

# Parental Tort Liability Dole Rule No Cause of Action Based on Parental Negligence in Child Supervision

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## RECENT DEVELOPMENT

### Parental Tort Liability—Dole Rule—No Cause of Action Based on Parental Negligence in Child Supervision

*Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338,  
364 N.Y.S.2d 859 (1974)

#### INTRODUCTION

In 1969 the New York Court of Appeals in *Gelbman v. Gelbman*<sup>1</sup> abrogated the immunity that for forty-one years had barred parents and children from suing each other for nonwillful torts. In 1972 the court in *Dole v. Dow Chemical Co.*<sup>2</sup> held that actions for contribution and indemnity lie among joint tortfeasors regardless of the degree or nature of their 'concurring faults.'<sup>3</sup>

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<sup>1</sup> 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).

<sup>2</sup> 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

<sup>3</sup> A summary of the major points of *Dole* and its impact on prior law is helpful at this point. Under pre-*Dole* law, there was by statute a right to contribution among joint tortfeasors. However, the statute applied only where the tortfeasors were *in pari delicto*. Thus, a tortfeasor whose negligence was "active" or "primary" could not secure contribution from a joint tortfeasor whose negligence was "passive" or "secondary." See, e.g., *Security Mut. Cas. Co. v. American Ice Co.*, 268 App. Div. 924, 51 N.Y.S.2d 299 (2d Dep't 1944). In the absence of contract, the "active" or "primary" tortfeasor had no right of indemnity. However, an implied contract of indemnity was said to arise in favor of a defendant whose negligence was "passive" or "secondary," against any "active" or "primary" joint tortfeasor. See *Putvin v. Buffalo Elec. Co.*, 5 N.Y.2d 447, 454-55, 158 N.E.2d 691, 695, 186 N.Y.S.2d 15, 20-21 (1959).

In *Dole* the court of appeals held

that where 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.

30 N.Y.2d at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. This allocation of responsibility is to be arrived at without regard to whether the defendant's negligence was "active" or "passive." The measure of responsibility is to be determined through an "apportionment of responsibility in negligence between those parties." This apportionment "may be sought in a separate action [citation omitted] or as a separate and distinguishable issue by bringing in the third party in the prime action pursuant to CPLR 1007." *Id.* at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387. See also *Kelly v. Long Is. Light. Co.*, 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

Besides abolishing the distinction between "active" and "passive" negligence, *Dole* also effectively abolishes the distinction between actions for indemnity and contribution. Unlike the old action for contribution, apportionment of liability under *Dole* need not await a judgment of full liability against one joint tortfeasor. Unlike the old action for indemnity, *Dole* apportionment is not a shifting of all liability; rather, it is a sort of "partial indemnity." See note 65 *infra*.

*Dole* has been the subject of considerable commentary. One of the most provocative

In a series of recent cases, the courts of New York have dealt with the interaction of the changes worked in New York tort law by *Gelbman* and *Dole*. In *Holodook v. Spencer*,<sup>4</sup> decided in December 1974, the court of appeals, by a five to two margin, held that no legal duty of supervision runs from parent to child. Thus, where a child is injured as the result of parental negligence in supervision, the child has no *Gelbman*-type action against his parent. Moreover, where a nonfamily member's negligence and a parent's negligent supervision concur to cause a child injury, there is no basis for a *Dole*-type apportionment of liability between the nonfamily tortfeasor and the negligent parent.

This Note will analyze the decision in *Holodook* from perspectives of both history and public policy. It will examine *Holodook's* relation to traditional formulations of the parental duty of supervision and will analyze the impact of the *Holodook* holding on the larger body of contemporary tort law.

## I

### THE DOCTRINE OF IMPUTED PARENTAL CONTRIBUTORY NEGLIGENCE: RECOGNITION OF A PARENTAL DUTY OF SUPERVISION, AND ITS MISDIRECTED APPLICATION

In *Hartfield v. Roper*,<sup>5</sup> decided in 1839, the New York Supreme Court of Judicature<sup>6</sup> confronted a fact situation in which a two-year-old child had wandered from his parents' property onto a public highway, where he was struck by a horse-drawn sleigh. In an opinion by Justice Cowen, the court expressed no doubt that parents or those standing in their place have a duty to supervise their *non sui juris* children so as to avoid their exposure to danger.<sup>7</sup>

discussions is Farrell & Wilner, *Dole v. Dow Chemical Co.: A Leading Decision—But Where?*, 39 BROOKLYN L. REV. 330 (1972).

<sup>4</sup> 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974).

<sup>5</sup> 21 Wend. 615 (N.Y. Sup. Ct. Jud. 1839).

<sup>6</sup> In 1839 the status of the supreme court of judicature was somewhat higher than that of today's supreme court. See N.Y. CONST. art. 5 (1821).

<sup>7</sup> 21 Wend. at 618-19. Once an infant becomes *sui juris* it is his own responsibility and not that of his parents to exercise reasonable care for his own protection. But even a *sui juris* child is "not required to exercise the degree of care required of an adult, but only to exercise the degree expected from one of its years." *Jacobs v. H.J. Koehler Sporting Goods Co.*, 208 N.Y. 416, 418-19, 102 N.E. 519 (1913) (citations omitted).

Precisely when an infant becomes *sui juris* is sometimes a question of law and sometimes one of fact. The child in *Hartfield* was two years old when injured, and he was considered *non sui juris* as a matter of law. At a certain age, some courts have said, a presumption of *sui juris* status arises. In *Gerber v. Boorstein*, 113 App. Div. 808, 99 N.Y.S. 1091 (2d Dep't 1906), this age was said to be 12 years. Such factors as intelligence and experience must enter into the determination. See W. PROSSER, LAW OF TORTS § 32, at 154-57 (4th ed. 1971).

