Intrafamily Torts

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.
contribution and indemnity should be the same. This understanding is substantially consistent with the subsequently amended CPLR 1402, which precludes the enforcement of a *Dole* claim for contribution until the party has paid more than his apportioned share of liability.223 Accordingly, *Adams* is not at all incongruous with the practicalities and fairness embodied in the recent modification of section 1402.

**Intrafamily Torts**

In *Lastowski v. Norge Coin-O-Matic, Inc.*224 and *Ryan v. Fahey*,225 the Second and Fourth Departments of the Appellate Division endorsed a recent Third Department decision, *Holodook v. Spencer*,226 concerning intrafamily torts. Considering the question of whether a parent owes a legal duty of supervision to his child, with a cause of action accruing to the injured child upon a breach of such duty, both courts answered in the negative. In light of *Dole*, the conclusion that such a claim is impermissible is of particular importance.227

223 CPLR 1402, as amended, reads as follows:

Amount of contribution. The amount of contribution to which a person is entitled shall be the excess paid by him over and above his equitable share of the judgment recovered by the injured party; but no person shall be required to contribute an amount greater than his equitable share. The equitable share shall be determined in accordance with the relative culpability of each person liable for contribution.

1 N.Y. Sess. Laws [1974], ch. 742, § 1 (McKinney) (emphasis added). Prior to the enactment of article 14, the Supreme Court, Kings County, in Mazelis v. Wallerstein, 77 Misc. 2d 335, 353 N.Y.S.2d 633 (Sup. Ct. Kings County 1974), held that to the extent one of the defendants pays more than his apportioned share of liability, he may bring an action for contribution. Id. at 340, 335 N.Y.S.2d at 659.


226 45 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), discussed in *The Survey*, 48 St. John's L. Rev. 611, 650 (1974). In *Holodook*, a four-year-old infant, while running between parked cars, was struck by the defendant's automobile. The Supreme Court, Columbia County, denied a motion to dismiss the defendant's counterclaim against the infant's father and a third-party action against the infant's mother, both of which involved requests for *Dole* apportionments. 75 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973). With one judge dissenting, the Appellate Division, Third Department, reversed, holding the *Dole* claims to be legally insufficient. 43 App. Div. 2d at 137, 350 N.Y.S.2d at 206.


227 Where negligent supervision of an infant is alleged, the claimant is essentially arguing that the parent had failed to supervise and protect the injured infant, thereby contributing to his injury. The existence of such a theory has been the subject of a great deal of judicial scrutiny. See, e.g., *Sorrentino v. United States*, 344 F. Supp. 1308 (E.D.N.Y. 1972) (claim allowed); *Northrop v. Hogstyn*, 75 Misc. 2d 486, 349 N.Y.S.2d 105 (Sup. Ct. Ontario County 1973) (claim disallowed); *Searles v. Dardani*, 75 Misc. 2d 279, 347 N.Y.S.2d 662 (Sup. Ct. Albany County 1973) (claim allowed). See generally *Dachs*.
In *Ryan*, the hand of the three-year-old plaintiff was run over by a lawnmower operated by a neighbor's child. At the time of the accident, the plaintiff's mother and the neighbor were in the latter's home. Acting in both an individual and representative capacity, the father of the injured infant brought a negligence action against the infant's mother, the neighbor, and the neighbor's son. Reversing the Supreme Court, Monroe County, the Fourth Department upheld the motion made by the mother of the infant plaintiff to dismiss the complaint for failure to state a cause of action.228

In *Lastowski*, the father of an infant commenced an action to recover for injuries sustained by the child in an automobile accident involving a vehicle owned by the defendant. Seeking a *Dole* apportionment of damages, the defendant counterclaimed against the father, contending that the infant's injuries were due to negligent parental supervision. The Second Department granted the father's motion to dismiss the counterclaim, holding that the defendant had failed to allege an actionable tort.229

Both the *Ryan* and *Lastowski* courts determined that despite abolition of the intrafamily tort immunity doctrine in *Gelbman v. Gelbman*,230 no tort of negligent supervision currently exists.231 Furthermore, no such tort had been recognized prior to adoption of the intrafamily immunity rule in *Sorrentino v. Sorrentino*.232 In so holding, both courts referred to Judge Burke's conclusion in *Gelbman* that by "abolishing the defense of intrafamily tort immunity for nonwillful torts, we are not creating liability where none previously existed. Rather, we are permitting recovery, previously denied, after liability

---

228 43 App. Div. 2d at 433, 352 N.Y.S.2d at 287. At trial, the defendant-neighbor cross-claimed against the defendant-mother, seeking a *Dole* apportionment of damages. The sufficiency of this cross-claim was not decided by the Fourth Department. *Id*. at 431, 352 N.Y.S.2d at 285.
232 248 N.Y. 626, 162 N.E. 551 (1928).
has been established." In firmly asserting the nonexistence of a negligent supervision tort, the two courts rejected earlier trial level opinions which had suggested that recovery might be had if special circumstances concerning the injured infant were alleged, such as mental or physical disability, or non sui juris status.

