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The Missing Link—Contribution Without Common Liability: *Nolechek v. Gesuale*

New York's contribution statute¹ allows a defendant a claim for contribution if "two or more persons . . . are subject to liability for damages for the same personal injury, injury to property or wrongful death."² In *Nolechek v. Gesuale*,³ the New York Court of Appeals held that a defendant, subject to liability for a child's personal injuries, has a right to seek contribution from the parent who entrusted a dangerous instrument to the child, even though the parent is not liable to his child.⁴ The contribution statute would require the parent and the defendant to be liable for the same personal injury—that of the child.⁵ The

1. N.Y. CIV. PRAC. LAW art. 14 (McKinney 1976). This article provides: Section 1401.

Except as provided in section 15-108 of the general obligations law, two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought.

Section 1402.

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

Section 1403.

A cause of action for contribution may be asserted in a separate action or by cross-claim, counterclaim or third-party claim in a pending action.

Section 1404.

(a) Nothing contained in this article shall impair the rights of any person entitled to damages under existing law.

(b) Nothing contained in this article shall impair any right of indemnity or subrogation under existing law.

2. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

3. 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978).

4. *Id.* at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

5. See N.Y. CIV. PRAC. LAW § 1401, C1401:4 (McKinney 1976). This comment provides:

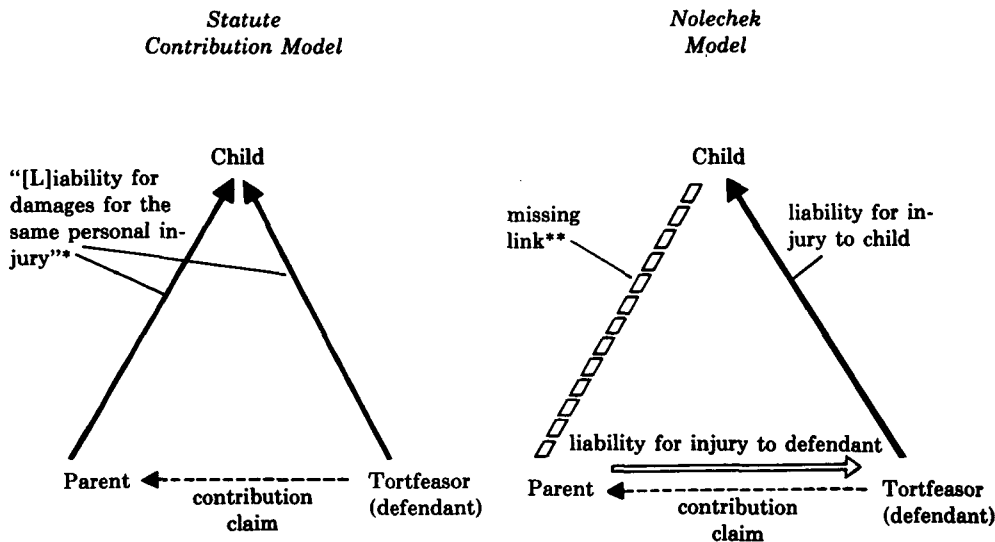
Nothing in the statute requires that the two defendants be liable upon the same theory. All that is necessary is that they be "subject to liability for damages for

court, however, permitted the contribution claim based on the injury sustained by the defendant on the theory that the parent breached an "independent duty" to the defendant.⁶

Walter Nolechek purchased a motorcycle for his 16-year-old son, Scott.⁷ He gave the unregistered vehicle to his son despite Scott's severely impaired vision and lack of a driver's license. Scott had undergone an operation for the removal of an eye; his long-distance vision in the remaining eye was uncorrectable.⁸ Scott died after the motorcycle he was operating⁹ collided with a steel cable which was alleged to have been negligently suspended across a roadway by two of the defendants to block off an area

the same . . . injury."

6. These diagrams illustrate the relationships of parent, child and defendant under the contribution statute and as they existed in *Nolechek*.