In the particular facts presented, parental contributory negligence as a matter of law was found.<sup>8</sup>

From this reasonable enough premise, the court leaped to a conclusion of more dubious validity. It declared that parental contributory negligence might be imputed to the child, thus defeating any action brought on his behalf for his personal injuries:

An infant is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect.<sup>9</sup>

In the usual formulation, contributory negligence is viewed as a breach of the duty of ordinary care for self, a duty which runs from potential victims to potential tortfeasors.<sup>10</sup> Thus, while the precise nature of the duty of supervision breached by the parent in *Hartfield* was not articulated by the court, it seems that it was perceived as one running from the parent, through the child, to the defendant tortfeasor. However, the court also implied that a duty running from parent to child had been breached: "If [the infant's] proper agent and guardian has suffered him to incur mischief, it is much more fit that he should look for redress to that guardian . . . ." <sup>11</sup>

<sup>8</sup> This seems to be the meaning of the court's statement "that here was a good defence established at the trial . . ." 21 Wend. at 623.

<sup>9</sup> *Id.* at 619. *Hartfield* was the first American decision to advance the doctrine of imputed parental contributory negligence. There is an English line of cases in accord, beginning with *Waite v. North Eastern Ry.*, 120 Eng. Rep. 682 (Exch. Ch. 1859), and ending with *Oliver v. Birmingham & Midland M.O. Co.*, 1 K.B. 35 (1933), wherein *Waite* was overruled. Ironically, the American doctrine originated in mere dictum: the *Hartfield* court held that no negligence on the part of the defendant had been made out (21 Wend. at 623), so the finding as to plaintiff's negligence was unnecessary.

The *Hartfield* court's concern seems to have been that, since the *non sui juris* infant has no duty to care for himself, even "an infant [who] suddenly throws himself in the way of a sleigh, a wagon or a railroad car" might be able to recover for his injuries. *Id.* at 622. Can it be that the law would require defendants to adhere to a standard of care that would, in effect, impose strict liability for injuries to *non sui juris* children? In other words, would it not have been enough for the court to have said that the law expects no one to be able to avoid running over a two-year-old child who suddenly appears in the highway?

<sup>10</sup> The classic study of contributory negligence defines it as such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of. C. BEACH, JR., A TREATISE ON THE LAW OF CONTRIBUTORY NEGLIGENCE 7 (3d ed. 1899) (footnote omitted).

<sup>11</sup> 21 Wend. at 620. "[T]he law has placed infants in the hands of vigilant and generally affectionate keepers, their own parents; and if there be any legal responsibility in damages, it lies upon them." *Id.* at 622. See also *Mangam v. Brooklyn R.R.*, 38 N.Y. 455 (1868), wherein the court of appeals wrote:

The doctrine of imputed parental contributory negligence has been called a "barbarous rule, which denied to the innocent victim of the negligence of two parties any recovery against either."<sup>12</sup> A more fair-minded characterization is that *Hartfield* represented an embryonic attempt to eliminate the inequity worked by the pre-*Dole* rule which required an "active" joint tortfeasor to assume full liability for damage for which he was, factually, only partially responsible.<sup>13</sup> Because of the restricted views of indemnity and contribution among joint tortfeasors which prevailed until recently, the only means available to a nineteenth century court seeking to reduce the liability of an "active" joint tortfeasor was to eliminate his liability entirely. Thus, hindsight requires a reading more generous than the one traditionally given *Hartfield* and its progeny. Criticism of the often harsh practical consequences of the doctrine of imputed parental contributory negligence should not prevent an appreciation of the New York courts' early recognition of a parental duty of supervision running to children and to those who might injure children.

## II

### THE ISSUE OF A PARENTAL DUTY OF SUPERVISION LIES DORMANT

#### A. *Criticism and Abrogation of the Doctrine of Imputed Parental Contributory Negligence*

As the nineteenth century progressed, the doctrine of imputed parental contributory negligence, firmly entrenched in the law of New York and several other states, came under increasing criticism.<sup>14</sup> In New York, criticism of the *Hartfield* rule was at first

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Surely, an infant could not recover against his parent or guardian, for negligence in permitting him to escape into the street, *unless* he could show some omission of ordinary care to prevent it.

*Id.* at 457 (emphasis added).

<sup>12</sup> W. PROSSER, *supra* note 7, § 74, at 490. Dean Prosser calls *Hartfield* "one of those bleak decisions which have here and there marred the face of our law . . ." *Id.*

The critics' case against *Hartfield* is often overstated. While as a practical matter child versus parent suits are rare even where children are granted causes of action for parental negligence, in a strict sense the *Hartfield* rule denied the infant recovery only against the non-family tortfeasor. *See* note 11 and accompanying text *supra*; notes 23-26 and accompanying text *infra*.

<sup>13</sup> *See* note 3 *supra*.

<sup>14</sup> *See* 1935 N.Y. LAW REVISION COMM'N 47, 73-88, for a discussion of the criticism and rejection of the doctrine in other jurisdictions. The Commission's report, which led to the statutory abrogation of the doctrine of imputed parental contributory negligence (*see* note 21 and accompanying text *infra*), is the best-reasoned critique of the doctrine. It is encyclopedic in scope, citing every relevant American case up to 1935.

confined to that case's suggestion that leaving a young child unattended might constitute, in the proper circumstances, negligence per se. Responding to this criticism in 1868, the New York Court of Appeals incorporated a factual test of "ordinary parental care" into the doctrine.<sup>15</sup> A further refinement of the doctrine was made four years later, when it was held that parental contributory negligence would be imputed only where the child had failed to exercise the degree of care for itself required by law of an adult.<sup>16</sup>

By the early twentieth century, the doctrine of imputed parental contributory negligence was followed in only a distinct minority of jurisdictions.<sup>17</sup> The doctrine's theoretical foundation, uncertain from the start, was seriously questioned.<sup>18</sup> Moreover, New York's adoption in 1928 of parental immunity for nonwillful torts<sup>19</sup> made the doctrine's harsh consequences unavoidable, by foreclosing the possibility (open at least in theory under prior law<sup>20</sup>) of the injured child's recovering from the "passive" joint tortfeasor, namely his parent.

