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Street Fights, Air Rifles, Shotguns, Minors & Their Parents - A New York Perspective on Parental Liability for the Torts of Their Minors

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Comment

Street Fights, Air Rifles, Shotguns, Minors & Their Parents A New York Perspective on Parental Liability for the Torts of their Minors

Joseph Mack

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I. INTRODUCTION

Do not hide behind my choices. You need to face the fact that this comes as result of YOUR CHOICES. Parents and teachers, you f—— up. You have taught these kids to be gears and sheep . . . I may have taken their lives and my own – but it was your doing. Teachers, parents, LET THIS MASSACRE BE ON YOUR SHOULDERS UNTIL THE DAY YOU DIE.¹

These apocalyptic words were written by Eric Harris, one of two assassins who carried out the deadliest school shooting in United States history on April 20, 1999. A rash of shootings has recently plagued school systems throughout America. In many situations, minors took weapons from their parents or other relatives. However, parents may be liable regardless of from where the children retrieved the weapons. In some jurisdictions, parents may be held legally liable for failing to anticipate a child's violent acts.

This situation is simply a new twist on an old question: whether or not parents can be held liable for the tortious acts of their minor children. New York courts have had a unique approach to this problem. In general, they have answered in the negative.²

This comment is divided into seven parts. Section II, following this introduction, briefly explores the New York case history of broad parental immunity antecedent to the New York Court of Appeals' decision in *Holodook v. Spencer*.³ This section also discusses the historical development of the nonliability doctrine and the principles that shaped early case law. Section III

1. Karen Lowe, *Police Cite Possible Suicide Note from Colorado Gunman*, AGENCE FRANCE-PRESSE, Apr. 24, 1999, available at 1999 WL 2589663.

2. See, e.g., *Holodook v. Spencer*, 324 N.E.2d 338 (N.Y. 1974); see also *infra* Part III.B; but see *Nolechek v. Gesuale*, 385 N.E.2d 1268 (N.Y. 1978) (establishing an exception to *Holodook*); see *infra* Part IV.

3. See *Holodook*, 324 N.E.2d at 338.

briefly addresses the two integral cases that led the Court of Appeals to decide *Holodook*.⁴ The remainder of the section will deal exclusively with *Holodook v. Spencer* and its justifications. Section IV illustrates the major exceptions to the *Holodook* principle, including exceptions for dangerous instruments⁵ and situations where a parent owes a duty to the world at large, not just to the child.⁶ Section V discusses New York's legislative foray into the area of parental liability.⁷ The case law illustrates the public policy reasons for the enactment of New York General Obligations Law § 3-112, which holds parents liable for certain acts of their minors. Section V also explores one judge's virulent attack on the constitutionality of the statute.⁸

Section VI of this comment presents an analytical inquiry. This section explores a question that this author hopes will never be asked: "What would happen if the Littleton, Colorado tragedy had occurred in New York?" An alarming number of school shootings have occurred recently; to date, New York has been fortunate not to have had such a disaster. This comment will apply the relevant facts in the Littleton tragedy to the New York case law from the previous sections.

II. EARLY NEW YORK CASE LAW – BROAD PARENTAL IMMUNITY

A. *Liability Imposed Strictly Upon the Parental Relationship*

Venerable New York case law has established the long-standing precedent that parents are not liable for the torts of

4. See *Gelbman v. Gelbman*, 245 N.E.2d 192 (N.Y. 1969); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972); see also *infra* Part III.A.

5. See, e.g., *Nolechek*, 385 N.E.2d 1268 (finding a parent's negligent entrustment of a dangerous instrument to a child resulted in parental liability); see also *infra* Part IV.B.

6. See *Grivas v. Grivas*, 496 N.Y.S.2d 757 (App. Div. 2d Dep't 1985) (finding that a mother had breached a duty of reasonable care owed to all by leaving a running lawnmower unattended and accessible to children).

7. See N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1989 & Supp. 1999); see also *infra* Part V.

8. See *Owens v. Ivey*, 525 N.Y.S.2d 508 (Rochester City Ct. 1988) (attacking the imposition of absolute monetary liability on a parent for her daughter's actions). But see *In re William George T.*, 599 A.2d 886 (Md. Ct. Spec. App. 1992); *Rudnay v. Corbett*, 374 N.E.2d 171 (Ohio Ct. App. 1977), and *Board of Educ. of Piscataway Township v. Caffiero*, 431 A.2d 799 (N.J. Sup. Ct. 1981) (determining that similar statutes in other states are constitutional).

their children merely because of the parent-child relationship.⁹ An additional act is required to impose parental liability, for example, some participation by the parent in the unlawful act.¹⁰ In addition, where a parent's negligence made it both possible and probable for the child to cause the complained-of injury, a parent may be held liable for an injury caused by the child.¹¹ This parental negligence, however, must consist of the omission of a degree of care that ordinarily prudent people would deem adequate in such a situation.¹²

B. *Steinberg v. Cauchois* – Situational Parental Liability

In the 1937 case of *Steinberg v. Cauchois*, the Appellate Division Second Department set forth situations in which the law would impute liability to parents for the torts of their children.¹³ The situations included: (I) when a parent negligently entrusts an instrument which, because of its nature, constitutes a danger in the hands of the child; (II) when a parent negligently entrusts an instrument which, although not inherently dangerous, is likely to be put to dangerous use because of the child's known propensities; and (III) where the parent is negligent because of his failure to reasonably restrain the child from vicious conduct that imperils others when this parent knows of the child's propensity to act in this way.¹⁴

Steinberg highlighted two other situations in which parents could be held liable: first, parents may be liable when there is a master-servant relationship and the child acts within his accorded authority, and, second, a parent who participates in the

9. See *Schultz v. Morrison*, 154 N.Y.S. 257, 258 (Sup. Ct. Erie County 1915) (holding that mere parental relationship did not render father liable for son's negligence in causing an accident while driving father's car); see also *McCarthy v. Heiselman*, 125 N.Y.S. 13, 15 (App. Div. 2d Dep't 1910) (finding parents were not liable for their son's conversion of money from his employer). However, it is argued by at least one judge that the New York legislature has predicated liability upon the relationship between parent and child. See *infra* Part V.B; see also *Owens*, 525 N.Y.S.2d at 516.

10. See *McCarthy*, 125 N.Y.S. at 15.

11. See *Schultz*, 154 N.Y.S. at 259.

12. See *Mangam v. Brooklyn R.R. Co.*, 38 N.Y. 455, 457 (1868) (holding that parents could not be liable for child's injuries because parents had not failed to exercise due care).

13. 293 N.Y.S. 147 (App. Div. 2d Dep't 1937).

14. See *id.* at 149.

child's tortious act, either by consenting to it, or by ratifying it later and accepting the benefits of the act, may be liable.¹⁵ A further exception that imposes parental liability was introduced by the Court of Appeals forty-one years later in *Nolechek v. Gesuale*, discussed in Section IV.¹⁶

C. *Steinberg Situations*

Since *Steinberg* was handed down, New York courts have consistently cited its ruling as establishing situations where parents may be held liable for their minors' actions.¹⁷ Case law subsequent to *Steinberg* has illustrated situations where there has been sufficient parental knowledge to impose liability upon the parents. In 1950, the Appellate Division Second Department held in *Agnesini v. Olsen* that there was sufficient parental knowledge of a minor's fire-starting propensities to present the issue of parental liability to the jury.¹⁸ In *Agnesini*, the mother knew that her child had started fires on three previous occasions; despite this, she still permitted him to play with matches.¹⁹ In *Zuckerburg v. Munzer*, the same court held that there were sufficient facts stated to constitute a cause of action against a parent.²⁰ Specifically, the complaint alleged that the youth's parent knew of the child's tendency to commit assaults,²¹ did not disclose this to the plaintiff domestic employee,²² and that the defendant parent allowed the child to possess the bat used to assault the plaintiff.²³

15. *See id.*

16. *See Nolechek*, 385 N.E.2d at 1271. The Court of Appeals held that parental liability can be premised upon a finding that a parent negligently entrusted a dangerous instrument to his child. *See discussion infra* Part IV and notes 123-44.

17. *Compare Agnesini v. Olsen*, 100 N.Y.S.2d 338 (App. Div. 2d Dep't 1950) (finding a mother's knowledge of her son's tendency to start fires sufficient to impose parental liability), *with Zuckerburg v. Munzer*, 100 N.Y.S.2d 910, 910 (App. Div. 2d Dep't 1950), *Staruck v. County of Otsego*, 138 N.Y.S.2d 385, 387 (App. Div. 3d Dep't 1955) (holding defendant county not liable for delinquent child shooting plaintiff, despite county's custody of the child), *and Sherri v. Gerwell*, 691 N.Y.S.2d 144, 145 (App. Div. 2d Dep't 1999) (holding that because *Steinberg* thresholds had not been crossed, the parents were not held liable).

18. *See Agnesini*, 100 N.Y.S.2d at 338.

19. *See id.*

20. *See Zuckerburg*, 100 N.Y.S.2d at 911.

21. *See id.* at 910.

22. *See id.* at 910-11.

23. *See id.* at 911.

In 1957, the First Department decided *Carmona v. Padilla*, where a grandmother who essentially raised her grandchild was found negligent for the acts of the child.²⁴ The defendant grandmother showed her grandson where the boy's father had hidden a bow and arrow, despite the father's having admonished the child against using the toy.²⁵ The grandson shot the infant plaintiff in the eye on the grandmother's porch, and the grandmother was found to have acted with affirmative negligence.²⁶ Liability was premised upon the fact that the grandmother had substantial supervision over the child, especially in her own home – this special circumstance vested the grandmother with the authority, and the responsibility, to monitor her grandson's conduct.²⁷

D. *Problems in Applying Steinberg*

New York courts have had difficulty applying these *Steinberg* principles.²⁸ It is unclear from subsequent case law just how specific parental knowledge of an infant's violent propensities must be in order to impute liability.²⁹ In addition, some subsequent case law has gone so far as to limit "the impact of *Steinberg* . . . to its facts."³⁰

In 1955, the Appellate Division Third Department practically required omniscience in order to impose parental liability

24. See *Carmona v. Padilla*, 163 N.Y.S.2d 741, 745 (App. Div. 1st Dep't 1957).

25. See *id.*

26. See *id.* at 743.

27. See *id.*

28. See *Staruck v. County of Otsego*, 138 N.Y.S.2d 385, 387 (App. Div. 3d Dep't 1955); see also *Linder v. Bidner*, 270 N.Y.S.2d 427, 430 (Sup. Ct. Queens County 1966); *Adolph E. v. Linda M.*, 566 N.Y.S.2d 165, 166 (App. Div. 4th Dep't 1991).