*N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976).

**In the *Nolechek* model, common liability for the child's injury is lacking.

7. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 337, 385 N.E.2d 1268, 1271, 413 N.Y.S.2d 340, 343 (1978).

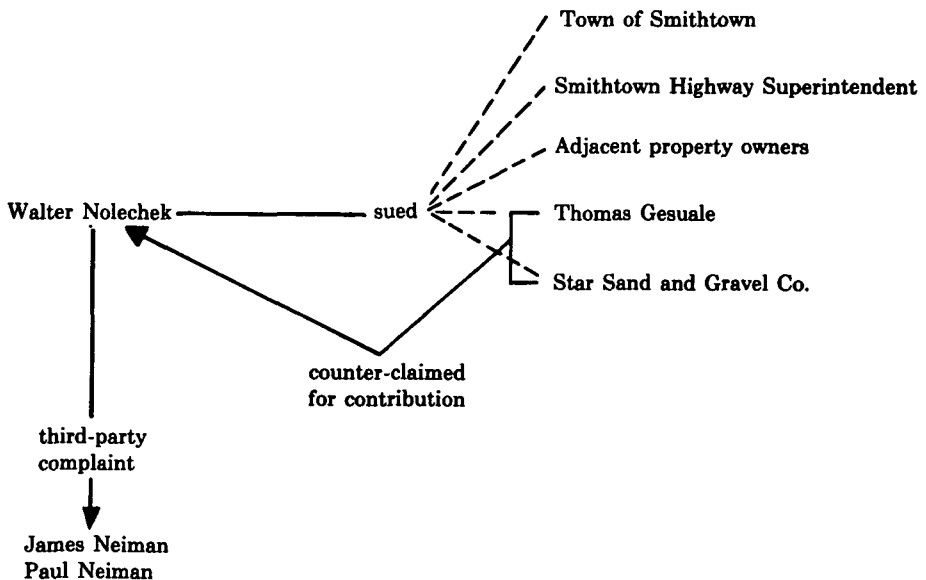
8. *Nolechek v. Gesuale*, 58 A.D.2d 885, 886, 396 N.Y.S.2d 881, 882 (2d Dep't 1977).

9. Prior to the accident, Scott had switched motorcycles with his friend, James Nieman. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 337, 385 N.E.2d 1268, 1271, 413 N.Y.S.2d 340, 343.

across a roadway by two of the defendants to block off an area used for mining.¹⁰ Walter Nolechek, individually and as administrator of his son's estate, commenced a wrongful death action.¹¹ The defendants counterclaimed against Nolechek for contribution, alleging that Nolechek was negligent in providing his handicapped son with a motorcycle. The Appellate Division dismissed the counterclaim on the ground that defendants had no claim for apportionment of damages against the parent "where

10. Nolechek sued Thomas Gesuale and Star Sand and Gravel Co., who had suspended the cable, the adjacent property owners, who had permitted the cable to be erected, and the Town of Smithtown and its highway superintendent, who had not required removal of the obstruction. Only Gesuale and Star Sand and Gravel were involved in this appeal. *Id.* at 336-37, 385 N.E.2d at 1271, 413 N.Y.S.2d at 343.

11. The following illustrates and explains the course of litigation in *Nolechek v. Gesuale*.



Special Term denied motions by the Neimans to dismiss the counterclaim and third-party complaint. On appeal by the Neimans, the Appellate Division reversed both determinations and dismissed the counterclaim and third-party complaint. Gesuale and Star appealed from the Appellate Division's order; Nolechek appealed from the dismissal of the third-party complaint. The Court of Appeals reinstated the counterclaim and affirmed the dismissal of the third-party complaint. *Id.* at 336-337, 385 N.E.2d at 1271, 413 N.Y.S.2d at 342-43.

peals reversed and reinstated defendants' counterclaim,¹³ premised on the parent's breach of a duty to protect third parties from foreseeable harm resulting from the negligent entrustment of a dangerous instrument to his child.¹⁴