In 1935 the New York Legislature decreed: "In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant."<sup>21</sup> While not negating the existence of a duty of supervision running from parents to potential tortfeasors, this statute rendered such a duty devoid of practical significance in the context of actions brought on behalf of injured children.<sup>22</sup>

<sup>15</sup> *Mangam v. Brooklyn R.R.*, 38 N.Y. 455 (1868). See also *Regan v. International Ry.*, 205 App. Div. 425, 199 N.Y.S. 601 (4th Dep't 1923).

<sup>16</sup> *Ihl v. Forty-Second St. & Grand St. Ferry R.R.*, 47 N.Y. 317 (1872). This point was also made in *Kupchinsky v. Vacuum Oil Co.*, 263 N.Y. 128, 188 N.E. 278 (1933). One of the last imputed parental contributory negligence cases, *Kupchinsky* occasioned much comment. Among the better notes are 34 COLUM. L. REV. 575 (1934) and 47 HARV. L. REV. 874 (1934).

<sup>17</sup> See 1935 N.Y. LAW REVISION COMM'N 47, 73-88.

<sup>18</sup> *Id.* at 88-89.

<sup>19</sup> See *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551 (1928).

<sup>20</sup> See note 11 and accompanying text *supra*; notes 23-26 and accompanying text *infra*.

<sup>21</sup> N.Y. GEN. OBLIG. LAW § 3-111 (McKinney 1964).

<sup>22</sup> New York courts had early recognized that parental breach of the duty of child supervision running to third parties would, besides barring the child's recovery, bar a parent from recovering in a derivative action for loss of his child's services. See *Honegsberger v. Second Ave. R.R.*, 1 Keyes 570 (N.Y. Ct. App. 1864). A leading contemporary case in which this rule was applied is *Juszczak v. City of New York*, 32 App. Div. 2d 824, 302 N.Y.S.2d 375 (2d Dep't 1969) (mem.). The effect of *Holodook's* general refusal to recognize a parental duty of child supervision on the availability of the contributory negligence defense to the parent's derivative action is uncertain.

In a few situations involving damage by children, rather than injury to children, courts have imposed on parents a duty of child supervision running to third parties. Breach of this

### B. *Adoption of Parental Immunity for Nonwillful Torts Against Children*

What of the duty recognized by way of dicta in the *Hartfield* line of cases: the duty of supervision running from parent to child?<sup>23</sup> It is clear that, at the time this duty was formulated, it was possible for it to serve as the basis for direct child versus parent suits. While obvious social and economic pressures operate to discourage such suits,<sup>24</sup> they were apparently not barred at early common law,<sup>25</sup> and the possibility of such suits was at least impliedly recognized by New York courts in the nineteenth century.<sup>26</sup>

The doctrine of parental tort immunity, first developed by an American court in 1891,<sup>27</sup> became the law of New York in *Sorrentino v. Sorrentino*,<sup>28</sup> decided in 1928. In *Sorrentino*, a divided court of

duty results in parental liability for the torts of children. Thus, where a parent is negligent in allowing a child access to an instrumentality, either inherently dangerous, or dangerous because of a known propensity of the child, damage caused by the child is the parent's responsibility. See, e.g., *Napiearski v. Pickering*, 278 App. Div. 456, 106 N.Y.S.2d 28 (4th Dep't 1951); *Steinberg v. Cauchois*, 249 App. Div. 518, 293 N.Y.S. 147 (2d Dep't 1937). Similarly, a parent is liable if he fails reasonably to restrain a child whom he knows to have a propensity toward vicious conduct. *Linder v. Bidner*, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (Sup. Ct., Queens County 1966). Note that in none of the above situations is liability an incident of the parent-child relationship per se.

In 1970, the New York Legislature adopted a provision that makes a parent liable in a civil action if his child "willfully, maliciously or unlawfully" damages or destroys property owned by another. The statute only applies to children between the ages of 10 and 18, and parental liability cannot exceed \$500. Moreover, it is a complete defense for the parent to show that he exercised "due diligence" in the supervision of his child. N.Y. GEN. OBLIG. LAW § 3-112 (McKinney Supp. 1974).

<sup>23</sup> See note 11 and accompanying text *supra*.

<sup>24</sup> It is probable that no child will sue his parent for any unintentional tort, unless insurance is present protecting the parent. This is the ordinary result of the close relationship between the parties; the natural affection would first preclude a suit and, of course, one cannot overlook the practicality that the parent, as the person who usually institutes the suit, would hardly make himself an adversary liable to payment of damages.

*Lastowski v. Norge Coin-O-Matic, Inc.*, 44 App. Div. 2d 127, 140, 355 N.Y.S.2d 432, 446 (2d Dep't 1974) (dissenting opinion, Hopkins, J.).

<sup>25</sup> *W. PROSSER, supra* note 7, §122, at 864-65. See also the examination of the English authorities by Chief Justice Peaslee in *Dunlap v. Dunlap*, 84 N.H. 352, 150 A. 905 (1930). The Chief Justice concluded that "there has never been a common-law rule that a child could not sue its parent." *Id.* at 354, 150 A. at 906.

<sup>26</sup> See note 11 and accompanying text *supra*.

<sup>27</sup> See *Hewlett v. George*, 68 Miss. 703, 9 So. 885 (1891).