29. See *Adolph E.*, 566 N.Y.S.2d at 165 (holding that even if defendant parents had knowledge of a perverse game their daughter played with her own brothers, this would not constitute notice that she would engage in harmful sexual conduct with a child for whom she babysat); *Staruck*, 138 N.Y.S.2d at 385 (holding that parents had notice and the ability to control the dangerous propensity of their son to beat up small children because they were frequently notified by neighbors of his actions); *Armour v. England*, 619 N.Y.S.2d 807, 808 (App. Div. 3d Dep't 1994) (holding that parents had no knowledge of their daughter's alleged tendency to injure others when no one had ever notified them of such conduct).

30. *Bodaness v. Staten Island Aid*, 544 N.Y.S. 2d 115, 117 (Sup. Ct. Richmond County 1989).

in *Staruck v. County of Otsego*.³¹ The State of New York, *in loco parentis*, was found not liable for the acts of a known "problem child" who shot the plaintiff with a rifle that he had stolen.³² The court noted that the infant had been a problem child for an extended period of time.³³ The child had appeared before the Children's Court, received an extensive psychiatric examination, stayed in three different boarding houses over five months, and was disorderly at each one.³⁴ Assuming *arguendo* that the court believed that the defendant was a known delinquent, the court held that in order to hold the State liable, the proof must indicate to a reasonable mind that such a delinquent could actually shoot another person.³⁵ The evidence presented by the plaintiff failed to make such a showing.³⁶

In *Littenberg v. McNamara*, bare allegations that parents knew or should have known of their seven year-old's propensity to throw rocks were held insufficient to impute liability, even after the child had hit the plaintiff with a rock.³⁷ This holding required the plaintiff to allege specific facts supporting allegations, rather than "an unmentioned assumption or a cautious innuendo" of a possible propensity that may or may not have been known by the parent.³⁸ The Queens County Supreme Court in *Linder v. Bidner* found a viable cause of action against a defendant's parents who "with full knowledge of the disposition, habit, and traits of their son permitted him to go at large . . . without guidance . . . where minor children were playing . . . and with his fists assault the plaintiff"³⁹ Unlike *Staruck*, where there had been formal knowledge of a child's conduct, the defendant parents in *Linder* were charged with knowledge of their son's activities because they were "frequently notified by complaining neighbors" of their child's "vicious and malignant disposition and . . . [his] habit of mauling, pummeling, assault-

31. See *Staruck*, 138 N.Y.S.2d at 385.

32. See *id.* at 387.

33. See *id.* at 386-87.

34. See *id.* at 386.

35. See *id.* at 387.

36. See *Staruck*, 138 N.Y.S.2d at 387.

37. See *Littenberg v. McNamara*, 136 N.Y.S.2d 178, 181 (Sup. Ct. Bronx County 1954).

38. See *id.*

39. *Linder*, 270 N.Y.S.2d at 428-29.

ing, and mistreating smaller children.”⁴⁰ In contrast, when parents have never been notified by anyone, including school officials, of their infant’s vicious or violent behavior, the parents will not be held liable.⁴¹

Although the cases vary, one caveat is certain in deriving a standard rule from the case precedents: broad, nonspecific parental knowledge of an infant’s conduct is insufficient to impute liability. In *Knopf v. Muntz*, the parents simply had knowledge that their child played in the street with other children.⁴² The court held that this alone did not give rise to liability when these children, while playing football on the street, knocked down and injured the plaintiff.⁴³

Using reasoning similar to *Staruck*, the most recent case in this evolving area held a parent not liable.⁴⁴ In *Sherri v. Gerwell*, the infant defendant gave the keys to his mother’s car to another defendant, without his mother’s knowledge or permission.⁴⁵ The two boys then drove the car and picked up the plaintiff, who sustained injuries in a subsequent accident.⁴⁶ The complaint alleged that the mother of the defendant negligently supervised her son by placing her car keys in an area accessible to him, knowing that he had a propensity to disobey rules.⁴⁷ However, the Appellate Division Second Department declined to find the mother liable without proof that she had specific knowledge of the defendant’s propensity to “utilize automobiles without permission, or to steal or borrow items which he was not authorized to use.”⁴⁸ The court clearly followed the reasoning of *Staruck*, pushing the knowledge requirement to

40. *Id.* at 428.

41. *See Armour*, 619 N.Y.S.2d at 807. In *Armour*, the court noted that, in addition to the parent’s ignorance of their daughter’s conduct, the daughter testified that she had “never been the subject of a restraining order for violent behavior,” and that disciplinary action had only been taken against her on one previous occasion. *Id.*

42. *See Knopf v. Muntz*, 121 N.Y.S.2d 422, 423 (Sup. Ct. N.Y. County 1952).

43. *See id.* at 424.

44. *See Staruck*, 138 N.Y.S.2d at 387.

45. *Sherri*, 691 N.Y.S.2d at 145.

46. *See id.*

47. *See id.*

48. *See id.*; *see also Gore v. Mackie*, 718 N.Y.S.2d 762, 763 (App. Div. 4th Dep’t 2000) (holding that defendant had established as a matter of law lack of knowledge of minor daughter’s propensity to use automobiles without permission).

the bounds of specificity. Thus, the court found that liability did not attach to the defendant mother.⁴⁹

Even when parents have actual knowledge of specific conduct, that knowledge is not necessarily sufficient to impute parental knowledge of an infant's behaviors.⁵⁰ The parents in *Adolph E. v. Linda M.* were held not liable for their daughter's sexual misconduct with a child she babysat, even though they were aware of her perverse sexual behavior with her own brothers.⁵¹ The defendant mother told the plaintiff's mother during a telephone conversation that she was aware of a game where "their daughter, wrapped in a towel but otherwise naked, asked her brothers to chase her . . . land on the bed and . . . have the boys jump on top of her and try to pull the towel off."⁵² The Appellate Division Fourth Department essentially required knowledge tantamount to that in *Staruck* to hold the parents liable for their daughter's actions. The court reasoned that, even if the defendants had such prior knowledge, it would not "constitute notice that their daughter had a propensity to engage in harmful sexual conduct with a child for whom she was babysitting" ⁵³

The Court of Appeals' most recent decision in this area was handed down in 1997. In *LaTorre v. Genesee Management*, the court held that a shopping mall management company could not maintain a third-party action against a developmentally disabled individual's mother for negligent supervision.⁵⁴ In *LaTorre*, a mother left her disabled son unattended in the arcade area of a mall, where he became involved in an altercation with other patrons.⁵⁵ The defendant's security guards were forced to physically subdue and restrain the disabled son.⁵⁶ The plaintiff and his mother instituted an action against the mall management company for resultant physical and psychological injuries.⁵⁷ In response, the shopping mall management company

49. See *Sherri*, 691 N.Y.S.2d at 145.

50. See, e.g., *Littenberg*, 136 N.Y.S.2d at 180.

51. See *Adolph E.*, 566 N.Y.S.2d at 166.

52. *Id.*

53. *Id.*

54. See *LaTorre v. Genesee Management*, 687 N.E.2d 1284, 1288 (N.Y. 1997).

55. See *id.* at 1284.

56. See *id.*

57. See *id.*

brought a third-party action against the plaintiff's mother for negligence.⁵⁸ This action was unsuccessful because of the general allegations of the complaint, combined with the Court's finding it unreasonable to charge parents of disabled children with "rebound liability, flowing from a child's or adult's natural deficits or personal qualities."⁵⁹ Furthermore, the Court also held that parental negligence must be "alleged and pleaded with some reasonable specificity, beyond mere generalities."⁶⁰ The Court promulgated a rule that "[s]ome knowledge of a specific type of pertinently dangerous characteristics and particularly foreseeable conduct might find a theoretical tort construct to support recognition of some liability."⁶¹ The Court held that the allegations were devoid of the requisite specificity.⁶² The courts have continued to apply the reasoning in *Staruck* requiring parents to have a highly particular knowledge of a child's dangerous characteristics before imposing liability upon defendant parents.⁶³

III. *HOLODOOK v. SPENCER* AND ITS PROGENY – THE CASES THAT DISTINGUISH NEW YORK

A. *Setting the Stage*

Two integral cases laid the groundwork for the New York Court of Appeals' decision in *Holodook v. Spencer* in favor of parental nonliability. In 1972, the Court of Appeals held in *Dole v. Dow Chemical Company* that liability must be apportioned between the prime defendant and third parties when a third party is deemed negligent for part of the damages.⁶⁴ This right to an apportionment of liability should rest on the relative responsibilities of the parties involved and should be determined from

58. See *LaTorre*, 687 N.E.2d at 1284.

59. *Id.* at 1287.

60. *Id.* at 1288. For a case that found the parents' negligence actionable, see *Cooper v. County of Rensselaer*, 697 N.Y.S.2d 486, 491-92 (Sup. Ct. Rensselaer County 1999) (holding that when the parents were made aware of the danger their child faced, but still took steps to expose the child anyway, the parents' negligence was actionable).

61. *LaTorre*, 687 N.E.2d at 1287.

62. See *id.*

63. See *Staruck*, 138 N.Y.S.2d at 387.

64. See *Dole*, 282 N.E.2d at 292.

the facts of the case.⁶⁵ In essence, *Dole* “enlarged the availability of apportionment among joint tort-feasors.”⁶⁶

In *Gelbman v. Gelbman*, the New York Court of Appeals overruled three earlier cases – *Sorrentino v. Sorrentino*,⁶⁷ *Cannon v. Cannon*,⁶⁸ and *Badigian v. Badigian*⁶⁹ — and found that intrafamilial suits were permissible.⁷⁰ Writing the opinion in *Gelbman*, Judge Burke concurred with Judge Fuld’s dissent in *Badigian* by summarizing Fuld’s arguments for the abolition of the immunity rule as such: “[T]he doctrine does not apply if the child is of legal age . . . the tolling provisions of the Civil Practice Law and Rules . . . seem to protect the right of the child to maintain the action upon reaching majority. The doctrine is also inapplicable where the suit is for property damage.”⁷¹ Thus, *Gelbman* abrogated the former defense of intrafamilial immunity.⁷² Together, these two cases led the Court of Appeals in *Holodook* to “specify the breadth of the path . . . ventured upon in *Gelbman*, and to define its intersection with . . . the long, winding road of *Dole*.”⁷³ The substantial impact of this case has led to much academic writing on the subject.⁷⁴

65. See *id.* at 295.

66. *Holodook*, 324 N.E.2d at 340.

67. 162 N.E. 551 (N.Y. 1928).

68. 40 N.E.2d 236 (N.Y. 1942).

69. 174 N.E.2d 718 (N.Y. 1961).

70. See *Gelbman*, 245 N.E.2d at 194.

71. *Id.* at 193.

72. See *Holodook*, 324 N.E.2d at 340. This defense essentially barred suits by minors against their parents for nonwillful torts. See also *Gelbman*, 245 N.E.2d at 194. This bar was supported by the public policies of discouraging fraudulent claims and preserving familial unity. See *id.* at 192-93 (citing *Badigian*, 174 N.E.2d at 719).

