Concurrent Tortfeasor in Child's Wrongful Death Action Entitled to Seek Contribution from Parent Who Negligently Entrusted Child with a Dangerous Instrument

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in any action involving a status determination following the death of one spouse, however, remains unclear.

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ARTICLE 14 — CONTRIBUTION

Concurrent tortfeasor in child's wrongful death action entitled to seek contribution from parent who negligently entrusted child with a dangerous instrument

Following the abandonment of the doctrine of intrafamilial tort immunity in Gelbman v. Gelbman, the question arose whether a child could maintain a cause of action for negligent supervision against his parent. In Holodook v. Spencer, the Court of Appeals

78 The doctrine of intrafamilial immunity first appeared in 1891 when a Mississippi court, citing no prior authority, established the rule with respect to intentional torts based on considerations of public policy. Hewellette v. George, 68 Miss. 703, 9 So. 885 (1891). While there appears to be no common-law basis for prohibiting tort actions between parent and child, see McCurdy, Torts Between Persons in Domestic Relation, 43 Harv. L. Rev. 1030, 1059-63 (1930), the justifications for invoking the doctrine of intrafamilial tort immunity have included: (1) the preservation of domestic tranquility; (2) the foreclosure of fraudulent claims; (3) the prevention of the depletion of family resources; (4) the avoidance of possible parental succession to the child's award; (5) the similarity to the common-law doctrine of interspousal immunity; and (6) the protection of the parents' inherent rights of supervision, discipline and control over their children. Id. at 1072-77. This immunity later was extended to nonwillful torts. See 33 Albany L. Rev. 438 (1969).

The intrafamilial immunity doctrine was first adopted by the New York Court of Appeals in Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928), wherein a child's cause of action against his father to recover for injuries caused by the latter's negligent driving was dismissed. Id. at 627, 162 N.E. at 551. The rule was reaffirmed in two automobile injury suits by minors against their parents. See Badigian v. Badigian, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961); Cannon v. Cannon, 287 N.Y. 425, 40 N.E.2d 236 (1942). See generally McCurdy, supra, at 1066-81.


80 Although the Gelbman Court cautioned that, "[b]y abolishing the defense of intrafamily tort immunity for nonwillful torts, [they were] not creating liability where none
refused to recognize such an action,\footnote{36 N.Y.2d at 45, 324 N.E.2d at 342, 364 N.Y.S.2d at 866; see, e.g., Latta v. Siefke, 60 ST. JOHN'S LAW REVIEW at 871-72.} notwithstanding that a parent could be held liable to third parties for injuries resulting from the negligent supervision of a child.\footnote{Id.; see note 118 and accompanying text infra.} Despite this apparent duty to

previously existed,”’ 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532, the decision raised questions concerning the legal obligations and duties a parent owes to a child. See Holodook v. Spencer, 36 N.Y.2d 35, 44, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 867 (1974). A parent’s duty to supervise his unemancipated child was first recognized in New York in Hartfield v. Roper, 21 Wend. 615 (N.Y. Sup. Ct. 1839), wherein a 2-year-old child was struck by a horse-drawn sleigh after he had wandered from his parent’s property onto the roadway. \textit{Id.} at 616. The court indicated that under certain circumstances, a parent leaving his child unattended and exposed to danger may be considered presumptively negligent. See \textit{id.} at 618-19; 60 CORNELL L. REV. 1105, 1109 (1975). The court concluded, however, that the parent’s contributory negligence was to be imputed to the child, thus barring the child’s suit against the sleigh driver. 21 Wend. at 619-20. The rule of presumptive negligence established by \textit{Hartfield} was later clarified in Mangam v. Brooklyn R.R., 38 N.Y. 455 (1868), where the Court of Appeals concluded that improper supervision by a parent was not negligence per se, but rather required a factual determination using an “ordinary care” test. \textit{Id.} at 457; see Weil v. Dry Dock, East Broadway & Battery R.R., 119 N.Y. 147, 153, 23 N.E. 487, 488 (1890). \textit{Hartfield}’s rule of imputed parental contributory negligence, which had been the subject of harsh criticism, see \textit{PROSSER, THE LAW OF TORTS} § 74, at 490 (4th ed. 1971), later was refined when it was held that imputation would occur only where the conduct of an infant \textit{non sui juris} amounted to what would be negligent conduct for a person \textit{sui juris}. Ihl v. Forty-second St. & Grand St. Ferry R.R., 47 N.Y. 317, 323 (1872). The legislative overruling of the doctrine of presumptive negligence, N.Y. GEN. OBLC. LAW § 3-111 (1975), eventually necessitated a reconsideration of the negligent supervision issue since \textit{Hartfield} seemed to suggest the possibility that negligent supervision could serve as a basis for a cause of action by a child against his parent. See 21 Wend. at 620; Mangam v. Brooklyn R.R., 38 N.Y. 455, 457 (1868); 60 CORNELL L. REV. 1105, 1107, 1110 (1975).