Unlike the courts of most other states, the *Hewlett* court went so far as to immunize the defendant parent from liability for an intentional tort (false imprisonment):

The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand.

*Id.* at 711, 9 So. at 887.

<sup>28</sup> 248 N.Y. 626, 162 N.E. 551 (1928) (mem.).

appeals<sup>29</sup> affirmed without opinion a no-opinion appellate division decision which forbade an unemancipated minor from suing his parents for injuries sustained as a result of parental negligence. Many years passed before the court advanced the rationale underlying such an immunity;<sup>30</sup> meanwhile, dissatisfaction with the doctrine mounted.<sup>31</sup> Broad exceptions were gradually carved out of the rule of parental immunity,<sup>32</sup> a process which made all but inevitable its abrogation in 1969 by *Gelbman v. Gelbman*.<sup>33</sup>

The forty-one year existence of the parental immunity for nonwillful torts was a period during which the duty of supervision running from parent to child remained buried in the law reports, without practical significance in tort liability. Only after *Gelbman*

<sup>29</sup> Chief Judge Cardozo and Judges Crane and Andrews dissented.

<sup>30</sup> In *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942), the court of appeals expressed the concern that

if within the wide scope of daily experiences common to the upbringing of a child a parent may be subjected to a suit for damages for each failure to exercise care commensurate with the risk—for each injury caused by inattention, unwise choice or even selfishness—a new and heavy burden will be added to parenthood.

*Id.* at 429, 40 N.E. 2d at 238.

In supporting the doctrine of parental tort immunity, courts have often expressed concern that the absence of such an immunity would prejudice society's poorer classes:

Lack of means, physical weakness or mental incapacity may cause parents to tolerate conditions in the family home which are unsafe and which might afford a basis for liability to one coming to the premises as an invitee or licensee. Not yet, however, have our courts granted an unemancipated child . . . the right to hold his parents in damages for unintended personal injuries resulting from such conditions.

*Id.* at 428-29, 40 N.E.2d at 238.

<sup>31</sup> The most frequently-cited critique is McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030, 1056-82 (1930).

<sup>32</sup> The series of decisions by which "innumerable exceptions and qualifications" to the immunity doctrine evolved was reviewed by Judge Fuld in *Badigian v. Badigian*, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961) (dissenting opinion). Among the situations in which various American courts qualified the immunity doctrine were cases where the child was emancipated, where the tortious injury was to property or was inflicted willfully, or where the child could sue a third party entitled to indemnity from the parent. *Id.* at 476-77, 174 N.E.2d at 721-22, 215 N.Y.S.2d at 39-40 (dissenting opinion).

<sup>33</sup> 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). *Gelbman* involved a suit by a mother against her unemancipated son for injuries suffered as a result of his negligent driving. The court stated that the underlying policy considerations and governing rules of law are the same in this situation as in its converse. *Id.* at 436, 245 N.E.2d at 192, 297 N.Y.S.2d at 530.

The *Gelbman* court advanced three principal reasons for abrogating the immunity doctrine: (1) citing with approval Judge Fuld's dissenting opinion in *Badigian* (see note 32 *supra*), the court concluded that it could not reconcile the immunity rule with its many exceptions; (2) given New York's requirement of compulsory automobile liability insurance, litigations like the present one were viewed as, in reality, suits against insurance companies, and not suits against family members, with the attendant threat to family harmony; (3) the court stated that there is no more danger of collusion in the intrafamily suit than in many other actions. In all cases, the law relies on the jury to exclude fraudulent claims. *Id.* at 437-39, 245 N.E.2d at 193-94, 297 N.Y.S.2d at 531-32.



did it become necessary for New York courts to consider once again the extent and effect of this duty.

### III

#### THE ISSUE OF A PARENTAL DUTY OF SUPERVISION IS REVIVED

In abrogating the doctrine of parental immunity for nonwillful torts, the *Gelbman* court wrote: "[W]e are not creating liability where none previously existed. Rather, we are permitting recovery, previously denied, after the liability has been established."<sup>34</sup> The above language highlights the fact that tort immunities are remedial rather than substantive in nature: strictly speaking, neither the adoption of an immunity nor its abolition alters the duties mandated by the substantive law.<sup>35</sup> But New York's abolition of parental tort immunity was problematic because the body of substantive law brought back into play by *Gelbman* had not been of practical use, and therefore had not been examined by the courts since 1928.

Thus, in the wake of *Gelbman* there was considerable confusion in New York courts regarding the scope of parental duties toward children. This was particularly true with regard to the duty of supervision, a duty which had not been formulated with clarity even in pre-*Sorrentino* case law.<sup>36</sup> It is not surprising, therefore, that the New York courts were far from uniform in their disposition of the flurry of actions engendered by *Dole* in which defendants who had negligently injured children sought to shift a portion of their liability onto parents accused of breaching an alleged duty of child supervision.<sup>37</sup>

<sup>34</sup> *Id.* at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.

<sup>35</sup> A parent who by negligence injures his minor child surely commits a civil "wrong" in the sense that there is neither lawful right nor privilege to inflict the injury. And, conversely, the law does not . . . deliberately carve an exception in favor of parents out of the right of a minor child to be secure from negligent harm to his person.

There is a wrong, it may be said, but the remedy is withheld for reasons of fundamental public policy . . . .

*Badigian v. Badigian*, 9 N.Y.2d 472, 476, 174 N.E.2d 718, 721, 215 N.Y.S.2d 35, 38 (1961) (dissenting opinion).

<sup>36</sup> See 1935 N.Y. LAW REVISION COMM'N 47, 88-89.