73. *Holodook*, 324 N.E.2d at 340.

74. See Gail D. Hollister, *Parent-Child Immunity: A Doctrine In Search of Justification*, 50 *FORDHAM L. REV.* 489, 517 (1982); see also Case Comment, *Torts – Parents and Child*, 42 *BROOK L. REV.* 125 (1975) (criticizing the reasoning in *Holodook*). After an in-depth look at *Gelbman* and *Dole*, other states’ rulings are distinguished by *Torts – Parent and Child*. The criticism alleges that “[w]hat was thought to be ‘intolerable’ in California will, indeed, be tolerated in New York.” *Id.* at 139. The *Holodook* reasoning is considered “anomalous,” *id.* at 141, “counter to the tort goal of deterring wrongdoing,” *id.* at 143, and, generally, “cannot withstand scrutiny.” *Id.* at 140. See also Note, *The “Reasonable Parent” Standard: An Alternative to Parent-Child Tort Immunity*, 47 *U. COLO. L. REV.* 795, 811 (1976). For a fairly neutral reading of the *Holodook* case and its reasoning, see Dale M. Thuillez, *Parental Nonsupervision: The Tort That Never Was*, 40 *ALB. L. REV.* 336 (1976).

B. *The Underlying Facts of Holodook*

Three cases were combined in the Court of Appeals' *Holodook* verdict since each case raised the same issue: whether parents may be held liable for a failure to adequately supervise a child.⁷⁵ One of the cases, *Graney v. Graney*, involved a suit by an infant and his guardian *ad litem* against his father, who was allegedly negligent in permitting his son to fall from the steps of a slide on a school playground.⁷⁶ It was also alleged that the father failed to give adequate supervision or warning to the child.⁷⁷ In the other case, *Fahey v. Ryan*, a three-year old infant's hand was run over by an eight year old neighbor who was operating a power-driven lawnmower.⁷⁸ The injured, by his father, sued his mother for negligently failing to supervise, warn, and protect him.⁷⁹ Finally, the third case, *Holodook v. Spencer*, came to the attention of the court in the posture of *Dole*, as a third-party action for indemnification and apportionment of responsibility against the infant plaintiff's mother for negligently failing to instruct, control, and maintain her child.⁸⁰ The *Holodook* infant was struck by the defendant's automobile when he ran out between two parked cars.⁸¹

In deciding *Holodook*, the Court of Appeals briefly reviewed the historically non-actionable tort of negligent supervision and discussed *Gelbman* and its implications.⁸² The majority concluded that negligent parental supervision would continue to be non-actionable by a child.⁸³ The majority contended that it could "conceive of few, if any, accidental injuries to children which could not have been prevented . . . by keener parental guidance"⁸⁴ Essentially, the majority felt that any parent could potentially be haled into court to answer for his or her conduct toward the child.⁸⁵

75. *See id.* at 339.

76. *See Holodook*, 324 N.E.2d at 340.

77. *See id.*

78. *See id.*

79. *See id.* at 340-41.

80. *See id.* at 341.

81. *See Holodook*, 324 N.E.2d at 341.

82. *See id.* at 341-43.

83. *See id.* at 346.

84. *Id.* at 343.

85. *See id.*

The court resurrected several policy considerations that gave vitality to the prior immunity rule.⁸⁶ For instance, when there is a lack of insurance coverage, *Holodook* would prevent family discord and preserve the familial resources for all members.⁸⁷ In this instance, if a recovery is made against a parent, the injured child is essentially victimized, because, in most cases, families are "a single economic unit."⁸⁸ The resultant diminished recovery and strain on family relations are results that the court wanted to avoid.⁸⁹ In addition, when there is insurance coverage, there exists the inherent danger of fraud and collusion between the child and his or her parents.⁹⁰ The court also feared that allowing *Dole* apportionment might lead some parents to forego legal redress on their child's behalf against third parties who are more likely than the parent to have the appropriate liability coverage.⁹¹ The majority also pointed out that General Obligations Law § 3-111 clarifies the New York legislature's unwillingness to diminish or bar a child's recovery against a third party because of a parent's failure to provide adequate supervision.⁹² Section 3-111, at the time of the decision, read: "the contributory negligence of the infant's parent . . . shall not be imparted to the infant."⁹³

In its lengthy opinion, the *Holodook* Court acknowledged that other states including Hawaii, Wisconsin, and California had recognized the duty to supervise.⁹⁴ The court also decided that, contrary to most tort cases, the "reasonable man" standard was not the wisest course to take in parent-child relations.⁹⁵ Parents have a wide range of discretion in how to supervise their children. There are a plethora of different educational, economic, ethnic, cultural, and religious backgrounds from which

86. See *Holodook*, 324 N.E.2d at 343-44.

87. See *id.* at 343.

88. *Id.* at 344.

89. See *id.*

90. See *id.* at 343.

91. See *Holodook*, 324 N.E.2d at 343.

92. See *id.* at 345.

93. *Id.* At the time, the statute was enacted to legislatively nullify case precedent which "allowed a jury to consider a defense in bar of contributory negligence on the part of a plaintiff child by imputing to the child the negligence of the parent in failing to provide reasonable supervision." *Id.*

94. See *id.*

95. See *id.* at 346.

parents may derive their values.⁹⁶ For this reason, the court stated that “[s]upervision is uniquely a matter for the exercise of judgment.”⁹⁷

As a result of the holding in *Holodook*, the infant plaintiffs in *Graney* and *Ryan* did not have a cause of action against their parents for negligent supervision.⁹⁸ The oft-cited precedent set by *Holodook* is derived, however, from the disposition of the *Holodook* child’s case. The defendant in *Holodook v. Spencer* had brought a counterclaim for *Dole* apportionment and contribution against the plaintiff father, alleging negligent supervision.⁹⁹ The defendant’s secondary right to contribution depended upon the parent’s alleged failure to perform some duty that was owed to the plaintiff child.¹⁰⁰ The counterclaim and third-party complaint were both defeated in *Holodook* because of the absence of the primary cause of action.¹⁰¹ In other words, the Court of Appeals refused to allow the *Holodook* infant to maintain an action against his mother or father for negligent supervision. This is the most commonly cited authority from the *Holodook* case, and the finding that sets New York apart from the majority of jurisdictions.

IV. EXCEPTIONS TO THE *HOLODOOK* RULE

A. *Limiting and Distinguishing Holodook*

Subsequent case law has reinforced and further developed the justifications for the *Holodook* rule.¹⁰² However, case law

96. See *Holodook*, 324 N.E.2d at 346.

97. *Id.*

98. See *id.*

99. See *id.* at 341.

100. See *id.* at 346.

101. See *Holodook*, 324 N.E.2d at 346.

102. See, e.g., *Russo v. Osofsky*, 492 N.Y.S.2d 623, 624 (App. Div. 2d Dep’t 1985) (holding that the trial court erred in instructing jury to consider “whether the plaintiff mother negligently supervised the infant plaintiff in determining liability”); *Middleton v. Village of Nichols*, 452 N.Y.S.2d 157, 158 (Sup. Ct. Tioga County 1982) (noting the difficulty of placing restrictions on the extent of the supervisory right of the parents). See also *Zikely v. Zikely*, 470 N.Y.S.2d 33 (App. Div. 2d Dep’t 1983). *Zikely* reiterates *Holodook*’s concern that the courts refrain from second-guessing parents’ discretion in raising their children. See *id.* at 34; see also *Lampman v. Cairo Sch. Dist.*, 366 N.Y.S.2d 579 (Sup. Ct. Greene County 1975) (restating that the parent’s duty to protect his or her child from injury goes to the heart of a family relationship).

has also limited the applicability of the general rule in *Holodook*.¹⁰³ For instance, the general rule in *Holodook* does not apply when a plaintiff is asserting his rights against a defendant's parents.¹⁰⁴ The infant plaintiff in *Pico v. Canini* sought to implicate the infant defendant's father for failing to provide proper parental supervision.¹⁰⁵ The court realized that *Holodook* did not apply because *Holodook* dealt with the rights of an infant against his own parents.¹⁰⁶ The Appellate Division Second Department granted the defendant's motion to dismiss based on the plaintiff's failure to allege a proper *Steinberg* situation where the parent could be held liable.¹⁰⁷

New York courts have deliberated whether or not the general rule of nonliability should be extended to those who are the temporary caretakers of the child. As a matter of first impression, the Supreme Court of Sullivan County held in *Rider v. Speaker* that a babysitter could be liable for negligent supervision when an infant under her care suffered injuries.¹⁰⁸ The defendant babysitter neglected to put the infant in a child seat, and the infant suffered injuries in a subsequent auto accident.¹⁰⁹ Although the babysitter had assumed temporary control and responsibility for the infant, and was the infant's custodian at the time of the accident, the court did not want to extend parental immunity for such a temporary entrustment.¹¹⁰ The Court held that the babysitter "donned the mantle of temporary custodian of the infant"¹¹¹ and that she had a duty to use reasonable care to safeguard the child.¹¹² However, this duty could not be measured by the duty imposed upon a parent.¹¹³

103. See generally *Russo*, 492 N.Y.S.2d at 623; *Middleton*, 452 N.Y.S.2d at 157; *Zikely*, 470 N.Y.S.2d at 33; *Lampman*, 366 N.Y.S.2d at 579; *Pico v. Canini*, 367 N.Y.S.2d 304 (App. Div. 2d Dep't 1975).

104. See *Pico*, 367 N.Y.S.2d at 305.

105. See *id.*

106. See *id.*

107. See *id.* at 306.

108. See *Rider v. Speaker*, 692 N.Y.S.2d 920, 923 (Sup. Ct. Sullivan County 1999).

109. See *id.* at 921.

110. See *id.* at 923.

111. *Id.*

112. See *Rider*, 692 N.Y.S.2d at 923.

113. See *id.*

Likewise, two other decisions have declined to extend parental nonliability to grandparents who had custodial care of infants who suffered injuries.¹¹⁴ According to *Barrera v. General Electric Company*, these individuals are outside of the parent-child relationship, and are to be judged according to "standards applicable to the reasonable man."¹¹⁵ The *Barrera* court deemed the relationship between a grandparent and a grandchild to be sufficiently different from the parent-child relationship; thus, this more detached relationship requires a different set of legal obligations.¹¹⁶ However, this heightened standard does not apply when the grandparental relationship to the child is a Potemkin village¹¹⁷ for the parental relationship. In other words, where the grandparent or other relative places himself or herself *in loco parentis* to the child, *Holodook* will protect this relative.¹¹⁸ In summary, the *Holodook* principle will only apply in the parent-child relationship, to the exclusion of the traditional relationship a child has with grandparents, uncles, aunts, or any other relatives of the infant.¹¹⁹

It is important to understand that the *Holodook* rule bars recovery for negligent supervision only when the injury to the infant results from the breach of a duty that is owed solely to the infant. New York courts will recognize a viable cause of action in favor of an infant against his parent when a parent "breaches a duty owed to the world at large."¹²⁰ In addition, this

114. See *Costello v. Marchese*, 524 N.Y.S.2d 232 (App. Div. 2d Dep't 1988) (failing to broaden the scope of parental immunity to include the grandfather of the injured infant). See also *Barrera v. General Elec. Co.*, 378 N.Y.S.2d 239 (Sup. Ct. Albany County 1975).