Dissenting in Lastowski, Justice Hopkins contended that with the complete abrogation of intrafamily tort immunity in Gelbman, the sole bar to the assertion of a cause of action grounded upon negligent supervision had been removed. Accordingly, he argued that negligent supervision is an actionable tort and suggested that a "reasonable parent" standard be imposed as the criterion for determining whether the duty of supervision has been breached.

---

233 23 N.Y.2d at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

In Miller, the Supreme Court, Orange County, observed:
If a child is alleged to have been 4 years old or below at the time of the accident and therefore non sui juris as a matter of law, the age of the child is in and of itself a special circumstance which creates a special responsibility for a parent to supervise and therefore also creates a recognizable cause of action over against the parent under Dole v. Dow . . . .
75 Misc. 2d at 940-41, 349 N.Y.S.2d at 599.


The majority in Lastowski did not directly analyze this line of argument. However, the Fourth Department in Ryan pursued the issue and found the cases cited by Justice Hopkins to be inapposite. Longacre and Mangam, it was observed, dealt with the duty of supervision owed by a parent not to his child, but to a third party. 43 App. Div. 2d at 493, 352 N.Y.S.2d at 287. Sorrentino was distinguished as being limited to Dole cases and therefore inapplicable to a direct suit by an infant against his parent. Additionally, the Sorrentino court relied upon Holodook v. Spencer, 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct. Columbia County 1973), which was subsequently reversed by the Third Department. 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973).

236 44 App. Div. 2d at 448-49 (Hopkins, J., dissenting). Justice Gulotta also dissented from the Lastowski decision, but on a ground different from that advanced by Justice Hopkins. Justice Gulotta concluded that some form of a modified negligent supervision theory should be recognized as actionable. He suggested that the rule adopted in Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963), might present a "workable compromise between the need to preserve some freedom of action on the part of a parent and the need to protect the child." 44 App. Div. 2d at 150, 355 N.Y.S.2d at 455 (Gulotta, J., dissenting). In Goller, the Supreme Court of Wisconsin, in
Ryan and Lastowski indicate that where a suit or a counterclaim for Dole apportionment is predicated upon the alleged negligent exercise of parental supervision over a child, a court will disallow the action or counterclaim. Such a result is appropriate, since to permit such suits would result in a jury second-guessing the day-to-day conduct of the parent. Furthermore, in evaluating a parent's supervision of his child, no readily definable standards could be applied, inasmuch as the obligation of the parent is essentially moral.237 Moreover, if the courts were to attempt to crystallize such an obligation, the result would be an interference with the freedom traditionally permitted a parent in the rearing of his offspring. The Second and Fourth Departments have wisely concluded that decisions concerning the supervision of children should remain with parents as a moral rather than legal duty.

eliminating the parental immunity rule in that jurisdiction, excepted acts involving parental authority and the "exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care." 20 Wis. 2d at 406, 122 N.W.2d at 198. Justice Gulotta conceded that the Goller rule would require further judicial refinement, particularly with respect to whether "other care" included negligent supervision, before it could be applied in New York. 44 App. Div. 2d at 151, 355 N.Y.S.2d at 456.

237 Despite Justice Hopkins' suggestion in Lastowski that a "reasonable parent" standard could be used as the criterion for determining whether a parental duty to supervise has been breached, the three departments of the Appellate Division passing on the question have declined to impose such a standard. See Lastowski v. Norge Coin-O-Matic, Inc., 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 288 (4th Dep't 1974); Holodook v. Spencer, 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973), discussed in The Survey, 48 ST. JOHN'S L. REV. 611, 650 (1974). Responding to Justice Hopkins' suggestion, Justice Shapiro observed in his majority opinion in Lastowski:

[T]he fact is that his proposed standard, the "fictional" reasonable parent, is so "flexible" as to constitute no standard at all, depending as it would have to on innumerable variables such as the number and ages of the children and the differing economic, educational, cultural, ethnic, religious, physical, social and health background of the particular family involved.

44 App. Div. 2d at 136, 355 N.Y.S.2d at 442.