<sup>37</sup> Prior to the availability of appellate court authority, a position frequently adopted by lower courts was that an absolute parental duty of supervision runs only to children who are *non sui juris* as a matter of law. Accordingly, where the child involved was more than three or four years old, complaints were dismissed for failure to allege "special facts and circumstances" which imposed a "special responsibility" on the parent. A reading of these decisions suggests that "special facts and circumstances" was intended to refer only to mental or physical handicap. Thus, under the "special facts and circumstances" rule, there was no duty to supervise a normal child who was no longer *non sui juris* as a matter of law. See, e.g., *Searles v. Dardani*, 75 Misc. 2d

In *Holodook v. Spencer*, the court of appeals affirmed three decisions in which the appellate division had refused to recognize the existence of a parental duty of supervision. (1) In *Graney v. Graney*,<sup>38</sup> a four-year-old child who fell from a playground slide sued his father by a guardian *ad litem*, alleging negligent supervision. With one justice dissenting, the third department had affirmed dismissal of the complaint in the supreme court for failure to state a cause of action.<sup>39</sup> (2) In *Ryan v. Fahey*,<sup>40</sup> the hand of a three-year-old child at play was run over by a lawnmower operated by a neighbor's child. By his father, the injured child sued his mother, the neighbor's child, and the neighbor. The fourth department had reversed the supreme court's denial of the mother's motion to dismiss the child's complaint as to her.<sup>41</sup> (3) In *Holodook v. Spencer*,<sup>42</sup> a four-year-old child darted from between parked cars and was struck by a car. The driver was sued for negligence. The driver's claim for indemnity and *Dole*-type apportionment against the child's mother had withstood the mother's motion to dismiss in the supreme court,<sup>43</sup> but the third department, with one justice dissenting, had reversed.

The court of appeals in *Holodook* felt unconfined by prior law in reaching its conclusion that no duty of supervision running from parent to child should be recognized. Noting that very few duties

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279, 347 N.Y.S.2d 662 (Sup. Ct., Albany County 1973); *Hairston v. Broadwater*, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (Sup. Ct., Nassau County 1973); *Bilgore v. Rennie*, 72 Misc. 2d 639, 340 N.Y.S.2d 212 (Sup. Ct., Monroe County 1973); *Marrero v. Just Cab Corp.*, 71 Misc. 2d 474, 336 N.Y.S.2d 301 (Sup. Ct., New York County 1972).

In a few other early cases, some lower courts held that *Gelbman* abrogated parental immunity and gave the child a cause of action that could serve as the basis for a defendant's *Dole* claim only where the parent was insured. See *Kiernan v. Jones*, 73 Misc. 2d 829, 342 N.Y.S.2d 873 (Sup. Ct., Nassau County 1973); *Graney v. Graney*, 75 Misc. 2d 828, 349 N.Y.S.2d 314 (Sup. Ct., Albany County 1972).

Prior to the court of appeals decision in *Holodook*, three of the departments of the appellate division had considered the issue of a duty of parental supervision. None had adopted either the "special facts and circumstances" or the "*Gelbman* is insurance-based" approaches. All three held that no duty of supervision runs from parent to child so as to support *Dole*-type apportionment claims. See *Morales v. Moss*, 44 App. Div. 2d 687, 355 N.Y.S.2d 456 (2d Dep't 1974) (Gulotta, J., dissenting); *Lastowski v. Norge Coin-O-Matic*, 44 App. Div. 2d 127, 355 N.Y.S.2d 432 (2d Dep't 1974) (Gulotta & Hopkins, JJ., dissenting); *Ryan v. Fahey*, 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't 1974); *Holodook v. Spencer*, 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973) (Staley, J., dissenting).

<sup>38</sup> 43 App. Div. 2d 207, 350 N.Y.S.2d 207 (3d Dep't 1973).

<sup>39</sup> 75 Misc. 2d 828, 349 N.Y.S.2d 314 (Sup. Ct., Albany County 1972).

<sup>40</sup> 43 App. Div. 2d 429, 352 N.Y.S.2d 283 (4th Dep't 1974).

<sup>41</sup> The supreme court (Monroe County) decision was unreported. See *id.* at 431, 352 N.Y.S.2d at 285.

<sup>42</sup> 43 App. Div. 2d 129, 350 N.Y.S.2d 199 (3d Dep't 1973).

<sup>43</sup> 73 Misc. 2d 181, 340 N.Y.S.2d 311 (Sup. Ct., Columbia County 1973).

that give rise to legal consequences for their breach run from parent to child,<sup>44</sup> the court declared that "research discloses no appellate case in New York in which a parent, prior to recognition of the immunity doctrine in *Sorrentino v. Sorrentino* . . . has been held answerable to his child in damages for negligent supervision."<sup>45</sup> The court further observed that the statutory repeal of the doctrine of imputed parental contributory negligence evinced "a legislative concern that the parent's failure to provide adequate supervision not be permitted to diminish . . . a child's recovery against a third party."<sup>46</sup>

In its opinion by Judge Rabin, the *Holodook* court advanced several policy arguments in support of its refusal to recognize a duty of child supervision. Its principal concern was "the potential impact . . . upon the fundamental relation between parent and child":

[I]n cases where the parents proceed to prosecute their child's action diligently and are themselves ultimately held liable for contribution for a percentage of the recovery because of their failure to supervise, family strife is a predictable consequence where insurance is absent.

It is apparent that the considerations which led us in the compulsory insurance situation in *Gelbman* to relax the immunity doctrine now militate against recognition of the negligent supervision cause of action urged on us by appellants herein.<sup>47</sup>

Underlying this position was the view that the family is "a single economic unit." Because any recovery by the third party against the parent would diminish the needy child's recovery, there would result "a strain on the family relationship, a result which our courts have consistently sought to avoid."<sup>48</sup>

<sup>44</sup> *Holodook v. Spencer*, 36 N.Y.2d 35, 44-45, 324 N.E.2d 338, 342-43, 364 N.Y.S.2d 859, 866-67 (1974). See note 22 *supra*.

