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Parent's Negligent Supervision of a Child Not a Tort

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DEVELOPMENTS IN NEW YORK PRACTICE

Parent's negligent supervision of a child not a tort.

Although *Gelbman v. Gelbman*[220] appeared to have eliminated intrafamily immunity,[221] whether an action could be maintained against a parent for negligent supervision of a child — a question one would expect to arise as a result of such elimination — was not, until recently, reexamined by the Court of Appeals. Confronted with a defendant seeking contribution from the mother of an injured plaintiff,[222] the Court of Appeals, in *Holodook v. Spencer*,[223] was finally required to resolve any uncertainty,[224] since as the Court noted, application of the *Dole* principles prevented the granting of relief unless the first-party plaintiff, the injured child, had a cause of action against the third-party defendant, his mother.[225]

In *Holodook*[226] the infant plaintiff had "darted out from between parked cars and was struck by an automobile driven by defendant."[227] Defendant, maintaining that the parent had negligently failed to supervise the infant, sought to have the plaintiff's mother share responsibility for the infant's injuries.[228] Speaking through Judge Rabin, the Court noted that negligent supervision was not, as a historical matter, civilly actionable in New York[229] and held that it "should not now be recognized as a tort . . . ."[230]

A number of compelling arguments were set forth in support of the Court's position. Allowing a nonparent defendant to obtain *Dole* apportionment from a parent, the Court feared, might dis-

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[220] 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

[221] *See* 33 ALBANY L. REV. 438 (1969); 19 CATH. U.L. REV. 113 (1969); 44 NOTRE DAME LAW. 1001 (1969); 15 N.Y.L.F. 419 (1969). *But see* 44 ST. JOHN'S L. REV. 127 (1969).

[222] The defendant's claim for contribution was based upon Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). For an extended discussion of *Dole* by Professor David D. Siegel, see 7B MCKINNEY'S CPLR 3019, commentary at 231-304 (1974).

[223] 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), *aff'g* 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973).

[224] For a brief analysis of *Holodook* at the appellate division level, see *The Survey*, 48 ST. JOHN'S L. REV. 611, 650 (1974).

[225] 36 N.Y.2d at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.

[226] *Holodook* was decided with two companion cases concerning negligent supervision: Graney v. Graney, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974), wherein a father was sued by his infant through a guardian ad litem; and Ryan v. Fahey, *id.*, wherein the mother was sued by her infant through his father.

[227] *Id.* at 42, 324 N.E.2d at 341, 364 N.Y.S.2d at 864.

[228] *Id.*

[229] *Id.* at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867. In Ciani v. Ciani, 127 Misc. 304, 215 N.Y.S. 767 (Sup. Ct. Albany County 1926), decided before intrafamily immunity was an established doctrine in New York, *see* Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928) (per curiam), the Supreme Court, Albany County, had held that in a suit by an infant plaintiff against his father "the plaintiff has no cause of action." 127 Misc. at 307, 215 N.Y.S. at 770.

[230] 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.

courage parents from prosecuting their children's legitimate claims. Should parents who pursue their children's legal remedies be held liable under *Dole,* economic hardship and emotional strain might weaken the family relationship.[231] The Court was also concerned with the difficulties inherent in applying a reasonable man standard to parental supervision of children.[232] To impose such a standard, the Court noted, "would be to circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence."[233] Finally, the rationale behind eliminating intrafamily immunity was held inapplicable to *Holodook.* Although if a duty be owed to the entire world "the law will not withhold its sanctions merely because the parties are parent and child,"[234] the Court reasoned that the duty to supervise and protect one's child arises solely from the family relationship and is not owed to the world at large.[235]

The conclusion reached in *Holodook* seems to be a desirable one.[236] Had the Court allowed recovery, an unreasonably heavy

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[231] *Id.* at 46-47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868, *citing* 7B McKINNEY'S CPLR 3019, commentary at 246 (1974). *But see* Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970), wherein the Supreme Court of Hawaii, in eliminating intrafamily immunity and holding that a child may sue his parent for the latter's negligent supervision, said that the disruption of family harmony caused by a lawsuit, the very reason for having immunity, is no longer a valid consideration where a wrong has already been committed.

[232] 36 N.Y.2d at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 870-71.

[233] *Id.*, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

[234] *Id.*

[235] *Id.* at 50-51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871. It should be noted, however, that a cause of action will lie against a parent if, through that parent's negligence, his child causes injury to a third party. *Id.* at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866; Stasky v. Bernardon, 81 Misc. 2d 1067, 367 N.Y.S.2d 449 (Sup. Ct. Nassau County 1975); Lampman v. Cairo Cent. School Dist., 81 Misc. 2d 395, 366 N.Y.S.2d 579 (Sup. Ct. Greene County 1975).