Part I of this note explores the areas of law involved in the *Nolechek* decision: New York's contribution statute, article 14 of the New York Civil Practice Law and Rules (CPLR);¹⁵ New York's rule that a child has no cause of action against his parent for negligent supervision, the *Holodook* rule;¹⁶ and New York's recognition of a parent's common-law duty to protect third parties from foreseeable harm caused by his child's misuse of a dangerous instrument.¹⁷ Parts II and III will discuss and analyze the *Nolechek* decision. This note contends that the Court of Appeals' reasoning is at odds with the contribution statute and should be limited to the unique facts of the case. Further, this note will suggest alternatives which the court could have used to achieve an equitable result.

I. Background

A. Contribution in New York

Early New York law¹⁸ followed the English rule that there could be no contribution among joint tortfeasors.¹⁹ Desire for

properly supervise him. An infant has no cause of action against a parent for lack of proper supervision" *Id.*

13. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 336, 385 N.E.2d 1268, 1271, 413 N.Y.S.2d 340, 343 (1978). The Court of Appeals upheld the Appellate Division's dismissal of *Nolechek*'s third-party claim against Scott's friend and his father, ruling that the exchange of the motorcycles was not the proximate cause of the accident and therefore provided no basis for liability. *Id.* at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

14. *Id.* at 338-39, 385 N.E.2d at 1272-73, 413 N.Y.S.2d at 344-45.

15. See note 1 *supra*.

16. *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). See notes 50-55 and accompanying text *infra*.

17. See notes 56-70 and accompanying text *infra*.

18. For discussions of the development of contribution in New York, see, e.g., *Survey of New York Practice* Dole v. Dow Chemical Co.: *A Revolution in New York Law*, 47 ST. JOHN'S L. REV. 185 (1972); Note, *The New Right of Relative Contribution: Dole v. Dow Chemical Co.*, 37 ALB. L. REV. 154 (1972); 41 FORDHAM L. REV. 167 (1972).

19. *Merryweather v. Nixan*, 101 Eng. Rep. 1337 (K.B. 1799) is commonly cited as expressing the general rule against contribution; but see Note, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898), which expresses the view that *Merryweather* did not state the general rule, but

more equitable loss distribution among tortfeasors²⁰ led to the enactment, in 1928, of a contribution statute.²¹ This statute allowed a codefendant a cause of action for contribution after a finding of common liability for a money judgment and payment by him of more than his pro rata share. While the statute permitted limited equitable loss distribution, courts and commentators criticized²² it for permitting a plaintiff to determine the extent and availability of contribution by his willingness to sue more than one tortfeasor.²³

Courts responded to the limited availability of contribution by permitting the named defendant to implead a nonparty for

the exception, in that the *Merryweather* holding applied to intentional tortfeasors. A principal New York case which adopted the rule of *Merryweather* was *Peck v. Ellis*, 2 Johns. Ch. 131 (N.Y. 1816). For a discussion of other early contribution cases, see Note, *Contribution Between Persons Jointly Charged for Negligence—Merryweather v. Nixan*, 12 HARV. L. REV. 176 (1898).

The courts' unwillingness to allow contribution was based on their refusal to aid wrongdoers *in pari delicto*, reluctance to apportion degrees of negligence among tortfeasors, and belief that a policy against contribution would deter wrongful conduct. See *id.*

20. See Note, *Dole v. Dow Chemical Co.*, 47 N.Y.U. L. REV. 815, 818 (1972).

21. Law of March 28, 1928, ch. 714, 211-a, [1928] N.Y. Laws 1549 (repealed 1962).

Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment has been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payments; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action a judgment may be entered by one such defendant against the other by motion on notice.

This statute was repealed and re-enacted without substantial change as section 1401 of the New York Civil Practice Law and Rules. CIVIL PRACTICE LAW AND RULES, ch. 308, § 1401, [1962] N.Y. Laws 653 (repealed 1974). This section was later repealed and the current section 1401 was enacted in 1974. N.Y. CIV. PRAC. LAW § 1401 (McKinney 1976). For the current text of this section, see note 1 *supra*.