<sup>45</sup> 36 N.Y.2d at 45, 324 N.E.2d at 343, 364 N.Y.S.2d at 866-67. But see *Lastowski v. Norge Coin-O-Matic*, 44 App. Div. 2d 127, 148, 355 N.Y.S.2d 432, 453 (2d Dep't 1974) (dissenting opinion, Hopkins, J.):

It may be true . . . that there is no decision in an American or English appellate court sustaining a cause of action for lack of supervision by a parent, but it seems to be equally true that there is no decision denying such right. In view of the immunity doctrine which became firmly entrenched in New York law when the question first came up in a case involving active negligence (*Sorrentino v. Sorrentino*, 248 N.Y. 626, 162 N.E. 551), one would hardly expect the question to come up with respect to the lesser wrong of passive negligence. Therefore, we would not be justified in concluding, from this absence of case law, that the right did not exist.

<sup>46</sup> 36 N.Y.2d at 49, 324 N.E.2d at 345, 364 N.Y.S.2d at 870.

<sup>47</sup> *Id.* at 47, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

<sup>48</sup> *Id.*, 324 N.E.2d at 344, 364 N.Y.S.2d at 869.

Thus, the *Holodook* court adopted the view that the *Gelbman* rule of parental tort liability applies only where insurance is present to protect the parent. See note 37 *supra*. Since

The *Holodook* court also worried about potential abuse of the conflict of interests between parent and child that would result if apportionment of liability were allowed. Surely defendants who injured children and these defendants' insurers would recognize that "vulnerability to a suit for contribution might make uninsured parents reluctant to assert their child's rights."<sup>49</sup> The mere threat of a *Dole*-type claim might result in a settlement between the parties that would not otherwise be considered and that might not be in the child's best interests. Moreover, the parent-child conflict of interest might give rise to claims "brought in a retaliatory context between estranged parents, one suing the other on the child's behalf, or by children estranged from their parents who could sue after reaching majority."<sup>50</sup>

Recognizing that "[e]ach child is different, as is each parent," and that "the law's external coercive incentives are inappropriate to assuring performance of the subtle and shifting obligations of family," the *Holodook* court expressed the belief that child supervision should remain wholly a matter of parental discretion.<sup>51</sup> Where parental discretion is to be encouraged, parental judgment must not be questioned by the courts. Given the myriad varieties of parent-child interaction, the court suggested that it would be difficult to fashion a standard with which to judge the sufficiency of parental supervision:

In most areas of tort law, the reasonable man standard well serves the law's general aim of structuring human activity in accordance with the community's understanding and expectations of proper conduct. In the family relation between parent and child, however, we do not believe that application of this standardized norm is the wisest course.<sup>52</sup>

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customary insurance policies would not indemnify a parent against a judgment arising out of negligent child supervision, this would mean that a *Dole*-type claim could never be brought against a parent for negligent supervision. This view is difficult to reconcile with *Dole*, since

[t]here is no indication that *Dole* is meant to be relaxed to maximize the aggregate intake of insurance proceeds to a family sheltering a joint tortfeasor.

Nobody else gets out from under *Dole* because he is not insured.

Hairston v. Broadwater, 73 Misc. 2d 523, 532, 342 N.Y.S.2d 787, 796 (Sup. Ct., Nassau County 1973).

<sup>49</sup> 36 N.Y.2d at 46, 324 N.E.2d at 344, 364 N.Y.S.2d at 868.

<sup>50</sup> *Id.* at 49, 324 N.E.2d at 345, 364 N.Y.S.2d at 870.

<sup>51</sup> *Id.* at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

<sup>52</sup> *Id.* at 49-50, 324 N.E.2d at 346, 364 N.Y.S.2d at 870-71.

The suggestion that an exception should be carved out of the new rule of parental tort liability for cases involving exercises of parental discretion is not a new one. In his dissenting opinion in *Badigian v. Badigian*, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961), Judge Fuld suggested that the arguments for abolishing the parental immunity might not be convincing in a case involving "passive" negligence:

The decision to be made herein has little, if anything, to do with a case where

The dissenting opinion of Judge Jasen, in which Judge Stevens concurred, is in total opposition to the arguments propounded by the *Holodook* majority. From his reading of the old imputed parental contributory negligence cases, Judge Jasen concluded that "[t]he parental duty to supervise was recognized in our early law . . . although usually in conjunction with the issue of the child's own

the child is injured in the kitchen or in some other room making up the family establishment. There may be injustice, as well as difficulty, in applying the standardized duty of the reasonable man in such a situation. . . . The house or the apartment may be out of order or in need of repair, but, there is force to the query, what is the father to do if there is no money to repair it? . . . In the ordering of the home, the father is still the judge, or, better perhaps, the king, not liable for error while he acts in good faith, without malice or indifference.

*Id.* at 480-81, 174 N.E.2d at 723-24, 215 N.Y.S.2d at 42 (dissenting opinion).

Although not speaking explicitly of exceptions, the *Gelbman* court did refer approvingly to Judge Fuld's *Badigian* dissent. *See* note 32 *supra*. There is some doubt, however, that Judge Fuld's exceptions, which pertain largely to parental ordering of the living premises, extend to the *Holodook*-like child supervision case.

Somewhat akin to Judge Fuld's exceptions is the rule adopted by the Wisconsin Supreme Court in *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) and followed by the courts of several other states. In abrogating the parental tort immunity, the Wisconsin court expressed concern that parental authority to control and discipline children would be abridged unless the immunity were retained

(1) where the alleged negligent act involves an exercise of parental authority over the child; and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care.

*Id.* at 413, 122 N.W.2d at 198.

