973). The report is discussed in McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 72, Apr. 13, 1973, at 1, col. 1.

246 *See* 7B MCKINNEY'S CPLR 3019, supp. commentary at 215 (1972).

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,[248] and its reasonableness is a compelling argument for the adoption of full comparative negligence in New York.[249] In *Long v. Zientowski*,[250] the Dunkirk City Court became at least the third lower court[251] to hold that *Dole* has already achieved such a result. The court allowed the plaintiff to recover two-thirds of his small property claim arising out of an automobile 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."[252]

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248 Rossman v. LaGrega, 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971).

249 *See* Yarish v. Dowling, 70 Misc. 2d 467, 469, 333 N.Y.S.2d 508, 511 (Sup. Ct. Queens County 1972) (mem.); 7B McKINNEY'S CPLR 3019, supp. commentary at 217 (1972); McLaughlin, *New York Trial Practice*, 167 N.Y.L.J. 93, May 12, 1972, at 4, col. 1; Note, Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185, 209-17 (1972).

250 73 Misc. 2d 719, 340 N.Y.S.2d 652 (Dunkirk City Ct. 1973).

251 Berenger v. Gottlieb, 72 Misc. 2d 349, 338 N.Y.S.2d 319 (N.Y.C. Civ. Ct. Kings County 1972); Murray v. Lidell, Index No. 1221-69 (N.Y.C. Civ. Ct. Richmond County, Sept. 27, 1972).

252 73 Misc. 2d at 720, 340 N.Y.S.2d at 654.