

No Cause of Action May Be Maintained for Negligent Supervision by an Unemancipated Sibling

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mit the admission of such evidence.¹⁹⁵ It is submitted that the use of limiting instructions, while not free from difficulty,¹⁹⁶ appears to be the most efficacious compromise. Indeed, such instructions already have proved workable in limiting the effect of evidence admitted solely for impeachment purposes.¹⁹⁷ It is suggested, therefore, that limiting instructions would provide some protection to the defendant being sued under multiple theories of tort liability.¹⁹⁸

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No cause of action may be maintained for negligent supervision by an unemancipated sibling

Under the doctrine of intrafamily immunity, tort actions between parents and their minor children had long been prohibited in New York.¹⁹⁹ Although the Court of Appeals ultimately abol-

¹⁹⁵ See Note, *Products Liability and Evidence of Subsequent Repairs*, *supra* note 169, at 851.

¹⁹⁶ The use of limiting instructions as an effective means to remove unwanted inferences from jurors' minds has been debated. See, e.g., *Nash v. United States*, 54 F.2d 1006 (2d Cir.), *cert. denied*, 285 U.S. 556 (1932). Judge Learned Hand noted that jury instructions are like "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's." *Id.* at 1007.

¹⁹⁷ When jury instructions are used to limit the effect of evidence admitted for impeachment purposes the jury is instructed that the evidence is to be received for this limited purpose only and has no probative value. See, e.g., *People v. Summers*, 49 App. Div. 2d 611, 612, 370 N.Y.S.2d 204, 206 (2d Dep't 1975); *People v. Williams*, 37 App. Div. 2d 686, 687, 323 N.Y.S.2d 377, 379 (4th Dep't 1971).

¹⁹⁸ Concededly, post-accident design modification evidence is prejudicial under any theory of liability. If, as the *Caprara* Court stated, the purpose of admitting subsequent design modifications in a strict products liability case is to aid the jury in understanding the alleged defect, 52 N.Y.2d at 125, 417 N.E.2d at 551, 436 N.Y.S.2d at 257, it would appear unnecessary and unduly prejudicial to identify the defendant as the originator of the design modification. See Twerski, *Corporations Face Dilemma in Rulings on Design v. Manufacturing Defects*, N.Y.L.J., Mar. 2, 1981, at 4, col. 1. It is suggested, therefore, that unless the plaintiff can establish a relevant purpose for the disclosure, the identity of the originator of the design change should not be disclosed to the jury. See *id.*

¹⁹⁹ See *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928) (per curiam) *overruled*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). The judicially created intrafamilial immunity doctrine first appeared in the United States in *Hewellette v. George*, 68 Miss. 703, 9 So. 885, 887 (1891). A variety of public policy concerns have been expressed to justify the doctrine including the preservation of domestic tranquility and the resources of the family treasury; the avoidance of fraudulent claims; and the protection of the parents' right to exercise discretion in the supervision of their children. See McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1072-77 (1930). Most states

ished parent-child tort immunity,²⁰⁰ it has refused to allow an injured child to maintain a negligent supervision action against his parents.²⁰¹ Recently, in *Smith v. Sapienza*,²⁰² the Court interpreted this exception to bar negligent supervision actions against unemancipated siblings.²⁰³

In *Sapienza*, the 4-year-old plaintiff, while under the supervision of his 10-year-old sister, was bitten by a neighbor's dog.²⁰⁴ The injured infant's father commenced a negligence action against the neighbor on the child's behalf.²⁰⁵ The neighbor, in turn, filed a third party claim for contribution against the supervising sib-

still adhere to the doctrine, although in diluted form. *See, e.g., Villaret v. Villaret*, 169 F.2d 677, 678-79 (D.C. Cir. 1948) (applying Maryland law); *Kohler v. Rockwell Int'l Corp.*, 600 S.W.2d 647, 650 (Mo. App. 1980); *Borst v. Borst*, 41 Wash. 2d 642, 648, 251 P.2d 149, 156 (1952) (en banc).