115. *Barrera*, 378 N.Y.S.2d at 241.

116. See *id.* at 240.

117. 2 THE NEW SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 2309 (1993 ed.) ("Any of a number of sham villages reputedly built on Potemkin's orders for Catherine II's tour of the Crimea in 1787; transf. any sham or unreal thing.").

118. See, e.g., *Barrera*, 378 N.Y.S.2d at 240.

119. See *id.*

120. *Ruffing v. Union Carbide Corp.*, 720 N.Y.S. 2d 328, 332 (Sup. Ct. Westchester County 2000) (quoting *Hurst v. Titus*, 432 N.Y.S.2d 938, 939 (App. Div. 4th Dep't 1980)); see also *Burgess v. Cappola*, 674 N.Y.S.2d 181, 182 (App. Div. 4th Dep't 1998) (rejecting defendant landlord's contention that the plaintiff tenants owed a duty to the "world at large" to prevent infant children from falling through their windows).

“world at large” theory is available to impose liability upon parents for contribution or indemnification.¹²¹

The largest abrogation of *Holodook* occurred when the New York Court of Appeals revisited the nonliability issue four years later. In *Nolechek v. Gesuale*, the New York Court of Appeals limited *Holodook* by carving out an exception to its rule.¹²² The *Nolechek* court held that an alleged tortfeasor may seek indemnity or contribution from the injured child’s parent when the child’s injuries, and the tortfeasor’s liability, resulted from the parent’s negligent entrustment of a dangerous instrument to the child.¹²³ The plaintiff administrator in *Nolechek* gave his son, the decedent, a motorcycle.¹²⁴ The decedent did not have an operator’s license, was blind in one eye, had impaired vision in the other eye, and suffered irremediably poor long distance vision.¹²⁵ The motorcycle was neither registered nor inspected.¹²⁶ The decedent and his friend, James Neiman, switched motorcycles with one another and then went driving.¹²⁷ The decedent was killed when he ran into a suspended steel cable that the defendant, a sand and gravel company, had used to close off the road on which the decedent and his friend had been riding.¹²⁸ The case came before the Court of Appeals by way of the defendant’s appeal from the Appellate Division’s dismissal of their counterclaim.¹²⁹ The plaintiff likewise cross-appealed from the Appellate Division’s dismissal of his third-party complaint against James Neiman and his father, for providing the instrument of young Nolechek’s death.¹³⁰

The defendants argued that a motorcycle is a “dangerous instrument,” especially in the hands of a visually disabled child.¹³¹ Although the court rejected this “dangerous instru-

121. See *Burgess*, 674 N.Y.S.2d at 182 (quoting *McNamara v. Banney*, 672 N.Y.S.2d 569, 570 (App. Div. 4th Dep’t 1998)).

122. See *Nolechek*, 385 N.E.2d at 1268.

123. See *id.* at 1274.

124. See *id.* at 1271.

125. See *id.*

126. See *id.*

127. See *Nolechek*, 385 N.E.2d at 1271.

128. See *id.* Defendants in the action included Thomas Gesuale, Star Sand and Gravel Co., Inc., and others. See *id.* at 1270.

129. See *id.* at 1270.

130. See *id.* at 1271.

131. See *id.*

ment exception" to *Holodook* as "neither analytically persuasive nor practically sound,"¹³² the court decided the case on a different legal relationship from that which existed in *Holodook*. *Holodook* addressed the responsibilities a parent owes to a child, while *Nolechek* premised the parental responsibility upon the duty to shield third parties from their infant's improvident use of dangerous instruments.¹³³

The Court acknowledged that *Nolechek* did not involve the parental duty to prevent children from injuring themselves by the use of dangerous instruments.¹³⁴ Furthermore, the direct physical injury that infants cause to third parties was not at issue. The harm involved in *Nolechek* was the "financial harm resulting from potential liability of a 'concurrent' tortfeasor for the child's death while using the dangerous instrument."¹³⁵ *Nolechek* established that there is an exception to the general rule of parental nonliability when parents have negligently permitted their child to use a dangerous instrument, based upon the parents' breach of an established duty to third persons who may be harmed.¹³⁶

The New York Court of Appeals concluded that "[t]he sound rule of the *Holodook* case survives only if accompanied by sound exceptions."¹³⁷ The Court reinstated the defendants' counterclaim and dismissed the plaintiff's third-party claim against the Neimans, ruling that the switching of the motorcycles was not a proximate cause of the fatal accident.¹³⁸ In essence, the court would not allow Mr. Nolechek to escape the defendants' counterclaim against him for contribution when he let his son, with such impaired vision, ride a motorcycle.¹³⁹ The father's actions, in entrusting his infant with a dangerous instrument, created a danger to all of society, for which he was partially liable.¹⁴⁰ A parent owes a duty to third parties to protect them from their child's improvident use of a dangerous instrument, especially if

132. *Nolechek*, 385 N.E.2d at 1271.

133. *See id.* at 1271-72.

134. *See id.* at 1273.

135. *Id.* at 1272.

136. *See id.* at 1273.

137. *Nolechek*, 385 N.E.2d at 1274.

138. *See id.*

139. *See id.*

140. *See id.*

the parent is aware of and can control the use of the dangerous instrument.¹⁴¹ Therefore, what constitutes a dangerous instrument for the purposes of the *Nolechek* exception must be determined.

B. *Sex Toys & Seesaws – Dangerous Instruments?*

The *Nolechek* decision mandates that there must be a dangerous instrument in order to impute negligence to a parent under the prescribed exception to *Holodook*.¹⁴² Furthermore, the parental duty applies particularly “when the parent is aware of and capable of controlling its use.”¹⁴³ If neither parent is cognizant that his child possessed a dangerous instrument, nor aware of how he obtained it, the parents are not charged with knowledge of the situation.¹⁴⁴ However, if the infant’s use of the instrument is open and notorious, regardless of the parents’ claimed ignorance, the parents will be deemed to have actual knowledge.¹⁴⁵

Parental knowledge of a child’s possession of a dangerous instrument may also be established by sufficient circumstantial evidence, despite the parent’s professions of ignorance.¹⁴⁶ Such circumstantial evidence might include the child’s open and notorious possession of the instrument, the fact that the family lived in a small apartment, and that both parents believed that their child was always truthful with them, and that they were aware of all his belongings.¹⁴⁷ The fact that a mother does all of the housework has even been considered a factor in charging parents with knowledge, especially since a mother’s cleaning

141. *See id.* at 1271.

142. *See Nolechek*, 385 N.E.2d at 1272.

143. *Id.*

144. *See Gordon v. Harris*, 448 N.Y.S.2d 598, 600 (App. Div. 3d Dep’t 1982) (holding the affidavits and depositions of the infant defendant’s parents legally sufficient to establish that neither could be charged with awareness of or liability for their son’s use of an air rifle to injure the infant defendant).

145. *See, e.g., Kuchlik v. Feuer*, 267 N.Y.S. 256, 259 (App. Div. 1st Dep’t 1933) (holding it sufficient to charge the parents with knowledge of their child’s activities when neighbors had seen the infant defendant in the street with the instrument, an air rifle, on previous occasions).

146. *See id.* at 259 (quoting *Woloszynowski v. New York Cent. R.R. Co.*, 172 N.E. 471, 472 (N.Y. 1930)).

147. *See id.* at 258-60.

would reveal the presence of a dangerous instrument.¹⁴⁸ If a parent sets a chain of events in motion by entrusting a dangerous instrument to his infant, even if this direct act does not cause the injury, the parent may be held liable.¹⁴⁹ Furthermore, neither a parent nor his infant must necessarily have owned the dangerous instrument in order to impute knowledge. It is sufficient if the parent knew of the child's possession and permitted its use.¹⁵⁰

If an infant defendant conceals the instrument from his or her parents and is not living with them at the time of the incident, a parent's claim of ignorance may be bolstered.¹⁵¹ The evidence that these cases turn upon, however, seems to be narrowly tailored. In an old case, *Ship v. Fridenburg*, a defendant parent was held non-negligent when his son shot a home nurse with a loaded revolver.¹⁵² The Appellate Division First Department explained that the loaded revolver was not owned by the defendant, nor was it in his room, nor did he set the revolver in the bureau where it was found.¹⁵³ The Court held that the shooting was an accident which was not the reasonable, natural, and probable result of foreseeable circumstances, such that the negligence could be imputed to the parent.¹⁵⁴

It is well settled that if the parent has knowledge of the infant's use of the dangerous instrument, and consents to such use, the parent can be found actively negligent.¹⁵⁵ In *Frellesen v. Colburn*, the defendant father was found to lack the requisite knowledge of his son's possession of a gun when the son shot

148. *See id.*

149. *See, e.g., Wheeler v. Bello*, 357 N.Y.S.2d 818 (Sup. Ct. Onondaga County 1974). The plaintiff father in *Wheeler* allegedly entrusted an air gun to his infant, who gave the gun to the infant defendant, who, in turn, shot the infant plaintiff in the eye. *See id.* at 820.

150. *See Len v. City of Cohoes*, 534 N.Y.S.2d 505, 506 (App. Div. 3d Dep't 1988); *see also Kuchlik*, 267 N.Y.S. at 259.

151. *See Len*, 534 N.Y.S.2d at 506.

152. *See Ship v. Fridenburg*, 117 N.Y.S. 599, 601 (App. Div. 1st Dep't 1909).

153. *See id.*; *see also, e.g., Napiearski v. Pickering*, 106 N.Y.S.2d 28, 30-31 (App. Div. 4th Dep't 1951) (finding father not negligent because he kept a rifle and ammunition hidden from his infant son, who found the instruments and used the rifle to shoot another infant). The Court noted that the facts of *Napiearski* did not fit into any of the *Steinberg* situations. *See id.* at 30.

154. *See Ship*, 117 N.Y.S. at 600.