Although it may be argued, as did the third department in *Holodook* (43 App. Div. 2d at 133-35, 350 N.Y.S.2d at 202-04), that *Gelbman*, via its reference to Judge Fuld's *Badigian* dissent, implicitly includes the *Goller* exceptions to the new rule of parental liability, only through a very broad reading of these exceptions may they be viewed as applying to cases of negligent supervision. Indeed, the Wisconsin Supreme Court has itself refused to extend *Goller* to negligent supervision cases:

Appellants assert that a parent's supervision of a child's play is an activity entitled to immunity because it involves direct parental control and is primarily an interaction between parent and child rather than a nondomestic activity. However, parental immunity is not determined by whether the negligence arises out of an "essentially parental" act involving parental control and this is not the standard this court set forth in *Goller*.

*Cole v. Sears, Roebuck & Co.*, 47 Wis. 2d 629, 632-33, 177 N.W.2d 866, 868 (1970). The court proceeded to explain that those parental functions which fall within the second *Goller* exception are only those that relate to the duties which the law imposes on parents to afford children food, housing, medical care, and education. *Id.* at 634-35, 177 N.W.2d at 869. *See also* *Thoreson v. Milwaukee & Suburban Transp. Co.*, 56 Wis. 2d 231, 201 N.W.2d 745 (1972), wherein the court commented: "The care sought in the exclusion is not the broad care one gives to a child in day-to-day affairs. If this were meant, the exclusion would be as broad as the old immunity was." *Id.* at 247, 201 N.W.2d at 753.

It is instructive to note that Wisconsin has had a *Dole*-type rule of apportionment of liability among joint tortfeasors since 1962. *See* *Bielski v. Schulze*, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Thus, in deciding *Goller*, *Cole*, and *Thoreson*, the Wisconsin court was aware of the consequences of its recognition of a duty of child supervision on third-party liability. Indeed, both *Cole* and *Thoreson* involved claims against parents for contribution.

negligence . . . ."<sup>53</sup> Bringing his historical analysis up to the present, Judge Jasen wrote:

[*Gelbman*] having removed the bar of intrafamily negligence immunity in New York, the duty of supervision persists unconfined by that defense. Where that duty is breached, only the most cogent reasons of public policy should warrant denial of a remedy and consequent deviation from the central principle of Anglo-American tort law, which is that wrongdoers should bear the losses they cause.<sup>54</sup>

Judge Jasen found the public policy reasons advanced by the *Holodook* majority to be less than compelling. Because "the natural ties of affection that bind the family unit and . . . the parent's power to hinder suit" make improbable child versus parent suits without the interposition of an insurer, the untoward consequences of such suits, feared by the majority, will rarely come about.<sup>55</sup> In any event, "family harmony" and the majority's related arguments were all found unavailing in *Gelbman* itself.<sup>56</sup> Furthermore, the possibility of the parent's hindering a suit on the child's behalf is a "practical possibility . . . present in all intrafamily legal relationships, particularly parent vis-à-vis child."<sup>57</sup> If this possibility does not operate to avoid the consequences of *Gelbman*, why should it operate to avoid the results of the interaction of *Gelbman* and *Dole*?

Unlike the majority, Judge Jasen believed the law capable of formulating a standard against which to judge the sufficiency of parental supervision. As in other areas of tort law, a "reasonable man" standard would enable jurors to evaluate relevant facts in light of community notions of responsibility:

To the assertion that the duty to supervise cannot be delineated or applied, I answer that juries daily perform greater miracles. What a reasonable and prudent parent would have done in similar circumstances should be the test and jurors, many of them parents themselves, drawing on their life experiences, should not find the task insuperable.<sup>58</sup>

<sup>53</sup> 36 N.Y.2d at 51, 324 N.E.2d at 347, 364 N.Y.S.2d at 872 (dissenting opinion) (citations omitted).

<sup>54</sup> *Id.* at 51-52, 324 N.E.2d at 347, 364 N.Y.S.2d at 872 (dissenting opinion).

<sup>55</sup> *Id.* at 52, 324 N.E.2d at 347, 364 N.Y.S.2d at 872 (dissenting opinion).

<sup>56</sup> *Id.* Judge Jasen appears to have assumed that *Gelbman* was not insurance-based. He did not deal with the majority's assumption to the contrary. See note 48 and accompanying text *supra*.

<sup>57</sup> 36 N.Y.2d at 52-53, 324 N.E.2d at 347, 364 N.Y.S.2d at 873 (dissenting opinion).

<sup>58</sup> *Id.* at 52, 324 N.E.2d at 347, 364 N.Y.S.2d at 873 (dissenting opinion).

The approach favored by the dissenting judges is the one the Supreme Court of California adopted in the wake of its abolition of parental tort immunity:

The standard to be applied is the traditional one of reasonableness, but viewed in

## IV

THE NEW PARENTAL SUPERVISION LOOPHOLES IN *Gelbman* AND *Dole*

Were it not for the consequences of *Dole*, resolution of the problems presented by the issue of a parental duty of supervision would prove uncomplicated. The old imputed parental contributory negligence cases could be looked to for the limited guidance they offer, and the recognition or rejection of such a duty could be grounded upon public policy analysis. Indeed, the policy considerations discussed by the *Holodook* court are weighty and may justify the court's refusal to "second guess" a parent's supervisory acts or omissions at the request of his child in a direct action.