²⁰⁰ *See Gelbman v. Gelbman*, 23 N.Y.2d 434, 439, 245 N.E.2d 192, 194, 297 N.Y.S.2d 529, 532 (1969). In *Gelbman*, a mother who had sustained injuries as a passenger in an automobile collision was allowed to bring a negligence action against her son, the driver of the vehicle. *Id.* at 436, 439, 245 N.E.2d at 192, 194, 297 N.Y.S.2d at 529, 532. The effect of *Gelbman* is to permit suits between family members when their acts would, absent a family relationship, be tortious. *See Holodook v. Spencer*, 36 N.Y.2d 35, 44, 324 N.E.2d 338, 342, 364 N.Y.S.2d 859, 866 (1974). *See generally* Thuillez, *Parental Nonsupervision: The Tort That Never Was*, 40 ALB. L. REV. 336, 337-40 (1976) [hereinafter cited as *Parental Nonsupervision*].

²⁰¹ *See Holodook v. Spencer*, 36 N.Y.2d 35, 40, 324 N.E.2d 338, 340, 364 N.Y.S.2d 859, 862-63 (1974). In *Holodook*, the infant plaintiff, who had been struck by the defendant's automobile, brought an action for personal injuries. *Id.* at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864. In response, the defendant alleged that the child had "darted out from between parked cars" and that the parent's negligent failure to supervise the child entitled him to an apportionment of damages under *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). 36 N.Y.2d at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864. *See note 206 infra.* In denying the defendant's contribution claim, the Court stated that prior to revocation of the intrafamily immunity doctrine, a parent's negligent supervision had not been recognized as an actionable tort. 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866-67. Indeed, the Court had cautioned in *Gelbman* that in abolishing the immunity defense it was "not creating liability where none previously existed." 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532. Thus, the *Holodook* Court was required to decide whether a new cause of action based on parental negligent supervision should be established. 36 N.Y.2d at 40, 324 N.E.2d at 340, 364 N.Y.S.2d at 862-63. Rejecting the proposed cause of action, the Court expressed a reluctance to allow the judiciary to intrude into the area of discretion exercised by a parent in fostering the growth of a child. *Id.* at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871. *See generally Parental Nonsupervision, supra* note 200, at 346-49. The Court also feared the consequences of *Dole* contribution upon familial relations, noting that since a family generally relies on a common treasury, any contribution obtained from a parent would reduce the value of the recovery to the child and thereby engender family strife. 36 N.Y.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868-69.

²⁰² 52 N.Y.2d 82, 417 N.E.2d 530, 436 N.Y.S.2d 236 (1981).

²⁰³ *Id.* at 86, 417 N.E.2d at 532, 436 N.Y.S.2d at 238.

²⁰⁴ *Id.* at 84, 417 N.E.2d at 531, 436 N.Y.S.2d at 237.

²⁰⁵ 73 App. Div. 2d 224, 225, 426 N.Y.S.2d 14, 15 (2d Dep't 1980).

ling.²⁰⁶ The Appellate Division, Second Department, affirmed special term's dismissal of the third party complaint, finding that the policy considerations which denied parental negligent supervision actions applied with equal force to actions against siblings.²⁰⁷

The Court of Appeals, relying primarily on its decision in *Holodook v. Spencer*, affirmed in a unanimous opinion authored by Chief Judge Cooke.²⁰⁸ The Court stated that many of the policy considerations enunciated in *Holodook*, which had disallowed actions for negligent parental supervision, also "militate[d] against recognition of a cause of action for negligent supervision between unemancipated siblings."²⁰⁹ The Court noted that recognition of a negligent supervision action would permit a right of contribution between a third party tortfeasor and a negligently supervising sibling.²¹⁰ Relying on *Holodook's* statement that a family is a single economic unit, the Court reasoned that such contribution would reduce the value of damages given to the injured child.²¹¹ Chief Judge Cooke also stated that negligent supervision actions could engender intrafamily conflict because the parents would be torn between promoting the injured child's suit and assisting his sibling in the third party action.²¹² The Court further observed that the temporary entrustment of a child to the care of a brother or sister is essentially a delegation of the parent's supervisory authority and