155. *See Sullivan v. O'Ryan*, 132 N.Y.S.2d 211, 212 (Sup. Ct. Westchester County 1954).

and killed the plaintiff's "coon" hunting dog with the defendant's gun.¹⁵⁶ The defendant hung up the unloaded gun in the house, kept the shells elsewhere, and denied knowing the child had ever used a gun.¹⁵⁷ The Appellate Division Fourth Department even found an infant non-negligent, but his father negligent when he entrusted a BB gun to the infant.¹⁵⁸

New York case law provides for specific objects that have been deemed to be dangerous instruments. When determining whether an instrument is dangerous, relevant considerations include "the nature and complexity of the alleged dangerous instrument, the age, intelligence and experience of the child, and his proficiency with the instrument."¹⁵⁹ It has been well established that a motorcycle is a dangerous instrument,¹⁶⁰ especially in the hands of a boy with impaired vision.¹⁶¹ Similarly, a motorized bicycle entrusted to a twelve-year-old has been termed a "dangerous contraption."¹⁶²

An air rifle,¹⁶³ a loaded revolver,¹⁶⁴ and a gun¹⁶⁵ are obviously dangerous instruments. Guns are always considered dangerous instruments, regardless of their power, operability, or ownership.¹⁶⁶ Courts have held air guns to be dangerous,¹⁶⁷ a significant fact when the third party defendant allegedly loans or gives the weapon to the shooter.¹⁶⁸ BB guns have been deemed to be dangerous instruments as well.¹⁶⁹ Even a toy

156. See *Frellesen v. Colburn*, 281 N.Y.S. 471, 474 (Tioga County Ct. 1935).

157. See *id.* at 473.

158. See *Lichtenthal v. Gawoski*, 354 N.Y.S.2d 267, 268 (App. Div. 4th Dep't 1974).

159. *Lamica v. Pecore*, 709 N.Y.S.2d 694, 695 (App. Div. 3d Dep't 2000) (citing *Botillo v. Poette*, 544 N.Y.S.2d 47, 48 (App. Div. 3d Dep't 1989)).

160. See *Len*, 534 N.Y.S.2d at 506.

161. See, e.g., *Nolechek*, 385 N.E.2d at 1274 (holding father liable for entrusting vision-impaired son with motorcycle resulting in son's death).

162. *Lalomia v. Bankers & Shippers Ins. Co.*, 312 N.Y.S.2d 1018, 1020 (App. Div. 2d Dep't 1970).

163. See *Wheeler*, 346 N.Y.S.2d at 818.

164. See *Ship*, 117 N.Y.S. at 600.

165. See *Napieralski*, 106 N.Y.S.2d at 30.

166. See *Wheeler*, 357 N.Y.S.2d at 821-22; *Gordon*, 448 N.Y.S.2d at 598; *Sullivan*, 132 N.Y.S.2d at 211.

167. See *Wheeler*, 357 N.Y.S.2d at 821 (quoting 109 N.Y. JUR. § 4 (1993)).

168. See *Sullivan*, 132 N.Y.S.2d at 212.

169. See *Masone v. Gianotti*, 388 N.Y.S.2d 322, 325 (App. Div. 2d Dep't 1976) (holding the gun to be a dangerous instrument, where a three-year old took a BB gun from a relative's closet and shot his one-year old brother in the eye, perma-

rifle, being used as a golf club by an eight-year old, has been held to be a dangerous instrument.¹⁷⁰

There have been a variety of dangerous instrument claims since the dangerous instrument exception was proffered by *Nolechek*.¹⁷¹ The *Nolechek* court had the foresight to include lawnmowers, power tools, and automobiles as instruments that are "in some contingencies, 'dangerous instruments.'"¹⁷² A chainsaw operated by a seventeen-year-old¹⁷³ and fiberglass boats¹⁷⁴ have been considered dangerous instruments.

In contrast, skateboards,¹⁷⁵ a simple plastic doll,¹⁷⁶ seesaws,¹⁷⁷ and a snowmobile, when operated by a licensed infant,¹⁷⁸ are not considered dangerous instruments. Sexually explicit materials, including magazines and videotapes, are not considered dangerous instruments, even when shown to an eleven-year-old.¹⁷⁹ Finally, a "Slip 'n Slide" is not a dangerous instrument.¹⁸⁰ It is important to remember that "[h]arm, unfortunately, comes to children in their play."¹⁸¹

nently blinding him). See also *Lichtenthal*, 354 N.Y.S.2d at 268. In *Lichtenthal*, the infant plaintiff and the infant defendant, along with three others, were engaged in a "BB gun war." *Id.* The Appellate Division Fourth Department held that a cause of action existed against the defendant parent for the negligent entrustment of the BB gun to his son, whom he knew to have a propensity to misuse the gun. See *id.*

170. See *Gordon*, 448 N.Y.S.2d at 599.

171. See, e.g., *Young v. Dalidowicz*, 460 N.Y.S.2d 82 (App. Div. 2d Dep't 1983); *LeSauvage v. Freedman*, 419 N.Y.S.2d 1018 (N.Y.C. Civ. Ct. 1979); *Pietrzak v. McGrath*, 445 N.Y.S.2d 827 (App. Div. 2d Dep't 1981); *Alfano v. Marlboro Airport*, 445 N.Y.S.2d 517 (App. Div. 2d Dep't 1981); *Adolph E.*, 566 N.Y.S.2d at 165; *Parsons v. Wham-O, Inc.*, 541 N.Y.S.2d 44 (App. Div. 2d Dep't 1989).

172. *Nolechek*, 385 N.E.2d at 1272. Although the *Nolechek* court also named bicycles as dangerous instruments in some contingencies, case law has held that if an infant has been riding for two years prior to the accident, and that there was no evidence that the parents were aware that the child might not be able to control the bike, then that bicycle is not a dangerous instrument. See *Santalucia v. County of Broome*, 613 N.Y.S.2d 774, 776 (App. Div. 3d Dep't 1994).

173. See *Bucholtz v. Grimmer*, 376 N.Y.S.2d 277, 278 (App. Div. 4th Dep't 1975).

174. See *LeSauvage*, 419 N.Y.S.2d at 1021.

175. See *Young*, 460 N.Y.S.2d at 86.

176. See *Barocas v. F.W. Woolworth Co.*, 622 N.Y.S.2d 5, 7 (App. Div. 1st Dep't 1995).

177. See *Pietrzak*, 445 N.Y.S.2d at 830.

178. See *Alfano*, 445 N.Y.S.2d at 517.

179. See *Adolph E.*, 566 N.Y.S.2d at 166.

180. See *Parsons*, 541 N.Y.S.2d at 45.

181. *Pietrzak*, 445 N.Y.S.2d at 830.

V. Children Who Destroy Property That Belongs to Others

A. Automatic Liability

The New York Legislature has imposed liability upon the parents of minors who destroy property under General Obligations Law § 3-112, otherwise known as the Parental Responsibility Act.¹⁸² This statute, in effect, imposes liability of up to \$5,000 upon a parent for the willful, malicious, or unlawful damage of public or private property by a child between the ages of ten and eighteen.¹⁸³ In the past, if the parent had no

182. See N.Y. GEN. OBLIG. LAW § 3-112. In relevant part, the statute reads:

1. The parent or legal guardian, other than the state . . . of an infant over ten and less than eighteen years of age, shall be liable to any public officer, organization or authority, having by law the care and/or custody of any public property of the state or any political subdivision thereof, or to any private individual or organization having by law the care, custody and/or ownership of any private property, for damages caused by such infant, where such infant has willfully, maliciously, or unlawfully damaged, defaced or destroyed such public property or private property, whether real or personal, or, where such infant, with intent to deprive the owner and/or custodian of such property or to appropriate the same to himself or herself or to a third person, has knowingly entered or remained in a building and has wrongfully taken, obtained or withheld such public or private personal property . . . Such public officer, organization or authority, or private individual or organization, as the case may be, may bring an action for civil damages . . . to recover such damages from such parent or legal guardian . . . In no event shall such damages portion of a judgment authorized by this section . . . exceed the sum of five thousand dollars.

2. Notwithstanding the provisions of subdivision one . . . prior to the entering of a judgment under this section . . . the court shall . . . hear and consider all evidence of financial hardship presented tending to establish the inability of such parent or legal guardian to pay any or all amount of the sum total in excess of five hundred dollars . . . [t]he court shall enter the judgment . . . in an amount within the financial capacity of such parent or legal guardian, provided . . . no such judgment shall be entered for an amount which is less than five hundred dollars.

3. It shall be a defense to an action under this section that restitution has been paid . . . It shall also be a defense . . . that such infant involuntarily and without good cause abandoned the home of the parent or guardian and without good cause refused to submit to the guidance and control of the parent or guardian prior to and at the time of the occurrence of such damages . . . In no event shall it be a defense that the parent or legal guardian has exercised due diligent supervision . . . however . . . in the interests of justice, the court may consider mitigating circumstances that bear directly upon the actions of the parent or legal guardian in supervising such unemancipated infant

Id.

183. See *id.* at § 3-112(1).

indicia of his or her child's hostile propensities, and did not control the child's actions, then a defense could be established.¹⁸⁴ However, this defense has been abolished, and the remaining defenses are limited.¹⁸⁵ Only restitution and emancipation remain as viable defenses to liability.¹⁸⁶ A plain reading of the statute¹⁸⁷ and interpretative case law indicates that if a parent does not have physical custody of the child at the time of the incident, that parent is absolved of liability.¹⁸⁸ In addition, a parent is totally free from liability if the child has made complete restitution.¹⁸⁹ While parents' exercise of due diligent supervision over the infant may be considered as a mitigating factor, it has been struck down as a defense.¹⁹⁰

Essentially, there are two overriding objectives that support this legislative enactment: (I) it creates a limited source of compensation for property owners who have suffered loss; and (II) it compels more effective parental supervision of children.¹⁹¹ Obviously, an infant cannot answer for his or her wrongful actions financially. Thus, the New York State legislature imposed liability on parents to answer for their children's actions.¹⁹²

B. *Judge Regan Declares the Parental Responsibility Act a Bill of Attainder*

Despite the aforementioned legislative considerations, the Parental Responsibility Act has not survived without criticism. In 1988, Judge Regan of the Rochester City Court penned a twelve-page opinion holding that the Parental Responsibility Act violates Article I, Section 10 of the Federal Constitution.¹⁹³

184. See *Izzo v. Gratton*, 383 N.Y.S.2d 523, 524 (Cohoes City Ct. 1976).

185. See *Owens*, 525 N.Y.S.2d at 511.

186. See *id.*

187. See N.Y. GEN. OBLIG. LAW § 3-112(3).

188. See *Leonard v. O'Neil*, 608 N.Y.S.2d 618, 620 (Justice Ct., Town of Clifton Park 1994).

189. See *A v. B*, 468 N.Y.S.2d 992, 995 (Sup. Ct. Rensselaer County 1983).

190. N.Y. GEN. OBLIG. LAW § 3-112(3).

191. See *A v. B*, 468 N.Y.S.2d at 994 (recognizing that the legislature has deemed the parent's responsibility separate and distinct from the infant's).

192. See *id.*

193. See *Owens*, 525 N.Y.S.2d at 516 (holding General Obligations Law § 3-112, as presently drafted, violates Article I, Section 10 of the Federal Constitution because it is, in substantial intent and practical effect, a bill of attainder).