\footnote{36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).} \footnote{Id. at 40, 324 N.E.2d at 339, 364 N.Y.S.2d at 862. In \textit{Holodook}, an action was instituted by the father of a 4-year-old infant who was injured when he was struck by the defendant’s automobile after he “allegedly [had] darted out from between parked cars.” \textit{Id.} at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864. The defendant counterclaimed and brought a third-party action against the child’s father and mother, respectively, in order to obtain an apportionment of damages, alleging that they negligently had failed to perform their parental duties. \textit{Id.} Judge Rabin, writing for the majority, noted that, “[h]istorically, . . . negligent supervision has not been a tort, actionable by the child . . . [and] should not now be recognized as [such] a tort . . . .” \textit{Id.} at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867. The Court was influenced strongly by the effect a \textit{Dole} claim for contribution, see note 84 infra, would have on parents who might be reluctant to pursue the child’s remedy against a third party, for fear of being held liable to the third party for a part of the child’s damages. See 36 N.Y.2d at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868. The Court considered such a result to be “obviously detrimental to the injured child.” \textit{Id.; see note 118 and accompanying text infra.} In addition, the Court was concerned with the difficulties of defining an act of negligent supervision, 36 N.Y.2d at 45, 324 N.E.2d at 342, 364 N.Y.S.2d at 867, and establishing a standard of care to be applied in such cases. \textit{Id.} at 49, 324 N.E.2d at 346, 364 N.Y.S.2d at 870-71. The \textit{Holodook} Court concluded that, only when the parent’s conduct would be actionable by the child in the absence of the family relationship, will the child have a cause of action against the parent. \textit{Id.} at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871-72. \textit{Holodook} has been criticized as an unnecessarily broad exception to the non-immunity rule declared by \textit{Gelbman}. See 42 BROOKLYN L. REV. 125, 146 (1976).}
third parties, the Holodook Court emphasized that the absence of a supervisory duty to the injured child necessarily defeated any claim for contribution asserted against a parent by a tortfeasor.\(^{84}\) Recently, however, in Nolechek v. Gesuale,\(^{85}\) the Court of Appeals held that a parent owes a duty to third parties not to expose them to tort liability for an infant’s injuries resulting from the parent’s negligent entrustment of a dangerous instrument to his child,\(^{86}\) and that the breach of this duty would support a claim for contribution against the parent.\(^{87}\)

In Nolechek, the plaintiff had provided his unlicensed 16-year-old son, whose vision was severely impaired,\(^{88}\) with an unregistered motorcycle. After exchanging motorcycles with a friend, the son was killed when he rode into a steel cable which had been suspended across the road by the defendants to close off the entrance to their property.\(^{89}\) The father, individually and as the administrator of the estate of his son, brought a wrongful-death action claiming that the

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[W]here a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.


\(^{86}\) 46 N.Y.2d at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345.

\(^{87}\) Id. at 336, 385 N.E.2d at 1270-71, 413 N.Y.S.2d at 342-43.

