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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[78] in *Gelbman v. Gelbman,*[79] the question arose whether a child could maintain a cause of action for negligent supervision against his parent.[80] In *Holodook v. Spencer,*[81] 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.

[79] 23 N.Y.2d 434, 439, 245 N.E.2d 192, 193, 297 N.Y.S.2d 529, 532 (1969), *discussed in Recent Developments,* 44 ST. JOHN'S L. REV. 127, 133 (1969). In *Gelbman,* the Court permitted a mother to bring a tort action against her unemancipated son to recover for injuries sustained in an automobile collision allegedly caused by his negligence, *see* 23 N.Y.2d at 436, 245 N.E.2d at 193, 297 N.Y.S.2d at 530, thereby overruling its prior contrary decisions. *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); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); note 78 *supra.* It is interesting to note that, although it was apparent that an insurer ultimately would pay any judgment, the *Gelbman* Court did not restrict its holding to those instances where liability insurance was available. *See* 23 N.Y.2d at 438, 245 N.E.2d at 193-94, 297 N.Y.S.2d at 531; 42 BROOKLYN L. REV. 125, 131 (1975). *But cf.* 44 NOTRE DAME LAW. 1001 (1969) (immunity should be retained in the absence of insurance). *See generally* 19 CATH. U.L. REV. 113, 118 (1969); 15 N.Y.L.F. 419, 424-25 (1969).

[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,[82] notwithstanding that a parent could be held liable to third parties for injuries resulting from the negligent supervision of a child.[83] 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. *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 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 *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. *Id.* at 457; *see* Weil v. Dry Dock, East Broadway & Battery R.R., 119 N.Y. 147, 153, 23 N.E. 487, 488 (1890). *Hartfield*'s rule of imputed parental contributory negligence, which had been the subject of harsh criticism, *see* 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 *non sui juris* amounted to what would be negligent conduct for a person *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 imputed parental negligence, N.Y. GEN. OBLIG. LAW § 3-111 (1975), eventually necessitated a reconsideration of the negligent supervision issue since *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).

[81] 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

[82] *Id.* at 40, 324 N.E.2d at 339, 364 N.Y.S.2d at 862. In *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." *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. *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 . . . ." *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 *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." *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. *Id.* at 49, 324 N.E.2d at 346, 364 N.Y.S.2d at 870-71. The *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. *Id.* at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871-72.

Holodook has been criticized as an unnecessarily broad exception to the non-immunity rule declared by *Gelbman*. *See* 42 BROOKLYN L. REV. 125, 146 (1975).

[83] 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

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

App. Div. 2d 991, 401 N.Y.S.2d 937 (4th Dep't 1978); Pico v. Canini, 47 App. Div. 2d 951, 367 N.Y.S.2d 304 (2d Dep't 1975); Stasky v. Bernardon, 81 Misc. 2d 1067, 367 N.Y.S.2d 449 (Sup. Ct. Nassau County 1975); note 102 and accompanying text *infra.*

[84] 36 N.Y.2d at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872. In Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the Court of Appeals enunciated the principles of apportioning damages among joint or concurrent tortfeasors, which later was codified in CPLR article 14. *See generally* CPLR 3019, commentary at 37 (Supp. 1978-1979); TWELFTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1973), in TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 197, 213-18 (1975). The *Dole* Court stated:

> [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.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. The apportionment rules, however, seem to indicate that a defendant may not seek apportionment by way of counterclaim or third-party claim unless there exists a primary cause of action between the plaintiff and the defendant in the counterclaim or third-party claim. *See* Holodook v. Spencer, 36 N.Y.2d 35, 51, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 872 (1974); Barry v. Niagara Frontier Transit Sys. Inc., 35 N.Y.2d 629, 633, 324 N.E.2d 312, 313, 364 N.Y.S.2d 823, 825 (1974); Rogers v. Dorchester Assoc., 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973); CPLR 1401 (1976).

[85] 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978), *modifying* 58 App. Div. 2d 885, 396 N.Y.S.2d 881 (2d Dep't 1977).

[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[90] were negligent in allowing a hazardous condition to exist without taking proper safety measures.[91] The defendants counterclaimed for contribution, alleging that the father was negligent in providing his visually-handicapped son with a dangerous instrument.[92] The trial court denied a motion to dismiss the counterclaim.[93] In accordance with *Holodook*,[94] 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.[95]

On appeal, the Court of Appeals reinstated the counterclaim,[96] 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.[97] Writing for the majority, Chief Judge Breitel[98] declined to adopt a "dangerous instrument" exception to the *Holodook* rule.[99] 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,[100] the Court concluded that such an exception was "neither

[90] *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.*

[91] *Id.*

[92] *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.*

[93] 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.