Judge Regan explained that the essential factor for his finding was that under the statute, the sole predicate for liability is the relationship between the parent and his child.¹⁹⁴ Throughout the 1960s, parental responsibility statutes were introduced in the legislature and were regularly defeated in the committee or vetoed by former New York Governor Rockefeller.¹⁹⁵ In 1970, the original New York parental liability statute was created.¹⁹⁶ The amendments made to the statute, which abolished due diligence as a defense,¹⁹⁷ were enacted by the Legislature to "coerce a higher level of consciousness in parents" ¹⁹⁸

Despite the statute's inherent presumption of constitutionality, Judge Regan held that the statute was unconstitutional. Judge Regan contrasted the vague powers of a parent to control children in their "unmanageable adolescence" with an employer's clear authority over an employee.¹⁹⁹ He opined that parents are defenseless to the liability imposed by the statute, and, therefore, parents are subjected to punishment solely on the basis of their blood relationship to the perpetrator.²⁰⁰ As a result, the bill is, in effect, a bill of attainder in violation of Article I, section 10 of the Constitution.²⁰¹ He reasoned that parents cannot control the blood relationship to the child, nor can they argue that they exercised proper supervision despite a child's destructive conduct.²⁰² Using the *Nixon v. Administrator* tests to determine if the punishment element of a bill of attainder was met, Judge Regan contended that the Parental Responsibility Act passed the tests: (1) the statute required traditional punishments; (2) it generally furthered punitive purposes; and (3) the Legislature intended to punish when it acted on the bill.²⁰³ The Parental Responsibility Act imposes fines and other

194. *See id.*

195. *See id.* at 510. For a complete discussion of these efforts, and a summary of this statute's early history, see John J. Puig, *Parental Responsibility in New York for an Infant's Willful Property Damage*, 44 ALB. L. REV. 943, 949-50 (1980).

196. *See Owens*, 525 N.Y.S.2d at 510.

197. *See id.* at 511.

198. *Id.*

199. *Id.* at 513.

200. *See id.* at 516 (discussing *Nixon v. Administrator*, 433 U.S. 425 (1977)).

201. *See Owens*, 525 N.Y.S.2d at 516.

202. *See id.*

203. *See id.* at 515 (discussing *Nixon*, 433 U.S. 425 (1977)).

monetary penalties that are clearly within the confines of "traditional punishment" and the statute's punitive purposes are furthered by the levying of financial penalties.²⁰⁴ Finally, the New York legislature intended the statute to be "both re-criminatory and punitive."²⁰⁵

Judge Regan found support for his theory of unconstitutionality in the case of *Corley v. Lewless*.²⁰⁶ In that case, the Supreme Court of Georgia held a similar statute unconstitutional and particularly violative of the Due Process Clause of the Federal Constitution.²⁰⁷ Specifically, the *Corley* court said that "[t]o allow any recovery on the basis stated by the statute would deprive the defendant of property without due process of law, would authorize a recovery without liability, and would compel payment without fault."²⁰⁸ However, several other states, including New Jersey,²⁰⁹ Maryland,²¹⁰ and Ohio,²¹¹ have upheld the constitutionality of state statutes providing for mandatory parental liability for the misbehavior of minor children.

VI. TERROR IN COLUMBINE – WHO IS LIABLE?

A. *Applicable New York Case Law*

On April 20, 1999, at 11:19 in the morning, Eric Harris and his "Trenchcoat Mafia" partner, Dylan Klebold, walked into Columbine High School in Littleton, Colorado bent on destruction.²¹² The duo carried with them a 9 mm carbine, a modified Tech 9 semiautomatic rifle, and two sawed-off shotguns.²¹³ They

204. *See id.*

205. *Id.*

206. 182 S.E.2d 766 (Ga. 1971).

207. *See Corley*, 182 S.E.2d at 770 (holding that Georgia Code Annotated § 105-113 (1966) violated state and federal due process). This statute stated that "a parent or other person in loco parentis having the custody and control over a minor child or children under the age of 17 shall be liable for the willful and wanton acts of said minor child" *Id.* at 768.

208. *Id.* at 770 (quoting *Lloyd Adams v. Liberty Mut. Ins.*, 10 S.E.2d 46, 51 (Ga. 1940)).

209. *See Board of Educ. of Piscataway Township*, 431 A.2d at 805.

210. *See In re William George T.*, 599 A.2d at 890.

211. *See Rudnay*, 374 N.E.2d at 175.

212. *See Gwen Florio, et al., Scattered Warning Signs Pointed to Colorado Rampage*, FLORIDA TIMES-UNION, May 2, 1999, available at 1999 WL 9671005.

213. *See id.*

had already rigged the school with almost thirty propane-tank bombs.²¹⁴ In all, officials eventually discovered forty-eight carbon dioxide bombs and twenty-seven pipe bombs, along with several other incendiary devices.²¹⁵ Armed with these weapons, the two rushed into Columbine High and opened fire on their fellow classmates. After the rampage, twelve students and a teacher had been slain, twenty-three students were wounded, and the assassins had both committed suicide.²¹⁶ Under New York law would the parents of the assassins be civilly liable to the parents of the deceased?

An application of the case law interpreted previously in this article²¹⁷ sheds light on whether the Harrises and the Klebolds would be found liable under New York law for their sons' nihilistic actions. Although much is still unknown about the circumstances surrounding the Littleton tragedy, the facts used were taken from the research that has been conducted up until the drafting of this comment. These facts are presented as the most reliable sources at the time of this writing and are not purported to be true.

As an initial matter, it is important to note that the Klebolds could possibly be liable to the Columbine School District under the Parental Responsibility Act, New York General Obligations Law § 3-112.²¹⁸ The Klebold parents would be liable for the damage done by their seventeen-year old son Dylan to the public property of the state, consisting primarily of the damage wreaked by the pipe bombs and bullets. The Klebolds' liability for the property would be limited to \$5,000,²¹⁹ and they could try to demonstrate financial hardship for any of the liability over \$500.²²⁰ Since the defense of emancipation or restitution could not be used, financial hardship would be the best mitigating factor available to the Klebolds.²²¹ On the contrary,

214. See *id.*; see also Matt Bai, *Anatomy of a Massacre (Columbine High School Shootings)*, NEWSWEEK, May 3, 1999, at 25.

215. See Peggy Lowe, *Columbine Was Packed With Bombs*, DENVER POST, Feb. 14, 2000, at 1A.

216. See Bai, *supra* note 214, at 25.

217. See *supra* Parts II-V.

218. See *supra* Part V.

219. See N.Y. GEN. OBLIG. LAW § 3-112(1).

220. See N.Y. GEN. OBLIG. LAW § 3-112(2).

221. See *supra* notes 185-190 and accompanying text.

Eric Harris' parents would not be liable for any of this damage because Eric was eighteen at the time of the shootings,²²² and, therefore, outside the reach of the statute.²²³

The larger issue in the case, however, involves assessing the various wrongful-death lawsuits that are pending against the parents of the two killers.²²⁴ The parents of slain Columbine student Isaiah Shoels have filed a \$250 million wrongful death lawsuit against the Harrises and the Klebolds.²²⁵ The local district attorney in Jefferson County has also not ruled out bringing formal charges against the parents.²²⁶

The general rule in New York is that there is no parental liability for the torts of minors.²²⁷ In the Littleton situation, it is important to remember the policy reasons behind *Holodook*. The *Holodook* court recognized that parental supervision is a matter for the exercise of judgment;²²⁸ that people come from varied backgrounds, and this affects the way parents bring up their child.²²⁹ The New York courts are reluctant to intrude upon parents' rights to bring up their children as they see fit. At some point, though, the parents must be accountable for the actions of their children, especially if they are particularly aware of dangerous conduct.²³⁰

New York law will not hold parents liable for neighborhood fights when the parents do not have extensive knowledge of their child's previous conduct. In similar situations, the nonliability case law is broad enough to excuse freak incidents of a child's behavior. However, New York courts will impose liabil-

222. See Jim Henderson, *Killers Gave Off Warning Signals, But Few in Littleton Took Notice*, HOUSTON CHRONICLE, Apr. 25, 1999, at 21A.

223. Paragraph 1 of § 3-112 states: "The parent . . . of an infant over ten and less than eighteen years of age, shall be liable" N.Y. GEN. OBLIG. LAW § 3-112(1).

224. See Leonard Pitts Jr., Editorial, *Columbine Families Won't Find Answers in Lawsuits*, ORLANDO SENTINEL, Nov. 5, 1999, available at 1999 WL 26019906 (reporting that there are as many as eighteen such lawsuits, as of the date of the article).

225. See *Sole Black Columbine Victim's Parents Plan to Move to Houston*, HOUSTON CHRONICLE, Dec. 15, 1999, at 42A.

226. See *Columbine Killers Wanted Screen Immortality*, THE MILWAUKEE JOURNAL SENTINEL, Dec. 13, 1999, available at 1999 WL 21557640.

227. See *supra* Part III.B; see also, e.g., *Holodook*, 324 N.E.2d at 346.

228. See *supra* note 96-98 and accompanying text.

229. See *supra* note 97.

230. See *Nolechek*, 385 N.E.2d at 1273.

ity where the parents have given their children dangerous instruments, or where they have been put on notice that their child is a repeat offender. This is only fair to protect innocent third parties that may be injured.

There is no evidence that the Columbine assassins were given the artillery by their parents.²³¹ Robyn Anderson, a friend of Klebold's, went with Dylan and Eric to a local gun show and bought three of the four guns the two used in the rampage.²³² However, federal and state prosecutors agree that it was not illegal for Robyn, an eighteen year-old, to buy guns in a private sale which did not require a background check.²³³ Twenty-two year-old Mark Manes recently pled guilty to supplying a weapon to a minor, specifically, a TEC-DC9 that Harris and Klebold used in their rampage.²³⁴ Phillip Duran, twenty-three, pled guilty to the same charges on May 8, 2000.²³⁵ Without evidence of the parents' involvement in or knowledge of these transactions, it would be impossible to base parental liability upon the entrustment of the weapons to the children. Therefore, the two *Steinberg* situations that require entrustment would not impose liability on Eric and Dylan's parents.²³⁶

There are essentially two theories of parental negligence under New York law that apply here: (1) the breach of parental duty to third parties to protect them from their infant's improvident use of a dangerous instrument when the parents are aware of and capable of controlling the instrument's use, as held in

231. See Steven K. Paulson, *Clues to Massacre Sought on Tape*, GREENSBORO NEWS & RECORD, Apr. 24, 1999, at A1.

232. See Mike Soraghan, *Colorado After Columbine, The Gun Debate*, STATE LEGISLATURES, June 1, 2000, available at 2000 WL 15407418.

233. See *id.*

234. See *Columbine Shooters Made Tapes, Brief Transcript of Video Will Be Read at Man's Sentencing*, THE GAZETTE, Nov. 12, 1999, available at 1999 WL 30082519.