\(^{88}\) Id. at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343. At the time of the accident, the son was blind in one eye and had impaired and uncorrectable vision in the other eye. Id.

\(^{89}\) Id. at 336-37, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343. The plaintiff’s son was accompanied by a friend with whom he had exchanged motorcycles just prior to the accident. Id. at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.
defendants were negligent in allowing a hazardous condition to exist without taking proper safety measures. The defendants counterclaimed for contribution, alleging that the father was negligent in providing his visually-handicapped son with a dangerous instrument. The trial court denied a motion to dismiss the counterclaim. In accordance with Holodook, the Appellate Division, Second Department, reversed the order and held that the absence of a primary cause of action for negligent supervision precluded the secondary counterclaim for apportionment of damages.

On appeal, the Court of Appeals reinstated the counterclaim, holding that, where a parent's negligent entrustment of a dangerous instrument to his child causes a "concurrent[ly]" negligent third party to incur liability for the child's injuries, the third party may seek contribution from the parent. Writing for the majority, Chief Judge Breitel declined to adopt a "dangerous instrument" exception to the Holodook rule. Reasoning that a parent's decision with respect to a child's use of a potentially dangerous instrument was not sufficiently distinguishable from supervisory decisions in general, the Court concluded that such an exception was "neither

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80 Id. The named defendants were Thomas Gesuale, the Star Sand and Gravel Company, the owners of the adjacent property, the Town of Smithtown and its superintendent of highways. Id.
81 Id.
82 Id. The plaintiff, in response to the counterclaim, interposed a third-party complaint against his son's companion and the companion's father, claiming that they, and not he, had provided his son with the motorcycle that was involved in the accident. Id.
83 46 N.Y.2d at 336, 385 N.E.2d at 1270, 413 N.Y.S.2d at 342. The Supreme Court, Suffolk County, also denied a motion to dismiss the father's third-party complaint against his son's friend and his father. 58 App. Div. 2d at 886, 396 N.Y.S.2d at 882.
84 See notes 81 & 82 and accompanying text supra.
85 58 App. Div. 2d at 886, 396 N.Y.S.2d at 882-83.
86 46 N.Y.2d at 336, 385 N.E.2d at 1270, 413 N.Y.S.2d at 343. The Court allowed the appellate division's dismissal of the third-party claim to stand, holding that the allegations were without merit since the exchange of motorcycles was not the proximate cause of the injury. Id. at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.
87 Id.
88 Chief Judge Breitel was joined by Judges Jasen, Jones and Wachtler. Judges Gabrielli and Fuchsberg concurred in the result, each writing a separate opinion. Judge Cooke dissented in a separate opinion.
89 46 N.Y.2d at 337-38, 385 N.E.2d at 1271-72, 413 N.Y.S.2d at 344.
90 See id. at 337-38, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343-44. The Court emphasized that, since parents are in the unique position to best judge the capabilities of their children, a parent's decision to entrust what might be a dangerous instrument to a minor child went to the heart of the exercise of the parental right to supervise. Id. at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344; see Holodook v. Spencer, 36 N.Y.2d 35, 49-51, 324 N.E.2d 336, 345-47, 364 N.Y.S.2d 859, 870-72 (1974); note 119 infra. Moreover, the Court theorized that, had the unfortunate accident occurred on family property, the operation of a dangerous instrument
analytically persuasive nor practically sound." Nevertheless, it was emphasized that parents would incur liability for harm accruing to a third party in such a situation. Postulating that a third party's "exposure to tort liability" is one of the many types of harm foreseeable in such a situation, Chief Judge Breitel stated that, when a parent negligently permits his child to use a dangerous instrument, he has breached a legal duty to protect those who may be exposed to such harm. Declaring that neither the absence of a duty running from the parent to the child nor the type of harm incurred by the "concurrent" tortfeasor should free the parent from liability, the Court held that the breach of the duty owed to the

exception to the Holodook rule could result in one parent, either individually or in a representative capacity, instituting a wrongful-death action against the other which could result in a windfall to both parents while their homeowner's insurance carrier sustained the actual damages. 46 N.Y.2d at 338, 385 N.E.2d at 1272, 413 N.Y.S.2d at 344.