[94] *See* notes 81 & 82 and accompanying text *supra.*

[95] 58 App. Div. 2d at 886, 396 N.Y.S.2d at 882-83.

[96] 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.

[97] *Id.*

[98] 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.

[99] 46 N.Y.2d at 337-38, 385 N.E.2d at 1271-72, 413 N.Y.S.2d at 344.

[100] *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 338, 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."[101] Nevertheless, it was emphasized that parents would incur liability for harm accruing to a third party in such a situation.[102] Postulating that a third party's "exposure to tort liability" is one of the many types of harm foreseeable in such a situation,[103] 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.[104] Declaring that neither the absence of a duty running from the parent to the child[105] 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

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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.

[101] *Id.*

[102] *Id.* at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. As stated by the Court in *Holodook:*

> Failure to supervise may entail legal consequence where injury to a third party results, for example, under circumstances where a parent negligently entrusts to his child a dangerous instrument, or an instrument potentially dangerous in the child's hands, so as to create an unreasonable risk to others.

Holodook v. Spencer, 36 N.Y.2d 35, 45, 324 N.E.2d 338, 343, 364 N.Y.S.2d 859, 866 (1974); *see, e.g.,* Lichtenthal v. Gawoski, 44 App. Div. 2d 771, 772, 354 N.Y.S.2d 267, 268 (4th Dep't 1974); Lalomia v. Bankers & Shippers Ins. Co., 35 App. Div. 2d 114, 117, 312 N.Y.S.2d 1018, 1020 (2d Dep't 1970), *aff'd mem.,* 31 N.Y.2d 830, 291 N.E.2d 724, 339 N.Y.S.2d 680 (1972); Carmona v. Padilla, 4 App. Div. 2d 181, 183, 163 N.Y.S.2d 741, 742 (1st Dep't 1957), *aff'd,* 4 N.Y.2d 767, 149 N.E.2d 337, 172 N.Y.S.2d 820 (1958); Zuckerberg v. Munzer, 277 App. Div. 1061, 100 N.Y.S.2d 910 (2d Dep't 1950) (mem.); Agnesini v. Olsen, 277 App. Div. 1006, 100 N.Y.S.2d 338 (2d Dep't 1950) (mem.); *cf.* Steinberg v. Cauchois, 249 App. Div. 518, 293 N.Y.S. 147 (2d Dep't 1937) (per curiam) (parents not negligent in entrusting bicycle to infant son). *Compare* Kucklik v. Feuer, 239 App. Div. 338, 267 N.Y.S. 256 (1st Dep't 1933), *aff'd mem.,* 264 N.Y. 542, 199 N.E. 555 (1934) *with* Napiearlski v. Pickering, 278 App. Div. 456, 106 N.Y.S.2d 28 (4th Dep't 1951). The *Nolechek* Court indicated that the duty involved is not owed to the child himself, but rather to a third party who stands to be injured by the child's actions. 46 N.Y.2d at 339, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345; *see* Lichtenthal v. Gawoski, 44 App. Div. 2d 771, 772, 354 N.Y.S.2d 267, 268 (4th Dep't 1974).

[103] 46 N.Y.2d at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345. In situations where a child is entrusted with a dangerous instrument, the Court considered not only the possible injuries to bystanders and damages to property, but also the possible tort liability of a third party who may have contributed to the child's injuries. *Id.*

[104] *Id. But see* note 111 and accompanying text *infra.*

[105] 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 1272-73, 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.[106]

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 *Dole v. Dow Chemical Co.*,[107] 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."[108] Judge Fuchsberg also concurred separately, suggesting that the *Holodook* rule be wholly discarded in favor of a reasonable-care-in-light-of-the-circumstances standard.[109]

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[106] 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 *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." *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 *Gelbman* rule abolishing the doctrine of intrafamilial immunity. *Id.* at 340-41, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345-46; *see* Gelbman v. Gelbman, 23 N.Y.2d 434, 438-39, 245 N.E.2d 192, 193-94, 297 N.Y.S.2d 529, 531-32 (1969); note 79 and accompanying text *supra*. *But see* Holodook v. Spencer, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868 (1974); note 82 *supra*. The Court declared that, where the rights of third parties are concerned, the considerations of domestic relations which were discussed in *Holodook* must be "subordinated . . . to other policy interests involved." 46 N.Y.2d at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

[107] 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 *supra*.

