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Civil Practice—Preference in Docketing Denied Though Party Aged, Infirm, and Destitute

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one injured would fall within the risk created by his conduct. *Palsgraf v. Long Island R.R. Co.,* 248 N. Y. 339, 162 N. E. 99 (1928); *Mac Pherson* v. *Buick Motor Co.,* supra at 390, 111 N. E. at 1053. Social conditions that once demanded temporary protective judicial legislation for manufacturers no longer exist. See Seavey, *Cardozo and the Law of Torts,* 52 Harv. L. Rev. 372, 379 (1939).

There are no legal or social barriers that now prevent approaching the manufacturer liability cases from the standpoint of the general principles of negligence. It is submitted that the complaint in *Campo* v. *Scofield* stated a cause of action in negligence; a preclusion of a manufacturer's responsibility should not rest on the patency or obviousness of the danger he creates.

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CIVIL PRACTICE—PREFERENCE IN DOCKETING DENIED THOUGH PARTY AGED, INFIRM, AND DESTITUTE

Plaintiff, over 72 years of age, received injuries in an accident allegedly due to the negligence of the Defendant and moves for preference in docketing this action for trial. In support of this contention, the following facts are alleged. Plaintiff received a fractured femur necessitating a metal pin in the hip, but is too old for a cast. According to physician's affidavit, Plaintiff is "totally and completely disabled," and according to physician's testimony under oath, Plaintiff's injury is permanent. Further, due to the effects of the injury and Plaintiff's age, it is extremely likely that he may not survive to trial in the regular order. The doctor bill is unpaid. Neither Plaintiff nor his wife, who is 70, has a bank account. There is no insurance except a $500.00 life policy to cover burial expenses. Plaintiff's income, received as Social Security benefits, is $35.00 a month; that of his wife, $19.00 a month. They must pay $34.00 a month rent, exclusive of gas and electricity. Only occasionally do various members of the family contribute to their aid. Held (3-2): Motion for preference properly denied under Rule 151 of Rules of Civil Practice. *Bitterman* v. *2007 Davidson Avenue, Inc.,* 278 A. D. 759, 104 N. Y. S. 2d 81. (1st Dept. 1951).

Subsection (3) of Rule 151 states that preference may be granted in "an action or special proceeding in which it is shown to the court or a judge thereof that the interest of justice will be served by an early trial or hearing thereof." This section was proposed by the Judicial Council to "simplify and consolidate for the entire State the procedure to be followed in obtaining a preference." It was designed to replace certain subdivisions of Section 138 of the Civil Practice Act which were in a state of cumbersome confusion. Rule 151 was needed to alleviate the technical procedure by which preference was being granted in nearly all cases, and to return the exercise of discretion to a consideration of the facts

and circumstances of each case as presented. "It is intended by this provision (subsection (2) as proposed—subsection (3) as enacted)—to permit a cause to be advanced for trial out of its regular order only if the facts of the particular case show a necessity for such advancement, and to obviate the advancement of causes simply because they fall into a specified category and without regard to the need thereof, - - -." 6 N. Y. Jud. Council 45, 267-287. From the proposal by the Judicial Council and wording of the rule by the Legislature as enacted, it appears that application of subsection (3) of Rule 151 is to be guided by a review of the facts of the particular case in the light of the interests of justice.

There is no case in which the First Department has handed down an opinion containing its interpretation of subsection (3). However, other courts have construed and applied the rule. Destitution is a basic criterion. *Whithers* v. *News Syndicate Co.,* 265 A. D. 868, 37 N. Y. S. 2d 780 (2nd Dept. 1942). In *Conroy* v. *Erie R.R. Co.,* 188 Misc. 59, 66 N. Y. S. 2nd 433 (Sup. Ct. 1946), Plaintiff was 71 years old, had both legs off and subsisted on charity. In view of the circumstances, destitution created a need for preference. And where an order granting preference was reversed the court said, "There is no persuasive showing of destitution." *O'Callaghan* v. *Brawley,* 276 A. D. 908, 94 N. Y. S. 2d 16 (2nd Dept. 1950). Likelihood of death before trial can stand alone as grounds for granting preference. *Rinzler* v. *Manufacturers Trust Co.,* 190 Misc. 710, 75 N. Y. S. 2d 867 (Sup. Ct. 1947); *Healy* v. *Healy,* 193 Misc. 62, 99 N. Y. S. 2d 874 (Sup. Ct. 1950). And when Plaintiff was 74 years of age and not likely to survive more than one year, the court reversed an order denying a motion for preference. *Christenson* v. *Brooklyn and Queens Transit Corp.,* 241 A. D. 697 (2nd Dept. 1944).

In view of the criterion employed by other courts in applying the same subsection of the same rule, the purpose set out by the proposal of the Judicial Council to the Legislature, and the wording of the rule itself, it is submitted that the holding in the instant case affirms an improvident exercise of discretion. Plaintiff is 72 years of age and permanently disabled. (cf. *Conroy* v. *Erie R.R. Co.,* supra.) According to expert testimony, Plaintiff is not likely to survive until trial in the regular order. (cf. *Christenson* v. *Brooklyn and Queens Transit Corp.,* supra.) The action for which the motion was made is for money damages, and therefore it would seem that the interest of justice will be served if there is sufficient immediate need for such recovery. After paying rent, Plaintiff and his wife have $4.60 a week, or less than $.66 a day, out of which must come gas, electricity, food and all other means of sustenance. Impoverishment, helpless physical condition, advanced age and likelihood of death before trial are clearly present in the circumstances under which this motion for preference was made. It is felt that fiction could not have provided a more exemplary situation for which subsection (3) of Rule 151 was designed.

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