Chief Judge Breitel supported his sanction of a contribution claim in the absence of a child-parent cause of action by analogy to the worker's compensation situation, where a third party who is liable in tort for injury to an employee may seek contribution from the employer whose own negligence contributed to the employee's injury, despite the statutory prohibition of a direct employee-employer suit. 46 N.Y.2d at 339, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345; see N.Y. WORK. COMP. LAW § 11 (1975). But see note 110 infra.
third party would support a claim for contribution against the parent.\footnote{46 N.Y.2d at 339-40, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. Considering the situation involved in \textit{Nolechek}, Chief Judge Breitel determined that "[i]t would be repulsive to permit the parent to recover from a third party guilty of 'concurrent' negligence for the death of his child while preventing the third party from counterclaiming for contribution against the parent." \textit{Id.} at 342, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346. The majority rejected the notion that the allowance of such a non-supervision counterclaim would deter parents from bringing tort actions on their children's behalf, reasoning that such a contention would be inconsistent with the \textit{Gelbman} rule abolishing the doctrine of intrafamilial immunity. \textit{Id.} at 340-41, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345-46; see \textit{Gelbman v. Gelbman}, 29 N.Y.2d 434, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969); note 79 \textsuperscript{ supra.} \textit{But see Holodook} v. \textit{Spencer}, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868 (1974); note 82 \textsuperscript{ supra.} The Court declared that, where the rights of third parties are concerned, the considerations of domestic relations which were discussed in \textit{Holodook} must be "subordinated . . . to other policy interests involved." \textit{Id.} at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.}

In a separate concurring opinion, Judge Gabrielli observed that to allow the counterclaim without acknowledging a direct child-parent cause of action would do violence to the principles established by \textit{Dole v. Dow Chemical Co.},\footnote{46 N.Y.2d at 346, 385 N.E.2d at 1277, 413 N.Y.S.2d at 349 (Fuchsberg, J., concurring).} but concluded that a direct child-parent claim should exist where the parent's conduct amounted to gross negligence. In such a situation Judge Gabrielli reasoned that "the standard of care may be readily defined without infringing on the vast domain best left to parental discretion."\footnote{46 N.Y.2d at 344-45, 385 N.E.2d at 1276, 413 N.Y.S.2d at 348 (Gabrielli, J., concurring).} Judge Fuchsberg also concurred separately, suggesting that the \textit{Holodook} rule be wholly discarded in favor of a reasonable-care-in-light-of-the-circumstances standard.\footnote{46 N.Y.2d at 342-45, 385 N.E.2d at 1274-76, 413 N.Y.S.2d at 346-48 (Gabrielli, J., concurring); see note 84 \textsuperscript{ supra.}}

\textsuperscript{108} 46 N.Y.2d at 339-40, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. Considering the situation involved in \textit{Nolechek}, Chief Judge Breitel determined that "[i]t would be repulsive to permit the parent to recover from a third party guilty of 'concurrent' negligence for the death of his child while preventing the third party from counterclaiming for contribution against the parent." \textit{Id.} at 342, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346. The majority rejected the notion that the allowance of such a non-supervision counterclaim would deter parents from bringing tort actions on their children's behalf, reasoning that such a contention would be inconsistent with the \textit{Gelbman} rule abolishing the doctrine of intrafamilial immunity. \textit{Id.} at 340-41, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345-46; see \textit{Gelbman v. Gelbman}, 29 N.Y.2d 434, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969); note 79 \textsuperscript{ supra.} \textit{But see Holodook} v. \textit{Spencer}, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868 (1974); note 82 \textsuperscript{ supra.} The Court declared that, where the rights of third parties are concerned, the considerations of domestic relations which were discussed in \textit{Holodook} must be "subordinated . . . to other policy interests involved." \textit{Id.} at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.}
Judge Cooke, dissenting vigorously, asserted that a claim for contribution is unsupportable, absent a duty running to the injured party. Moreover, the dissent declared that the majority's holding could not be justified as creating a new cause of action in tort, since the parent had not proximately caused the defendants to suffer any legally-cognizable injury. Finally, Judge Cooke decried the majority decision's unfortunate potential for discouraging parents from pursuing claims on behalf of their children.