[108] 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring). Judge Gabrielli distinguished *Holodook*, noting that the conduct which was considered to be "negligent supervision" in that case constituted only mere negligence. *Id.* at 342-43, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring). Thus, he reasoned that the policy considerations underlying *Holodook's* recognition of parental immunity, *see* notes 82 & 84 *supra*, were not applicable when the parental conduct in question was grossly negligent. 46 N.Y.2d at 343, 385 N.E.2d at 1275, 413 N.Y.S.2d at 347. (Gabrielli, J., concurring). Judge Gabrielli was of the opinion that precise jury instructions would limit recovery to the proper case and that family disruption would be at a minimum. *Id.* (Gabrielli, J., concurring). Moreover, Judge Gabrielli stated that the recognition of direct parent-child liability would not only result in an equitable decision, but it would also prevent the perversion of the principles established by *Dole*. *Id.* at 344-45, 385 N.E.2d at 1276, 413 N.Y.S.2d at 348 (Gabrielli, J., concurring).

[109] 46 N.Y.2d at 346, 385 N.E.2d at 1277, 413 N.Y.S.2d at 349 (Fuchsberg, J., concurring). To support the abandonment of *Holodook*, Judge Fuchsberg referred to the Court of Appeals' recent abolition of the rigid classifications that were traditionally used to determine a landowner's liability in favor of a single standard of reasonable care. *Id.* (Fuchsberg, J., concurring); *see* Quinlan v. Cecchini, 41 N.Y.2d 686, 363 N.E.2d 578, 394 N.Y.S.2d 872 (1977); Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976); Basso v.

Judge Cooke, dissenting vigorously, asserted that a claim for contribution is unsupportable, absent a duty running to the injured party.[110] 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.[111] Finally, Judge Cooke decried the majority decision's unfortunate potential for discouraging parents from pursuing claims on behalf of their children.[112]

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

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Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976). Analogizing this related area of tort law to negligent supervision, Judge Fuchsberg advocated the treatment of child-parent claims on a case-by-case basis. *See* 46 N.Y.2d at 346-47, 385 N.E.2d at 1277, 413 N.Y.S.2d at 349 (Fuchsberg, J., concurring).

[110] 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.* Judge Cooke pointed out that, although direct job-related injury suits against an employer are barred by statute, *see* N.Y. WORK. COMP. LAW § 11 (1975), the employer nonetheless owes the employee a duty of care which, if breached, subjects him to damages by way of contribution. 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* Briscoe v. Williams, 50 App. Div. 2d 883, 377 N.Y.S.2d 163 (2d Dep't 1975).

[111] 46 N.Y.2d at 349, 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)).

[112] 46 N.Y.2d at 349-50, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351-52 (Cooke, J., dissenting); *see* Holodook v. Spencer, 36 N.Y.2d 35, 46, 324 N.E.2d 338, 344, 364 N.Y.S.2d 859, 868; note 82 *supra;* note 118 and accompanying text *infra.* 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 350, 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,[113] as codified in CPLR 1401,[114] permit an apportionment of damages only among those who might be liable to the injured plaintiff.[115] Consequently, the *Nolechek* majority's sanctioning of a claim for contribution against a party owing no duty whatsoever to the injured party[116] appears to be irreconcilable with these principles.[117]

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

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[113] *See* note 84 *supra*.

[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 *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*..

[115] *See* TWELFTH ANN. REP. OF THE JUD. CONFERENCE ON THE CPLR (1973), in TWENTIETH ANN. REP. N.Y. JUD. CONFERENCE 194 (1975); note 84 *supra*.

[116] *See* note 105 and accompanying text *supra*.

[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, *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 *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 *Holodook*, the *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 *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, *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 *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 *Nolechek* Court recognized as supporting the contribution claim.

Court's concern with the impact *Dole* contribution would have upon family harmony.[118] According to *Nolechek,* however, whenever a parent's negligent entrustment of an arguably "dangerous instrument"[119] 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.[120] 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.[121]

In contrast, it is submitted that the gross-negligence exception proposed by Judge Gabrielli[122] 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.[123] Finally, the recognition of such a cause of action would have supported a claim for contribution, thereby preventing the tortured application of *Dole*.[124] In view of the confusion and possible inequity which seem likely to result,[125] it is hoped that the Court of Appeals will reexamine its position.

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CRIMINAL PROCEDURE LAW

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.[126] The absence of specific

[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 *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. *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. *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," 42 BROOKLYN L. REV. 125, 136 (1975), it is unlikely that those concerns would develop under Judge Gabrielli's gross negligence standard.

[124] *See* notes 84 & 110 and accompanying text *supra*.

[125] *See* notes 113-114 and accompanying text *supra*.

[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 People v. Farson, 244 N.Y. 413, 155 N.E. 724 (1927), stated that an indictment would be sufficient