²⁰⁶ *Id.* The right of a tortfeasor to receive proportionate contribution from a concurrent tortfeasor was established in *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), and has been codified in CPLR 1401. See generally CPLR 3019, commentary at 37 (Supp. 1980-1981); TWELFTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1973), in TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 197, 213-18 (1975). For discussions of the effect of contribution on the area of parent-child litigation, see Wilner and Farrell, *Dole v. Dow Chemical Co.: The Kaleidoscopic Impact of a Leading Case*, 42 BROOKLYN L. REV. 457, 469-76 (1976); 2A WK&M ¶ 1401.18.

²⁰⁷ 73 App. Div. 2d at 226-27, 426 N.Y.S.2d at 17-18. The appellate division reasoned that the considerations expressed in *Holodook* against creating a "strain on the family relationship" and "circumscribing the [free exercise] of discretion" by a parent were "equally important" with respect to an action against an injured child's sibling. *Id.* at 229, 426 N.Y.S.2d at 17-18. The appellate division also dismissed a third party complaint which had been brought against the plaintiff's father, stating that "[p]arents owe no duty to the world at large to prevent tort-feasors from injuring their children." *Id.* at 226, 426 N.Y.S.2d at 16. The Court of Appeals declined to review this determination because it was not a final decision within the meaning of the state constitution. *Smith v. Sapienza*, 50 N.Y.2d 913, 409 N.E.2d 995, 431 N.Y.S.2d 523.

²⁰⁸ 52 N.Y.2d at 84, 87, 417 N.E.2d at 531, 533, 436 N.Y.S.2d at 237, 239.

²⁰⁹ *Id.* at 85, 417 N.E.2d at 531-32, 436 N.Y.S.2d at 237-38.

²¹⁰ *Id.* See note 206 *supra*.

²¹¹ 52 N.Y.2d at 85-86, 417 N.E.2d at 532, 436 N.Y.S.2d at 238.

²¹² *Id.* at 86, 417 N.E.2d at 532, 436 N.Y.S.2d at 238.

that the gravamen of the offense, negligent parental supervision, is none other than that excepted by *Holodook*.²¹³ Finally, the Court stated that the entrustment of supervisory authority to an infant is not equivalent to giving him a dangerous instrument,²¹⁴ noting that when the latter conduct results in injury to a third party, it generally does warrant a negligence action against the child's parent.²¹⁵

It is submitted that the *Sapienza* decision is a logical refinement of *Holodook* since it recognizes that the policy considerations which bar parent-child negligent supervision suits weigh against negligent supervision actions between members of a nuclear family. Nevertheless, it is suggested that the rule forged in *Holodook* and supplemented in *Sapienza* should not be extended to forbid negligent supervision claims against persons outside of the nuclear family. Indeed, a majority of the lower courts have upheld suits for

²¹³ *Id.* at 86 & n.2, 417 N.E.2d at 532 & n.2, 436 N.Y.S.2d at 238 & n.2. The Court noted that, absent parental delegation of supervisory authority, a sibling generally has no obligation to supervise another sibling. *Id.*

²¹⁴ *Id.* at 86-87, 417 N.E.2d at 532, 436 N.Y.S.2d at 238. Chief Judge Cooke stated that the defendant's reliance on *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978), was unfounded. 52 N.Y.2d at 86-87, 417 N.E.2d at 532, 436 N.Y.S.2d at 238. The Court held in *Nolechek* that although the decision to entrust a child with a dangerous instrument was "an element of parental supervision," and thus could not give rise to a child-parent action, the parent nevertheless would be liable for the third party defendant's injury, including exposure to potential tort liability. 46 N.Y.2d at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. Prior to *Nolechek*, the Court had acknowledged that a parent would be liable for injuries to a third party which resulted from negligent entrustment of a dangerous instrument to a child. See *Holodook v. Spencer*, 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866; note 215 *infra*. Interestingly, the *Sapienza* Court did not consider whether a parent may incur liability for injuries to a third party which result from a grossly negligent delegation of supervisory authority. Such liability, theoretically, could be premised on the dangerous instrumentality theory. Indeed, circumstances may be envisioned where a court properly could conclude that a parent had breached a duty owed to the world at large by allowing a child to supervise another child known to have inherently dangerous propensities. Cf. *Goedkoop v. Ward Pavement Corp.*, 51 App. Div. 2d 542, 543, 378 N.Y.S.2d 417, 419 (2d Dep't 1976) (parent owed duty to the world not to negligently maintain explosives which injured child); *Hurst v. Titus*, 99 Misc. 2d 205, 208-09, 415 N.Y.S.2d 770, 774 (Sup. Ct. Monroe County 1979) (mother owed duty to all not to negligently start a fire which injured child).