It is submitted that the Nolechek Court misinterpreted the meaning of Dole and its progeny in an effort to achieve an equitable


10 46 N.Y.2d at 347-48, 385 N.E.2d at 1278-79, 413 N.Y.S.2d at 350-51 (Cooke, J., dissenting). Although Judge Cooke agreed with the majority's refusal to create a cause of action in favor of a child against his parent for negligent supervision, id. at 347, 385 N.E.2d at 1278, 413 N.Y.S.2d at 350 (Cooke, J., dissenting), he suggested that the majority's decision to permit one who is not concurrently liable for injury to the plaintiff to be subject to a Dole contribution claim, "marks a sudden, unexplained departure from prior well-reasoned decisions." Id. (Cooke, J., dissenting); see Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972); note 84 supra. Judge Cooke reasoned that, "[i]f the person from whom contribution is sought owes no duty to the injured plaintiff, . . . he simply is not a joint or concurrent tort-feasor . . . [and] no apportionment may be granted." 46 N.Y.2d at 348, 385 N.E.2d at 1278, 413 N.Y.S.2d at 350 (Cooke, J., dissenting); see CPLR 1401 (1976); W. Prosser, The Law of Torts § 50, at 309 (4th ed. 1971). The dissent also questioned the majority's analogy to the worker's compensation situation. 46 N.Y.2d at 348-49, 385 N.E.2d at 1278-79, 413 N.Y.S.2d at 351 (Cooke, J., dissenting); see note 104 supra. The dissent observed that, even if parents did institute claims on behalf of their injured children, the effect of the child's recovery on the parent's financial resources might create family conflicts. 46 N.Y.2d at 349-50, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351 (Cooke, J., dissenting). The dissent criticized the majority's holding as "creating a new tort cause of action which defendants may assert directly against [the plaintiff without having] suffered any injury recognized by tort law." Id. (Cooke, J., dissenting) (citing W. Prosser, The Law of Torts §§ 30, 41-44 (4th ed. 1971)).

11 46 N.Y.2d at 349, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351 (Cooke, J., dissenting). Moreover, Judge Cooke was disturbed by the majority's adoption of an exception to the Holodook rule which would add an extra burden of potential tort liability to the parents of handicapped children. Id. at 350, 385 N.E.2d at 1279, 413 N.Y.S.2d at 352 (Cooke, J., dissenting); see CPLR 3019, commentary at 253 (1974).
result. The well-established principles of contribution,\textsuperscript{113} as codified in CPLR 1401,\textsuperscript{114} permit an apportionment of damages only among those who might be liable to the injured plaintiff.\textsuperscript{115} Consequently, the \textit{Nolechek} majority's sanctioning of a claim for contribution against a party owing no duty whatsoever to the injured party\textsuperscript{116} appears to be irreconcilable with these principles.\textsuperscript{117}

It additionally appears that the Court's failure to recognize a direct child-parent cause of action in \textit{Nolechek} may have the unfortunate effect of neutralizing the policy considerations which form the foundation of \textit{Holodook}. At the root of its refusal to acknowledge negligent supervision as an actionable tort in \textit{Holodook} was the

\textsuperscript{113} See note 84 supra.
\textsuperscript{114} CPLR 1401 (1976). Section 1401 provides:
[T]wo or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought. (Emphasis added).

Significantly, as pointed out by the \textit{Nolechek} dissent, potential exposure to tort liability has never before been equated to personal injury, injury to property, or wrongful death by legal authorities. See 46 N.Y.2d at 349, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351 (Cooke, J., dissenting); note 111 supra..