235. See Sue Lindsay, *Columbine Gun Middleman Pleads Guilty for His Role*, DENVER ROCKY MOUNTAIN NEWS, May 9, 2000, available at 2000 WL 6595783.

236.

(2) Where a parent is negligent in intrusting to the child an instrument which, because of its nature, use, and purpose, is so dangerous as to constitute, in the hands of a child, an unreasonable risk to others; [(3)] where a parent is negligent in intrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child

Steinberg, 293 N.Y.S. at 149.

Nolechek, and (2) the *Steinberg* court's imputation of liability to parents because of their negligence in failing to reasonably restrain the child from vicious conduct that imperils others, when the parents know of the child's propensities.

Parental liability could be imposed, if it could be shown that the parents were "aware of and capable of controlling" their sons' use of the weapons.²³⁷ As previously discussed, the New York Court of Appeals in *Nolechek v. Gesuale* highlighted the duty parents owe to third parties to control their children's use of dangerous instruments.²³⁸ Under *Nolechek*, parents who have negligently permitted an infant to use a dangerous instrument have breached "an established duty to third parties who may be harmed."²³⁹ In order to impose liability upon the Harrises and the Klebolds under *Nolechek*, it is paramount to establish that they negligently permitted Eric and Dylan to use the dangerous instruments. The question then is: Were the parents aware of and capable of controlling Eric and Dylan's use of those weapons?

To find the parents liable under *Nolechek* would strain a reasonable interpretation of the facts. *Nolechek* and its progeny demonstrate that there must be a negligent entrustment of a dangerous instrument.²⁴⁰ In order to demonstrate this, plaintiffs in a wrongful-death action would have to show that Eric and Dylan's parents entrusted them with the weapons. This is a burden that the plaintiffs cannot meet. Reports indicate that the Harrises and the Klebolds were "normal" households.²⁴¹ However, commentators have questioned how the parents could be ignorant of the two boys' building bombs and stocking an arsenal in their homes.²⁴²

Analytically, the *Nolechek* exception to *Holodook* focuses on whether the parents were aware of and capable of controlling

237. *Nolechek*, 385 N.E.2d at 1272.

238. *See id.* at 1273.

239. *Id.*

240. *See, e.g., Adolph E.*, 566 N.Y.S.2d at 166; *Parsons*, 541 N.Y.S.2d at 45; *Young*, 460 N.Y.S.2d at 85.

241. *See* Jeff Kass, *Portrait of Two Teens Reveals a Lot of Gray*, CHRISTIAN SCIENCE MONITOR, May 3, 1999, at 3; *see also* Dale Russakoff, *et al.*, *In Littleton, Neighbors Ponder What Went Wrong*, WASHINGTON POST, May 2, 1999, at A20.

242. *See* Gregory Freeman, *Parents Must Stay in Touch With Their Children*, ST. LOUIS POST-DISPATCH, May 2, 1999, at D3.

the use of the dangerous instrument. The “awareness and capable of controlling” threshold in *Nolechek* is a higher standard to meet than *Steinberg*’s “negligent failure to restrain when the parent knows of the child’s propensity” standard. For *Nolechek* liability to be established, the parents must exhibit a modicum of control over their children’s use of the dangerous instrument. Awareness of the child’s use of the instrument is a demanding standard – Columbine plaintiffs would have to demonstrate that Eric and Dylan’s parents were “aware” that their children owned the weapons that were used in the attack and were capable of controlling Eric and Dylan’s use of the instruments.²⁴³ To put it bluntly, it seems doubtful that anyone could control these two children.

Under *Steinberg*, liability can be imposed on parents in situations where they reasonably fail to restrain their child from vicious conduct that endangers others, when they have knowledge of their child’s propensities.²⁴⁴ Under *Steinberg*, the plaintiffs would not have to substantiate that the parents were aware or capable of controlling Eric and Dylan’s use of the weapons, nor show entrustment. Instead, a lighter burden must be shouldered – that Eric and Dylan’s parents were negligent, because they failed to restrain the children from vicious conduct that imperils others. The plaintiffs would also have to prove that the parents knew of their child’s propensity to act viciously in a way that endangers others. Obviously, Eric Harris and Dylan Klebold engaged in vicious conduct which endangered others. It is also a foregone conclusion that the parents of these two failed to restrain them from this vicious conduct. Their actions have been called “[a]n inexplicable slaughter of innocents by two disturbed, nihilistic and unfathomably wicked young men.”²⁴⁵ The only question left to be answered under *Steinberg* is: Did the Harrises and the Klebolds have knowledge of their children’s propensities?

243. See *supra* notes 136-41.

244. See *supra* Part II.B.

245. Pitts, *supra* note 224.

B. *Did the Harrises and the Klebolds Have Sufficient Knowledge of Their Sons' Propensities to Impute Liability Under Steinberg?*

1. *What did teachers and administrators know?*

There are several people who are integral in determining what the Harrises and the Klebolds knew of the boys' dispositions. Teachers, administrators, neighbors, employees, friends, and the justice system could all opine as to whether the boys' parents knew or should have known of their propensities. Under New York case law, knowledge of an infant's use of dangerous instruments can be imputed to parents, despite their profession of ignorance.²⁴⁶ In these instances, circumstantial evidence plays a large part in determining liability, as evidenced by the *Kuchlik* decision.²⁴⁷

The group Eric and Dylan belonged to, the "Trenchcoat Mafia," was a loose organization of social outcasts at Columbine. The principal of Columbine High, Frank DeAngelis, denies having ever heard of the "Trenchcoat Mafia" until after the shootings.²⁴⁸ He also claimed that no one had ever informed him that anyone was harassing Klebold or Harris in school.²⁴⁹ The Jefferson County Superintendent of Schools also denies ever having heard of the group.²⁵⁰ However, this is not the first time that a "Trenchcoat Mafia" member has been involved in a killing. In 1997, an alleged member and Columbine senior, Robert Craig, killed his stepfather and then shot himself to death.²⁵¹

For a video production class, Eric and Dylan made a tape that depicted an assassination in which they shot the school's "jocks."²⁵² A couple of their videos depicted fires and explosions.²⁵³ On one occasion, one of the boys' writings was brought

246. See *Kuchlik*, 267 N.Y.S. at 259 (quoting *Woloszynowski v. New York Cent. R.R. Co.*, 172 N.E. 471, 472 (N.Y. 1930)); see also discussion *supra* notes 145-51.

247. See *id.* at 258.

248. David K. Li, *Cops Have New Suspect Who Says Others Helped*, NEW YORK POST, April 24, 1999, at 6.

249. See John Cloud & Andrew Goldstein, *Could He Have Done More?*, TIME, Dec. 20, 1999, at 48.

250. See Henderson, *supra* note 222, at 21A.

251. See *id.*

252. See *id.*

253. See Florio, *supra* note 212.

to the attention of the guidance counselor because of its graphic violence.²⁵⁴ An essay that Klebold wrote for an English class portrayed a protagonist clad in a black trenchcoat with a duffel bag, brutally executing “college preps.”²⁵⁵ One particular teacher, Cheryl Lucas, claimed that she and a few others had warned the administration that Eric and Dylan were potentially violent students, based on stories they had written about hate and death.²⁵⁶ In addition, a parent of one of the Columbine victims had complained to school authorities about the boys, alleging they were “dangerous racists.”²⁵⁷ Some teachers also knew about Eric’s web site where he posted a message that stated: “God, I can’t wait till I can kill you people . . . All I want to do is kill as many of you as I can.”²⁵⁸

2. *What did friends know?*

Friends had noticed that Eric and Dylan were slipping into “their own eerie world” just before the shootings.²⁵⁹ As members of the “Trenchcoat Mafia,” the two were enamored of Nazi culture.²⁶⁰ They wore swastikas and quoted German literature.²⁶¹ An ex-girlfriend of Eric’s once found him sprawled on the ground by a large rock with fake blood spattered around him, making the scene look like an attempted suicide.²⁶² Friends knew that Eric had begun experimenting at home with pipe bombs;²⁶³ co-workers knew that he enjoyed making “dry ice bombs” and other miniature exploding devices.²⁶⁴ Yet, the boys’ supervisor at a pizza parlor said they were two of his best employees,²⁶⁵ and that neither boy gave any “outward indication

254. See Bai, *supra* note 214, at 27.

255. See Dave Cullen, *Columbine Myths Debunked*, CHICAGO SUN-TIMES, Nov. 26, 2000, available at 2000 WL 6706554.

256. See Henderson, *supra* note 222, at 21A.

257. See Bai, *supra* note 214, at 31.

258. Henderson, *supra* note 222, at 21A.

259. *Id.*

260. See *id.*

261. See *id.*

262. See Tom Rhodes, *Murderous Revenge of the Trenchcoat Misfits*, SUNDAY TIMES LONDON, April 25, 1999, § 4G, at 26.

263. See Florio, *supra* note 212.

264. See Rhodes, *supra* note 262, at 26.

265. See Kass, *supra* note 241, at 3.

that this kind of tragedy could take place.”²⁶⁶ However, the owner of the pizza shop was recently named as a defendant in a lawsuit, and he is claimed to have “created ‘a work environment that included . . . detonation of dry ice bombs, handling of gun powder, numerous fires, pyrotechnic explosions, discussions of killing and the display of bombs’” and that he knew Harris and Klebold were playing with pipe bombs.²⁶⁷

3. *What did the authorities know?*

The boys had a run-in with the police; in 1998, the two were arrested for stealing tools out of a van.²⁶⁸ They went through a court-ordered diversion program, including weekly visits to a “diversion officer” as well as several reform programs, including “anger-management class.”²⁶⁹ One of the diversion program’s requirements was that the two stay out of trouble, but, in March of 1998, Rudy and Judy Brown filed a complaint against Harris saying that he had threatened their son, was making pipe bombs, and had posted a violent web site.²⁷⁰ Unlike the parents in *Armour v. England*, who were found not to have known about their child’s propensities, Eric Harris and Dylan Klebold’s parents had obviously been notified of their children’s conduct.²⁷¹

4. *What did the parents know?*

The facts of Columbine may be more similar to *Staruck v. County of Otsego*,²⁷² discussed above, where the State, *in loco parentis*, had extensive knowledge of the infant defendant’s disciplinary problems.²⁷³ However, the Court in *Staruck* concluded that, even if the State knew the child to be a delinquent, the

266. See Florio, *supra* note 212.

267. See Mike McPhee, *4 Added to Columbine Lawsuits*, DENVER POST, Dec. 30, 2000, available at 2000 WL 25838558.

268. See Russakoff, *supra* note 241, at A20.

269. See Bai, *supra* note 214, at 26.

270. See Valerie Richardson, *Columbine Shooting Shadows Election: Publicity Not a Plus for Candidate*, THE WASHINGTON TIMES, May 29, 2000, at A4.