But *Dole* complicates the matter. In the context of the *Dole*-type claim, the major policy concerns expressed in *Holodook* do not stand alone. Rather, they must be balanced against the inequity of denying "the negligent [third party] recourse against the parent whose responsibility for the child's injuries may be greater."<sup>59</sup> The *Holodook* court, however, regarded "the secondary right to contribution" as defeated by "the absence of the primary cause of action."<sup>60</sup> By failing to consider *separately* the issues involved in the direct child versus parent action and in the *Dole*-type apportionment claim, the *Holodook* court gave insufficient attention to those considerations which are unique to the latter. In particular, the court did not come frankly to terms with *Dole*'s directive that liability among joint tortfeasors should reflect factual responsibility.<sup>61</sup>

In one recent pre-*Holodook* case, *Sorrentino v. United States*,<sup>62</sup> a federal district court construing New York law held that the *Dole*-type action against a negligent parent must be allowed, despite

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light of the parental role. Thus, we think the proper test of a parent's conduct is this: what would an ordinarily reasonable and prudent *parent* have done in similar circumstances?

We choose this approach over the *Goller*-type formula for several reasons. First, we think that the *Goller* view will inevitably result in the drawing of arbitrary distinctions about when particular parental conduct falls within or without the immunity guidelines. Second, we find intolerable the notion that if a parent can succeed in bringing himself within the "safety" of parental immunity, he may act negligently with impunity.

*Gibson v. Gibson*, 3 Cal. 3d 914, 921-22, 479 P.2d 648, 653, 92 Cal. Rptr. 288, 293 (1971) (emphasis in original).

A comparison of the *Goller* and *Gibson* approaches, and a survey of the jurisdictions which have adopted them, is found in Note, *The Vestiges of Child-Parent Tort Immunity*, 6 U.C. DAVIS L. REV. 195 (1973).

<sup>59</sup> 36 N.Y.2d at 52, 324 N.E.2d at 347, 364 N.Y.S.2d at 873 (dissenting opinion).

<sup>60</sup> *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 872.

<sup>61</sup> See note 3 *supra*.

<sup>62</sup> 344 F. Supp. 1308 (E.D.N.Y. 1972).

the fact that the direct child versus parent action might be disallowed for compelling policy reasons. In insisting that *Dole* mandates liability of the negligent parent to other joint tortfeasors, the court was concluding that, in the *Dole*-type case, the traditional policy factors weighing against parental tort liability are outweighed by the equitable considerations underlying the *Dole* rule. However, in the direct parent versus child action, where there are no countervailing equities, the traditional policy factors stand alone and compel immunization of the parent from liability.<sup>63</sup>

### CONCLUSION

In its rejection of a parental duty of child supervision, the *Holodook* holding leads to certain incongruities within the new system of tort law ushered in by *Dole*. Assume that a child darts into the street as a result of negligent parental supervision. He is too young to be capable of contributory negligence. Under *Holodook*, a negligent driver who strikes him is liable for the full extent of his injuries. But assume the same child riding in the automobile of his parent, who is driving negligently. If the negligent driver hits their automobile, liability will be apportioned between him and the negligent parent under *Dole*. In Judge Jasen's words, *Holodook* "runs counter to the evolution in our law which is toward a system of comparative fault."<sup>64</sup>

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<sup>63</sup> [Custodial and supervisory negligence] could be conceived as exposing a parent to a defense of contributory negligence when the parent sues for the parent's own loss arising out of injury to the allegedly negligently supervised child, and it could also be conceived as creating a responsibility . . . for the total injury inflicted on the child as a consequence of the concurring negligences of the third party and the parent, without at the same time and automatically subjecting the parent to a direct responsibility to the child for parental negligence in so intimate an aspect of the intrafamilial duties of custodianship and supervision.

*Id.* at 1310. The conclusion, contrary to the common law, that actions for contribution might be allowed even where the direct action based on the same breach of duty is barred by an immunity, has been reached by several courts. For example, in *Perchell v. District of Columbia*, 444 F.2d 997 (D.C. Cir. 1971), Mr. Perchell's son had been injured as a result of the negligent driving of both his father and a District employee. The court allowed the District contribution from Mr. Perchell, notwithstanding the fact that a direct action against him by his son was barred by the parental immunity:

The underlying basis for the doctrine of parental immunity is to further domestic tranquility, recognizing the special relationship of parent and child. While domestic tranquility would be served by precluding the District from seeking contribution from the father, Mr. Perchell, the result would cast the full burden of the joint tort upon the District, thus serving one equitable purpose but creating an inequity.

*Id.* at 998.

For a discussion of *Perchell* and of decisions in other jurisdictions which, as a result of a "balancing of equities," have permitted actions for contribution in the face of a bar to the underlying direct action, see 60 *Geo. L.J.* 1612 (1972).

<sup>64</sup> 36 N.Y.2d at 53, 324 N.E.2d at 348, 364 N.Y.S.2d at 873 (dissenting opinion) (citation omitted).



It may be unfair, however, to criticize *Holodook* for giving rise to the apparent incongruity described above. The doctrine of comparative fault is not a magical formula to be applied to all cases; it is merely one means to the end of effective loss distribution. Thus, it may be argued that the *Dole* rule should not be applied when it would result in a shifting of loss from a superior loss bearer, such as the insured defendant in *Holodook*, to an inferior loss bearer, such as the presumably-uninsured parent.<sup>65</sup> Until a more sizable body of post-*Dole* court of appeals case law is available for analysis, it will be premature to judge whether *Holodook* represents a well-reasoned determination not to apply the *Dole* rule unthinkingly, or a case in which parental tort immunity was resurrected by the worn policy arguments of an earlier day.

*Paul K. Stecker*

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<sup>65</sup> Indeed, the *Dole* court itself instructed that the comparative negligence rule is not to be applied in a mechanical fashion:

[T]he policy problem involves more than terminology. If indemnification is allowed at all among joint tort-feasors, the important resulting question is how ultimate responsibility should be distributed. There are situations when the facts would in fairness warrant what Dow here seeks—passing on to Urban all responsibility that may be imposed on Dow for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.

*Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 147, 282 N.E.2d 288, 291, 331 N.Y.S.2d 382, 386 (1972).