\textsuperscript{117} As expressed by the dissent, quoting Chief Judge Breitel:
The rule of apportionment applies when two or more tort-feasors have shared, albeit in various degrees, in the responsibility by their conduct or omissions in causing an accident, \textit{in violation of the duties they respectively owed to the injured person}. 46 N.Y.2d at 348, 385 N.E.2d at 1278, 413 N.Y.S.2d at 351 (Cooke, J., dissenting) (quoting Rogers v. Dorchester Assoc., 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973) (emphasis added by Judge Cooke). The \textit{Nolechek} majority seems to have overlooked that the presence of an actionable parental duty is a necessary element of a contribution claim. Moreover, in its attempt to preserve \textit{Holodook}, the \textit{Nolechek} Court has left the anomaly that the presence of an additional tortfeasor seemingly controls whether parental liability will arise from negligent supervisory conduct. Where injury is incurred at a place isolated from the influence of a third party, no enforceable claim against a parent for the negligent entrustment of a dangerous instrument would exist between child and parent. See 46 N.Y.2d at 338-40, 385 N.E.2d at 1273, 413 N.Y.S.2d at 344-45. Where, however, the injury results from a combination of tortious acts committed by the parent and third parties, parental liability \textit{vis-a-vis} the third party would arise in the form of contribution. This irreconcilable result was achieved by the Court through the recognition of a new duty between parents and third parties: a duty based on concepts of foreseeable risk requiring parents to shield third parties from potential exposure to tort liability. See note 104 and accompanying text supra; McLaughlin, \textit{Dole v. Dow (continued)}, N.Y.L.J., March 9, 1979, at 2, cols. 3-4. Unfortunately, the suggested harm caused to a third party by "exposure to tort liability" will not always develop into actual damages since they are contingent on the outcome of the litigation. Thus, the traditional tort injuries contemplated by the \textit{Holodook} Court as a basis for a cause of action, see 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866, are inapposite to the speculative harm caused by exposing another to tort liability which the \textit{Nolechek} Court recognized as supporting the contribution claim.
Court’s concern with the impact Dole contribution would have upon family harmony. According to Nolechek, however, whenever a parent’s negligent entrustment of an arguably “dangerous instrument” to his child subjects a third party to suit for the child’s injuries, the parent will be liable for Dole contribution, the very result the Holodook Court wished to avoid. It would appear, therefore, that the Nolechek Court has stripped Holodook of its essence by nominally adhering to the mandate that a child cannot directly sue his parent.

In contrast, it is submitted that the gross-negligence exception proposed by Judge Gabrielli would have been the wisest choice. Such a narrow exception would have done little to weaken Holodook since it could not be argued logically that extreme carelessness lies

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118 See Holodook v. Spencer, 36 N.Y.2d 35, 45-48, 324 N.E.2d 338, 343-44, 364 N.Y.S.2d 859, 867-69 (1974); note 82 supra. The Holodook majority observed that “[i]t would be artificial to separate the parent and child as economic entities,” and that if Dole third-party complaints or counterclaims were asserted against uninsured parents, the resulting depletion of the family’s financial resources would put an unavoidable strain upon the intrafamilial relationship. 36 N.Y.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868. Noting that the courts have consistently sought to avoid such a result, Judge Rabin stated that “Holodook illustrates that if a negligent supervision claim is allowed, the rights and procedures granted to a defendant by Dole directly collide with the policies of promoting family harmony.” Id. at 48, 324 N.E.2d at 344, 364 N.Y.S.2d at 869. The Holodook Court also feared that possible Dole liability might make parents reluctant to pursue their children’s legitimate claims. Id. at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868; see 42 Brooklyn L. Rev. 125, 135-36 (1975); note 82 supra. Similarly, this concern was recognized in Nolechek by Judge Cooke, who argued that “the spectre of liability might well deter the parents from instituting a lawsuit on behalf of their child.” 46 N.Y.2d at 350, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351 (Cooke, J., dissenting).