271. In *Armour*, the defendant parents’ key contention was that no one, including school officials, had notified them of any violent conduct. See *Armour*, 619 N.Y.S.2d at 808; see also *supra* note 41 and accompanying text.

272. 138 N.Y.S.2d 385 (App. Div. 3d Dep’t. 1955); see also *supra* notes 31-36 and accompanying text.

273. See *supra* notes 33-34 and accompanying text.

proof in the case must have indicated to a reasonable mind that the defendant would actually shoot someone.²⁷⁴ For example, the defendant parents in *Adolph E. v. Linda M.* were aware that their daughter had engaged in a polymorphously perverse game with her younger brothers.²⁷⁵ However, the Appellate Division Second Department held that, even if the parents had such knowledge, this would not put them on notice that their daughter would engage in any harmful sexual conduct with the plaintiff's child, for whom she babysat.²⁷⁶ Similarly, eight years later in *Sherri v. Gerwell*, the same court required the plaintiffs to demonstrate that the defendant parent had specific knowledge of her son's propensity to use cars without permission,²⁷⁷ or to steal or borrow items that he was unauthorized to use, in order to impose parental liability.²⁷⁸ Thus, it seems that New York courts have required plaintiffs to show that defendant parents had very particular knowledge of their child's aberrant behavior. The information provided by Columbine teachers or students in the previous sections only facilitate a general notion of Eric Harris and Dylan Klebold's antisocial behavior. This would be insufficient under New York law; the knowledge that the parents would have had to possess must be refined and specific. It does not appear that the Klebolds and the Harrises were on notice that their children would try to kill someone. Or were they?

Randy and Judy Brown, parents of Columbine student Brooks Brown, had reported Eric Harris to the police a year prior to the shooting.²⁷⁹ Harris had thrown a chunk of ice through Brooks' car windshield.²⁸⁰ The parents also found Harris' web site where he allegedly threatened to kill Brooks and encouraged others wishing to kill someone to consider Brooks as a target.²⁸¹ Mrs. Brown took her complaint directly to the Harrises, who were reportedly upset with the news.²⁸² Pursuant to

274. See *supra* note 35 and accompanying text.

275. See *Adolph E.*, 566 N.Y.S.2d at 166.

276. See *id.*

277. *Sherri*, 691 N.Y.S.2d at 145.

278. See *id.*

279. See Henderson, *supra* note 222, at 21A.

280. See *id.*

281. See *id.*

282. See Russakoff, *supra* note 241, at A20.

Linder v. Bidner, discussed above, that the Harrises possessed knowledge of this incident might make them liable under New York law for the actions of their son.²⁸³ In *Linder*, it was alleged that neighbors had frequently notified the defendant parents of their child's vicious habit of beating up other children.²⁸⁴ This was found sufficient to charge the parents with knowledge of their son's conduct.²⁸⁵ Therefore, according to *Linder*, the Brown incident may qualify as actual parental notification.

The Court of Appeals' language in *LaTorre v. Genesee Management* is especially telling: "[s]ome knowledge of a specific type of pertinently dangerous characteristics and particularly foreseeable conduct might find a theoretical tort construct to support recognition for some liability."²⁸⁶ The Harrises were put on notice that their son wanted Brooks Brown dead, and they saw the violent messages the Browns downloaded from Eric's web site. New York precedent exists for the proposition that if neither parent is aware nor cognizant of his child's possession of a dangerous instrument, then parental knowledge is insufficient.²⁸⁷ In *Brahm v. Hatch*, a previously benign defendant effectuated a quadruple-homicide of his father and girlfriend, his brother, and his cousin.²⁸⁸ The deceased father had allegedly told a friend, who testified at trial, that he wouldn't be surprised if the defendant would one day take a gun and "sh[o]t whoever was around him."²⁸⁹ Despite this evidence, the court found the defendant's administratrix non-negligent.²⁹⁰ In their defense, the Harrises could argue along the lines of the reasoning in *Brahm* that they were neither aware nor cognizant of Eric's violent tendencies. Is it possible that the parents did not know?

The final damning piece of evidence against the Harrises is the alleged fact that police found a sawed-off shotgun and pipe bomb materials in plain view in Eric Harris' room,²⁹¹ and a

283. See *supra* notes 39-40 and accompanying text.

284. See *Linder*, 270 N.Y.S.2d at 428.

285. See *id.* at 430.

286. *LaTorre*, 687 N.E.2d at 1287.

287. See *supra* note 144 and accompanying text.

288. See *Brahm v. Hatch*, 609 N.Y.S.2d 956, 957 (App. Div. 3d Dep't 1994).

289. See *id.* at 958.

290. See *id.*

291. See *Bai*, *supra* note 214, at 31.

taped admission by Harris that his father had found a pipe bomb in his room.²⁹² On a tape released to the media, Harris says: "Thank God my parents [didn't] search my room. They would have found so much s—. . . ." ²⁹³ Both boys venture, on tape, that their plans might have been diffused if their parents had been more curious.²⁹⁴ Police also recovered a diary detailing the assassins' plans for the massacre, including calculations as to the time of day that would produce the most deaths.²⁹⁵ Tapes reveal that Harris had an arsenal right in his room. He had his desk drawers filled with bomb-making material, and his closet was replete with combat knives, guns, and gunpowder.²⁹⁶

VII. CONCLUSION – THE VERDICT

The cumulative amount of information available to the Harrises could very well impute liability to them under New York law. Using a *Steinberg* analysis, it appears that the Harrises, knowing of Eric's propensities, failed to reasonably restrain him from vicious conduct that endangered others. Certainly the Internet death threats to Brown and the bomb-making material in Eric's room would have given the Harrises sufficient parental knowledge to engender liability, similar to the mother's knowledge in *Agnesini v. Olsen*. As in *Linder v. Bidner*, the complaints of neighbors (the Browns) fell on deaf ears, and there is a viable cause of action under these facts. Although the New York courts have required increasingly specific parental knowledge,²⁹⁷ it is reasonable to assume that the Harrises were well aware of Eric's propensities. The Court of Appeals' recent decision in *LaTorre v. Genesee Management* held that the plaintiffs must allege and plead parental negligence with some reasonable specificity.²⁹⁸ Plaintiffs in a wrongful-death suit against the Harrises have plenty of red flags that

292. See Lynn Bartels, *Columbine Killer's Videotape Reveals His Bedroom Concealed an Arsenal*, THE PLAIN DEALER, Dec. 16, 1999, at 1.

293. *Id.*

294. See *Columbine Parents Protest Showing of Tapes to Magazine*, ST. LOUIS POST-DISPATCH, Dec. 14, 1999, at A1.

295. See Bai, *supra* note 214, at 31.

296. See *Columbine Parents Protest*, *supra* note 294.

297. See, e.g., *Sherri*, 691 N.Y.S.2d at 145; see also *supra* notes 44-63; *Adolph E.*, 566 N.Y.S.2d at 166.

298. See *LaTorre*, 687 N.E.2d at 1286.

they could point to in order to plead properly under this standard. Eric Harris' blatant conduct, including keeping weapons in his bedroom, and making overt death threats, combine to put the parents on notice.

It may also come to light that Dylan Klebold's parents knew as much as the Harrises about their own son's behavior.²⁹⁹ There is evidence that one of Dylan's teachers met with a guidance counselor and Dylan's parents to discuss a graphically violent essay he wrote where a "protagonist in a black trench coat with a duffel bag brutally execut[ed] 'college preps.'"³⁰⁰ However, dealing with the facts presented, this author does not believe that the Klebolds would be found negligent under applicable New York case law. It appears that most of the weapons were kept in the Harris household, and Eric was much more blatant with his violent threats than Dylan. There is no record of Dylan's having made death threats, nor does it appear that the Klebolds were specifically informed of Dylan's conduct.

EPILOGUE

Shortly after the Columbine shootings, New York Governor George Pataki proposed new legislation to combat school violence, and the Senate passed it within two days.³⁰¹ Former President Clinton proposed federal anti-gun legislation that would make it possible for parents to be charged with a felony if their children commit crimes with guns.³⁰² Likewise, Colorado and other states have tightened their legislation on gun control recently.³⁰³

299. Author's note: This article was written in November 1999 and submitted for publication in February 2001.

300. Cullen, *supra* note 255.

301. See *Rush to Fix It: National Trauma Inevitably Inspires a Wave of Bad Lawmaking*, HERALD AMERICAN, May 2, 1999, at D2.

302. See Nancy Churnin, *Who's Responsible?*, DALLAS MORNING NEWS, May 4, 1999, available at 1999 WL 4118021.

303. For example, Colorado legislators approved bills that make "straw purchases" (where a gun buyer fronts for a minor or someone with a criminal background) illegal, and a bill that requires parental permission before someone who has legally obtained a firearm (i.e., Robyn Anderson) gives it to someone underage (i.e., Klebold and Harris). See Jennifer Hamilton, *Owens Signs Gun Control Legislation*, THE GAZETTE, May 20, 2000, available at 2000 WL 19081089. Furthermore, there is a new Colorado law that requires background checks on every gun show sale in the state. See David Olinger, *Gun Vendors Come Forward*, DENVER POST, Nov. 22, 2000, at 13A. Arkansas passed a law last year that makes parents respon-

In the wake of the Columbine shootings, as mentioned earlier, there was a proliferation of wrongful death suits filed against the parents of Dylan Klebold and Eric Harris. In addition, victim's families have filed suits against the Sheriff's office, Sheriff John Stone, seven Sheriff's officers and the former Sheriff.³⁰⁴ The two men who sold Anderson the guns at the gun show, the gun-show operator, and the owner of the pizza shop where Harris and Klebold worked have also been named as defendants in civil lawsuits.³⁰⁵ Klebold's creative-writing teacher, Judy Kelly, has also been named as a defendant in a lawsuit claiming that she was warned of the attack by a graphically violent essay that Klebold wrote.³⁰⁶ In an interesting turn of events, on November 5, 1999, the parents of Dylan Klebold filed notice of their intention to sue Littleton Sheriff John Stone.³⁰⁷ The parents are alleging that Stone knew that Eric Harris was a disturbed young man, and that he did not inform them.³⁰⁸ The Klebolds contend that, if he had, they would have forbidden their son, Dylan, from associating with Harris.^{309 310}

sible for minors who possess firearms on school property. See Soraghan, *supra* note 232. Rhode Island passed a law in 1999 that prohibits a person from giving ammunition and firearms to minors, with or without parental consent. See *id.*

304. See *Sheriff's Office Argues to Dismiss 5 Columbine Suits*, DENVER POST, Aug. 23, 2000, available at 2000 WL 25825865.

305. See McPhee, *supra* note 267.

306. See Cullen, *supra* note 255.

307. See Pitts, *supra* note 224.

308. See *id.*

309. See *id.*

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