²¹⁵ 52 N.Y.2d at 86-87, 417 N.E.2d at 532, 436 N.Y.S.2d at 238. Courts have recognized a variety of instruments as sufficiently dangerous, when entrusted to the use or possession of a child, to impose liability on a parent. See, e.g., *Nolechek v. Gesuale*, 46 N.Y.2d 332, 339, 385 N.E.2d 1268, 1272, 413 N.Y.S.2d 340, 345 (1978) (motorcycle); *Lichtenthal v. Gawoski*, 44 App. Div. 2d 771, 772, 354 N.Y.S.2d 267, 268 (4th Dep't 1974) (BB gun); *Lalomia v. Bankers & Shippers Ins. Co.*, 35 App. Div. 2d 114, 117, 312 N.Y.S.2d 1018, 1020-21 (2d Dep't 1970) (motorbike); *LeSauvage v. Freedman*, 100 Misc. 2d 857, 860-61, 419 N.Y.S.2d 1018, 1021 (N.Y.C. Civ. Ct. N.Y. County 1979) (sailboat); *Neumann v. Shlansky*, 58 Misc. 2d 128, 131-32, 294 N.Y.S.2d 628, 632-33 (Westchester County Ct. 1968), *aff'd*, 36 App. Div. 2d 540, 318 N.Y.S.2d 925 (2d Dep't 1971) (golfball).

negligent supervision when a party, such as a grandparent, was acting "in loco parentis."²¹⁶ This approach is consonant with *Holodook* and *Sapienza* since in an action against a person not dependent on the family treasury there is no threat that the value of the child's recovery will be impaired, and consequently, the parent's exercise of supervisory discretion will not be chilled.²¹⁷ Hence, it is suggested that the availability of a negligent supervision action against persons outside of the nuclear family strikes a fair balance between the objectives of ensuring family harmony and of providing contribution rights to third party tortfeasors.²¹⁸

Finally, it is submitted that the *Sapienza* decision correctly interpreted the distinction in New York jurisprudence between injuries to third party defendants caused by the negligent entrustment of a dangerous instrument to an infant, as opposed to inju-

²¹⁶ See *Bartels v. County of Westchester*, 76 App. Div. 2d 517, 522, 429 N.Y.S.2d 906, 909 (2d Dep't 1980); *Barrera v. General Elec. Co.*, 84 Misc. 2d 901, 903, 378 N.Y.S.2d 239, 240 (Sup. Ct. Albany County 1975); *Broome v. Horton*, 83 Misc. 2d 1002, 1003, 372 N.Y.S.2d 909, 910 (Sup. Ct. Yates County 1975). But see *Kaplan v. Vavasour*, 101 Misc. 2d 519, 521, 421 N.Y.S.2d 335, 337 (Sup. Ct. Queens County 1979).

In *Bartels*, an infant who was injured due to the carelessness of foster parents with whom he had been placed commenced an action against the County of Westchester for negligence in the selection of the foster parents. 76 App. Div. 2d at 519-20, 429 N.Y.S.2d at 908. The court held that the County's relationship of "in loco parentis" did not preclude liability since the "considerations of public policy stated in *Holodook* . . . have no application . . . where the interests of the parent and child are united, and no liability of the parent is threatened." *Id.* at 522, 429 N.Y.S.2d at 909-10.