In addition, the Holodook Court expressed the view that, to allow a Dole counterclaim against a parent for negligent supervision would be inconsistent with § 3-111 of the General Obligations Law, N.Y. Gen. Oblig. Law § 3-111 (1978), since it would have the effect of permitting the parent’s negligence to be imputed to the child. 36 N.Y.2d at 48, 324 N.E.2d at 345, 364 N.Y.S.2d at 869. While it is well-settled that an injured party’s right to recover damages is independent of any concurrent tortfeasor’s Dole claims, see CPLR 1404 (1976), that right certainly will be hampered in a Nolechek situation where third-party counterclaims against a parent may result in the forfeiture of the child’s award.

119 As noted by Chief Judge Brietel, what constitutes a “dangerous instrument” will often depend upon the circumstances in which it is used. See 46 N.Y.2d at 337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 344; see note 21 supra.

120 See note 118 supra.

121 While Nolechek has affirmed Holodook’s refusal to recognize a child’s cause of action for negligent parental supervision, see 46 N.Y.2d at 338-40, 385 N.E.2d at 1273, 413 N.Y.S.2d at 344-45, by permitting a Dole counterclaim when negligent entrustment of a dangerous instrument to a child is involved, it apparently has disregarded the underlying judicial concern with the disruptive effect of such a claim on family harmony. See note 37 and accompanying text supra.

122 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring); see notes 27 & 28 and accompanying text supra.
within the boundaries of parental discretion.\textsuperscript{123} Finally, the recognition of such a cause of action would have supported a claim for contribution, thereby preventing the tortuor application of \textit{Dole}.\textsuperscript{124} In view of the confusion and possible inequity which seem likely to result,\textsuperscript{125} it is hoped that the Court of Appeals will reexamine its position.

\textit{John F. Farmer}

\textbf{CRIMINAL PROCEDURE LAW}

\textbf{CPL § 200.50: Court of Appeals clarifies requirements of factual statement in indictment}

Section 200.50 of the CPL sets forth the requisite form and content of an indictment and mandates that it contain a "plain and concise factual statement" which supports all elements of the crime charged with sufficient preciseness to afford the defendant notice of the conduct for which he stands accused.\textsuperscript{126} The absence of specific

\textsuperscript{123} See 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring); note 108 and accompanying text \textit{supra}. Judge Gabrielli noted that the major difficulty the courts have faced in negligent supervision cases has been the establishment of an acceptable standard of good parental care. 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring). This difficulty is drastically reduced, however, when the parental conduct can be classified as grossly negligent. \textit{Id.} (Gabrielli, J., concurring). In the event of egregious parental conduct within the parent-child relationship, the weighty policy considerations in respect to harmonious family relations become subordinated to the more compelling interests of providing a remedy for the injured child and allocating to a marginally negligent third party his rightful share of the damages. \textit{See id.} at 344, 385 N.E.2d at 1276, 413 N.Y.S.2d at 348 (Gabrielli, J., concurring).

Moreover, it is submitted that, were the Court to define a standard of care to be applied to parents whose conduct toward their children is considered gross, reckless or wanton, parents would not be faced with an undue burden of shielding themselves from liability. While a cognizable action for mere negligent supervision might cause parents to be overprotective and "result in a society of reliant individuals, incapable of making responsible judgments respecting the propriety of their own actions," \textit{42 Brooklyn L. Rev.} 125, 136 (1975), it is unlikely that those concerns would develop under Judge Gabrielli's gross negligence standard.

\textsuperscript{124} See notes \textsuperscript{84} & \textsuperscript{110} and accompanying text \textit{supra}.

\textsuperscript{125} See notes \textsuperscript{113-114} and accompanying text \textit{supra}.

\textsuperscript{126} CPL § 200.50(7)(a) (Supp. 1978-1979) states that an indictment must contain [a] plain and concise factual statement in each court which, without allegations of an evidentiary nature,

(a) asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation . . . .

The Court of Appeals, in \textit{People v. Farson}, 244 N.Y. 413, 155 N.E. 724 (1927), stated that an indictment would be sufficient.