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CPLR 1401: Contribution Between Joint Tort-Feasors

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ARTICLE 12 — INFANTS AND INCOMPETENTS

CPLR 1201: Court may appoint guardian ad litem in instances where conflict of interest might arise between incompetent and committee.

In *Berman v. Grossman,*[74] a judicially declared incompetent, on his own initiative, retained an attorney to obtain (1) an adjudication of competency, (2) a discharge of his committee and (3) a return of his property. The court recognized the fact that, as a general rule, the judicially declared incompetent cannot invoke the jurisdiction of the court except by means of his committee.[75] However, the court, relying on Mental Hygiene Law, Section 100(1) which gives the supreme court jurisdiction over such persons and their property, utilized CPLR 1201 to appoint a guardian *ad litem* in addition to the attorney retained by the incompetent. The Court of Appeals, in *Sengstack v. Sengstack,*[76] has established precedent which allows an appointment of a guardian *ad litem* under special circumstances such as a conflict of interest. A clear example of such a conflict warranting the utilization of CPLR 1201 is found when the incompetent seeks to sue his committee directly for fraud.[77]

The problem presented in the instant case is whether the circumstances warranted the multiple representation of the incompetent. Under the existing facts, there was an obvious interest of the committee to preserve its own existence, possibly to the detriment of the incompetent. From the majority's holding it would seem that any apparent conflict of interest will suffice to empower the court to appoint a guardian *ad litem.* In opposition, the dissent questioned the propriety of the appointment of the guardian *ad litem* in view of the fact that an attorney was retained to protect the incompetent's interests.

ARTICLE 14 — ACTIONS BETWEEN JOINT TORT-FEASORS

CPLR 1401: Contribution among joint tort-feasors.

CPLR 1401, which provides for contribution among joint tort-feasors, is, as was its analogue,[78] in derogation of the common law.[79]

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[74] 24 App. Div. 2d 432, 260 N.Y.S.2d 736 (1st Dep't 1965).

[75] *In re* McGuinness, 290 N.Y. 117, 48 N.E.2d 286 (1943); see also Shatsky v. Sea Gate Ass'n, 11 Misc. 2d 905, 172 N.Y.S.2d 947 (Sup. Ct. Kings County 1958).

[76] 4 N.Y.2d 502, 151 N.E.2d 895, 176 N.Y.S.2d 337 (1958).

[77] Mathews v. Mathews, 25 Misc. 2d 250, 203 N.Y.S.2d 475 (Sup. Ct. Broome County 1960).

[78] CPA § 211-a.

[79] 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1401.01 (1965).

Recently, in *Bundy v. City of New York*,[80] plaintiff upon alighting from a bus, operated by defendant Surface Transportation Corporation, fell due to an obstruction caused by an excavation. The obstruction was created by defendant Consolidated Edison Company pursuant to a permit from defendant City of New York. The actual work, however, was performed by defendant Slattery Contracting Company. The city cross-claimed against Consolidated Edison which, in turn, cross-claimed against Slattery. Consolidated Edison also commenced a third-party action against Fitzgerald Paving Company which had undertaken, but failed, to pave the hazard.

The plaintiff recovered a judgment against the four defendants and both the city and Consolidated Edison recovered on their cross-claims. Thereupon, Surface paid one-quarter of the judgment and Slattery paid the balance. Slattery thereafter sought contribution, contending that Fitzgerald should be liable for one-half of Consolidated Edison's liability. The majority of the court held that as between these parties there existed no right of contribution.[81]

The rationale for this decision lies in the strict application of the statute. CPLR 1401 limits the right of contribution to *defendants* who have paid *more than* their pro rata share of the judgment. Here, Fitzgerald was not a defendant in the plaintiff's action but was impleaded by Consolidated Edison. Slattery realized this difficulty and argued that it was proceeding against Fitzgerald indirectly as an indemnitor of Consolidated Edison who was a defendant. The court was not pursuaded by this contention.

The holding in this case is a good illustration of the judicial tendency to narrowly construe contribution.[82] This attitude has been reinforced by the repeated legislative failures of the Law Revision Commission's recommendation providing for a general right of contribution based on common liability rather than upon joint judgment.[83]

In addition, the court in *Bundy* held Surface liable for one-half of the judgment, one-quarter to Slattery by way of contribution. The theory for this division was that two sets of circumstances combined to cause the injury. The first one consisted in the creation of the hazardous condition, for which the city, the utility and the contractor were responsible, and the second one was in placing the plaintiff in a dangerous situation, caused by Surface.

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[80] 23 App. Div. 2d 392, 261 N.Y.S.2d 221 (1st Dep't 1965).

[81] The dissent noted that the majority's opinion disregarded the adjudication of the trial court holding that Slattery and Fitzgerald were jointly liable for Consolidated Edison's share.

[82] Fox v. Western New York Motor Lines, Inc., 257 N.Y. 305, 178 N.E. 289 (1931). See generally 2 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 1401.01 (1965).

[83] 1952 N.Y. LEG. DOC. No. 65, N.Y. LAW REVISION COMM'N REP. (D) 27.

The court's rejection of the arithmetical approach of dividing the total recovery by the number of defendants in favor of a more equitable division has long-standing judicial acceptance in the area of derivative liability.[84] The majority noted that it was not to be confined to such situations, but rather was to be utilized when the nature of the association of the defendants involved allowed the imposition of a more equitable result.[85]

Thus, the practitioner should be sensitive to the strict interpretation accorded the term "defendant" in CPLR 1401, and to the possibility of a judicial determination of pro rata share at variance with the arithmetical formula.

ARTICLE 30 — REMEDIES AND PLEADING

CPLR 3012: Service of pleadings and demand for complaint.

In *Waldron v. Ward*,[86] plaintiff appealed from an order which granted defendant's motion to dismiss the complaint for neglect to prosecute. The appellate division affirmed, holding, however, that the action should have been dismissed under CPLR 3012(b) for failure to serve a complaint and proceed with the action. The court noted that the motion to dismiss was for failure to serve a complaint [87] and not for neglect to prosecute.[88] After serving the summons, the plaintiff did nothing for forty months and the appellate division found that there was nothing in the record to justify such delay. The instant case was an action to recover for personal injuries. Presumably, the three-year statute of limitations had expired at the time of the dismissal for the forty-month delay.

CPLR 3012(b) provides for the dismissal of an action when a plaintiff fails to serve a complaint within twenty days after a written demand by the defendant. Under a similar provision in the CPA, dismissals were generally granted when there was no valid excuse for the delay and no meritorious claim was shown.[89] CPLR

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[84] Wold v. Grozalsky, 277 N.Y. 364, 178 N.E. 389 (1938).

[85] Lyons v. Provencial, 20 App. Div. 2d 875, 248 N.Y.S.2d 663 (1st Dep't 1964).

[86] 24 App. Div. 2d 470, 260 N.Y.S.2d 850 (2d Dep't 1965).

[87] CPLR 3012(b) provides: "If the complaint is not served with the summons, the defendant may serve a written demand for the complaint. If the complaint is not served within twenty days after service of the demand, the court upon motion may dismiss the action."

[88] CPLR 3216 provides for the dismissal, upon motion, or on the court's own initiative, of an action for unreasonable neglect to prosecute. This section does not speak expressly in terms of a *complaint*, but speaks in terms of a general neglect to prosecute, and of a failure to timely file and serve a note of issue.

[89] CPA § 257. See *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 406, 441 (1965).