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Hypothetical Pleading--Indemnity

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incomplete treatment. The practitioner is urged to read the case thoroughly. His pleading burdens may be substantially relieved if he keeps in mind the admonitory words that *Foley* directs at anyone who would ask the court to dismiss the pleading upon any showing that does not manifest how its defects—whatever they be —prejudice him. If *Foley* is adhered to, the fear of the pleading draftsmen will be a thing of the past so long as the pleading gives basic notice to the other party of what it is that the pleader complains of.

Hypothetical Pleading — Indemnity

In a recent case,[85] a retailer brought an action against a doll manufacturer for breach of an implied warranty of merchantability. The plaintiff alleged that he was being sued in Connecticut on behalf of an infant who sustained an eye injury while playing with a doll purchased in one of the plaintiff's stores. The complaint indicated that the retailer had denied the allegations in the Connecticut suit, but that *if* liability should be adjudged against plaintiff (as defendant in that suit), he would be entitled to be indemnified by the doll manufacturer because ultimate fault would be in its breach of implied warranty in the manufacture of said doll. The appellate division, in reversing the lower court decision, held that the complaint was sufficient to state a cause of action for breach of implied warranty even though the cause of action was hypothetically pleaded.[86]

At common law hypothetical pleadings were subject to demurrer on the grounds of indefiniteness and uncertainty.[87] Even under the CPA, hypothetical pleadings were frowned upon by the courts,[88] with but few exceptions.[89] The court in the instant case read quite liberally Rule 3014 of the CPLR, which permits causes of action or defenses to be pleaded hypothetically. It sustained the complaint even though it did not unequivocally assert a present breach of the warranty. The court merely subjected the hypothetical pleading to a "good faith" test and found that the existence or non-existence of the breach was a fact concerning which the plaintiff had pleaded with "honesty and good faith." [90]

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[85] W. T. Grant Co. v. Uneeda Doll Co., *supra* note 71.

[86] *Id.* at 362-63, 243 N.Y.S.2d at 430-31.

[87] Stroock Publishing Co. v. Talcott, 129 App. Div. 14, 113 N.Y. Supp. 214 (2d Dep't 1908).

[88] General Aniline & Film Corp. v. Bayer Co., 305 N.Y. 479, 113 N.E.2d 844 (1953); Lazar v. Steinberg, 269 App. Div. 760, 54 N.Y.S.2d 859 (2d Dep't 1945).

[89] Polstein v. Smith, 239 App. Div. 724, 268 N.Y. Supp. 617 (1st Dep't 1934); R & L Goldmuntz Sprl v. Fischer, 57 N.Y.S.2d 489 (Sup. Ct. 1945).

[90] W. T. Grant Co. v. Uneeda Doll Co., *supra* note 71, at 363, 243 N.Y.S.2d at 430-31.

The dissent argued that the cause of action pleaded was one for indemnification and as such was prematurely brought since it would not accrue until there was an actual — and satisfied — judgment on behalf of the infant against the retailer in the Connecticut action. It would seem that even though the action be viewed as one for indemnification it could nonetheless be allowable by simple analogy to an impleader cause of action, which may be asserted when a party is or *may be* liable to the pleading party.[91]

An impleader cause of action in New York is one for indemnity, and though an indemnity cause of action does not accrue until actual payment by the third-party plaintiff of any judgment recovered against him, impleader traditionally permits assertion of the indemnity claim on a hypothetical basis (*i.e.*, without it being certain that there will be anything for which the third-party plaintiff would have to be indemnified).

Thus, even though there is no express statutory authorization for permitting such a premature independent action for idemnification, the action may be permitted by a liberal construction of the CPLR as required by section 104, and a liberal construction of the pleadings as authorized by section 3026.[92] Furthermore, the court after allowing the complaint, can either stay the proceedings until the Connecticut action culminates or continue the action, but stay any judgment until the Connecticut action is completed, thereby insuring that defendant's rights will not be prejudiced. There was obviously a jurisdictional problem involved in this case, in that the other action, pending in Connecticut, was beyond the control of the New York courts. The case was distinguished on that ground by another case,[93] which indicated that an independent indemnity claim will not be allowed before its technical accrual when jurisdictional problems are not present.

Pleading Special Damages — Itemization

Rule 3015(d) of the CPLR requires that special damages be itemized. Although the rule is new, there is some indication that it merely codifies the existing case law which recognizes a distinction between general damages[94] which need not be pleaded with

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[91] CPLR § 1007.

[92] Section 3026 provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced." Ultimately, the significance of the instant case lies not so much in the construction it has given hypothetical pleadings, but rather in the further indication that the first department stands ready to construe pleadings liberally in order to allow a plaintiff with an honest claim his day in court.

[93] Morey v. Sealright Co., 247 N.Y.S.2d 306 (Sup. Ct. 1964).

[94] General damages are such as are naturally presumed to follow from the injuries alleged. 4 SEDGWICK, DAMAGES § 1261 (9th ed. 1912).