In *Broome*, the infant, while temporarily under the care of his grandparents, was bitten by a dog owned by his aunt and uncle. 83 Misc. 2d at 1003, 372 N.Y.S.2d at 910. A suit was instituted against the aunt and uncle who, in turn, filed for contribution from the grandparents, alleging that they had negligently supervised the child. *Id.* The court granted the contribution claim, finding that grandparents should be held to a standard of reasonableness when temporarily supervising a child. *Id.* at 1005-06, 372 N.Y.S.2d at 912; accord, *Barrera v. General Elec. Co.*, 84 Misc. 2d 901, 903, 378 N.Y.S.2d 239, 241 (Sup. Ct. Albany County 1975).

In contrast, the plaintiff in *Kaplan* was injured at the defendant's home while under the care of a family friend. 101 Misc. 2d at 520, 421 N.Y.S.2d at 336. The mere statement in the defendant's third party pleadings that the family friend had "acted in loco parentis" was deemed sufficient to cloak the supervising party with the same immunity from legal action granted to a parent under *Holodook*. *Id.* at 521, 421 N.Y.S.2d at 337. Additionally, at least one court has stated in dicta that "where a relative [permanently] assumes all the obligations incident to the parental relationship," he will be immune from actions for negligent supervision. *Barrera v. General Elec. Co.*, 84 Misc. 2d 901, 902, 378 N.Y.S.2d 239, 240.

²¹⁷ See *Barrera v. General Elec. Co.*, 84 Misc. 2d 901, 903, 378 N.Y.S.2d 239, 240-41.

²¹⁸ See *Broome v. Horton*, 83 Misc. 2d 1002, 1005, 372 N.Y.S.2d 909, 912 (Sup. Ct. Yates County 1975). The *Broome* court recognized that family ties might make parents reluctant to seek recovery on behalf of their children when grandparents ultimately may be held liable. Nevertheless, the defendant's right to contribution was felt to override this consideration. *Id.*

ries caused by such defendants to infants who had been supervised negligently.²¹⁹ The former conduct, not the latter, traditionally has been actionable.²²⁰ Nonetheless, since both injuries result, in part, from the culpability of the supervising parent or sibling, it appears anomalous to permit the third party defendant to recover in only one of the two instances.²²¹ Thus, it is suggested that the Court should reconsider whether the policy considerations underlying the *Holodook* rule outweigh a fair apportionment of damages among culpable parties.²²²

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²¹⁹ See 52 N.Y.2d at 86-87, 417 N.E.2d at 532, 436 N.Y.S.2d at 238.

²²⁰ See notes 214-215 *supra*.

²²¹ A number of states have sanctioned actions based on negligent supervision, thereby ensuring that a parent's culpable conduct is actionable irrespective of whether the child harmed the defendant or was harmed by the defendant. See *Gibson v. Gibson*, 3 Cal. 3d 914, 919-22, 479 P.2d 648, 650-53, 92 Cal. Rptr. 288, 290-93 (1971); *Peterson v. City & County of Honolulu*, 51 Hawaii 484, 462 P.2d 1007, 1009 (1970); *Howes v. Hansen*, 56 Wis. 2d 247, 261, 201 N.W.2d 825, 832 (1972); *cf. Quest v. Joseph*, 392 So. 2d 256, 258-60 (Fla. 1981) (despite retention of intrafamily immunity doctrine a third party may seek contribution from a negligently supervising parent).

²²² One commentator suggests:

Given the acceptance of comparative negligence and *Dole* contribution, the real need is, to make bold, for the resurrection of the doctrine of imputed contributory negligence. In such a case, the infant when injured will be able to recover for only part of the loss from the stranger, who in turn will no longer have or need any action for indemnity or contribution against the parent. The third party action will no longer create a possible conflict of interest between parent and child because the parent can bring the child's suit without fear of being exposed to the third party claim for contribution or indemnity.

C. GREGORY, H. KALVEN & R. EPSTEIN, *CASES AND MATERIALS ON TORTS* 745 (3d ed. 1977).