Another argument postulated in *Holodook* was based on N.Y. GEN. OBLIG. LAW § 3-111 (McKinney 1964), which mandates that the contributory negligence of a parent not be imputed to an infant seeking to recover damages for personal injury. If a parent were subjected to a *Dole* claim, the infant plaintiff's award, contrary to the policy inherent in § 3-111, would likely be reduced because, in most cases, the parent's contribution would be taken out of the award that the child had received from the first-party defendant. 36 N.Y.2d at 48-49, 324 N.E.2d at 345, 364 N.Y.S.2d at 869-70. But, as Judge Jasen noted in his dissent, *id.* at 53, 324 N.E.2d at 347, 364 N.Y.S.2d at 873, this argument is not convincing in light of CPLR 1206 which provides that

> any property to which an infant . . . is entitled, after deducting any expenses allowed by the court, shall be distributed to the guardian of his property . . . to be held for the use and benefit of such infant . . . .

[236] Three departments of the appellate division had previously held that negligent supervision was not a tort. *See* Lastowski v. Norge Coin-O-Matic, 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974); Ryan v. Fahey, 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't), *aff'd sub nom.* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); Graney v. Graney, 43 App. Div. 2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973), *aff'd sub nom.* Holodook v. Spencer, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); Holodook v. Spencer, 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), *aff'd,* 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

burden would have been placed upon parents,[237] who, in order to protect themselves from onerous judgments, may have been encouraged to become overly protective towards their children, giving rise to possibly harmful psychological consequences. In addition, by establishing a policy against increasing parental burdens, the Court recognized the difficulties encountered in raising children, the special and individual relationship between parent and child, into which, it was noted, "[c]ourts and [l]egislatures . . . have intruded only minimally . . .,"[238] and the fact that external sanctions alone will not assure performance of family obligations.[239]

Although the decision is well reasoned, there is one potential drawback: in establishing what appears to be an absolute rule, the Court has failed to consider cases in which parental misconduct may be so great as to warrant tort liability. Under facts which show, for example, that a parent's activities have so departed from the norms of accepted conduct as to give rise to criminal culpability,[240] it would appear anomalous to preclude civil liability. The better course would be to limit *Holodook* to situations not involving grossly negligent supervision.

As a result of *Holodook,* the abolition of intrafamily immunity in New York, once thought absolute,[241] has been limited to "nonwillful torts between parent and child 'for acts which if done by one ordinary person to another would be torts.' "[242] The precise implications of this language and the extent to which the *Holodook* rationale can be relied upon in other factual settings has yet to be resolved.

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[237] *See* 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 867.

[238] *Id.* at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

[239] *Id.*

[240] It is a violation of N.Y. PENAL LAW § 260.10(2) (McKinney 1975) for a parent to fail to "exercise reasonable diligence" to prevent his child from becoming a "neglected child" as defined in the Family Court Act. A neglected child includes one whose physical condition has been impaired by his parent's failure "to exercise a minimum degree of care . . . in providing the child with proper supervision . . . ." N.Y. FAMILY CT. ACT § 1012(f)(i)(B) (McKinney Supp. 1974). That gross negligence is required to support liability under § 260.10(2) is made clear by an examination of article 15 of the Penal Law dealing with culpability. To be liable under § 260.10(2), a culpable mental state is required. *See* N.Y. PENAL LAW § 15.15(2) (McKinney 1975). Of the four exclusive culpable mental states set forth in the Penal Law, *id.* § 15.00(6), criminal negligence, *id.* § 15.05(4), which requires that the misconduct constitute "a gross deviation from the standard of care that a reasonable person would observe in the situation," *id.*, would appear to be the only logical culpable mental state applicable to the conduct proscribed by § 260.10(2).

[241] *See* note 221 *supra.*

[242] 36 N.Y.2d at 44, 324 N.E.2d at 342, 364 N.Y.S.2d at 865, *quoting* McCurdy, *Torts Between Persons in Domestic Relation,* 43 HARV. L. REV. 1030 (1930). Indeed, the *Holodook* Court noted that *Gelbman, see* note 220 and accompanying text *supra,* had relaxed the intrafamily immunity doctrine. 36 N.Y.2d at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868. Obviously, relaxing a doctrine is quite different from abolishing it.