22. See *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 291-92, 331 N.Y.S.2d 382, 386-87 (1972); Note, *The New Right of Relative Contribution: Dole v. Dow Chemical Co.*, 37 ALB. L. REV. 154, 156. For a discussion of various unsuccessful attempts by defendants to bring third-party actions, see *id.* at 156-57.

23. If plaintiff sued only one tortfeasor, the named defendant could neither implead another tortfeasor nor sue for contribution in a separate action. 41 FORDHAM L. REV. 167, 167 (1972).

purposes of indemnification.²⁴ Whereas contribution allowed loss-sharing among defendants jointly liable to a plaintiff, indemnity allowed a court to shift the entire loss from one tortfeasor to another.²⁵ The right of indemnification arises when one party has been compelled to pay for another's wrong.²⁶ Contribution and indemnity are doctrines based on considerations of fairness.²⁷ The right to contribution, however, derives from statute,²⁸ while the right to indemnification derives from a contract implied in law,²⁹ from an express contract,³⁰ or from a statute which so provides.³¹

Dissatisfaction with the limitations of contribution and indemnity³² crystallized in the New York Court of Appeals' landmark decision, *Dole v. Dow Chemical Co.*³³ The court abol-

24. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 150, 282 N.E.2d 288, 293, 331 N.Y.S.2d 382, 388-89 (1972) (citing 65 COLUM. L. REV. 123, 126 (1965)) "It has been observed that the doctrine of indemnity 'evolved in the unnatural surroundings of an inflexible rule against contribution'. . . ." *Id.*

25. See, e.g., W. PROSSER, LAW OF TORTS § 51 (4th ed. 1971); *McFall v. Compagnie Maritime Belge*, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952). "The right to indemnity, as distinguished from contribution, is not dependent upon the legislative will. It springs from a contract, express or implied, and . . . reimbursement is sought." *Id.* See *Putvin v. Buffalo Elec. Co.*, 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

26. *Margolin v. New York Life Ins. Co.*, 32 N.Y.2d 149, 152, 297 N.E.2d 80, 82, 344 N.Y.S.2d 336, 338 (1973); *Taft v. Shaffer Trucking*, 52 A.D.2d 255, 258, 383 N.Y.S.2d 744, 746 (4th Dep't 1976).

The New York courts traditionally denied indemnity where parties were found to have been *in pari delicto*, equally culpable. As a result of this limitation, courts developed the active-passive theory of indemnity which allowed full indemnification of a passively negligent tortfeasor by one who was actively negligent. Courts and commentators criticized this doctrine, as it involved the courts in weighing comparative degrees of negligence and its application was uncertain. See *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 148-49, 282 N.E.2d 288, 291-92, 331 N.Y.S.2d 382, 386-87 (1972); *Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co.*, 11 A.D.2d 220, 225, 202 N.Y.S.2d 172, 179 (1st Dep't 1960), *rev'd on other grounds*, 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961).

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

28. See notes 1 and 21 *supra*.

29. *Leflar, Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 146 (1932).

30. The New York courts have recognized contracts by which the parties provide for indemnification of liability for negligence. *Rogers v. Dorchester Assoc.*, 32 N.Y.2d 553, 563-66, 297 N.E.2d 403, 408-10, 347 N.Y.S.2d 22, 30-32 (1973).

31. See, e.g., N.Y. GEN. MUN. LAW § 50b (McKinney 1977).

32. See note 24 and accompanying text and note 26 *supra*.

33. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). In *Dole*, an employee died after he inhaled a toxic fumigant used to spray a grain bin which he entered in the

ished the active-passive test for indemnification³⁴ and held that there could be apportionment of damages among tortfeasors.³⁵ The *Dole* court expanded the availability of indemnification³⁶ and foreshadowed a new rule of contribution.³⁷

In 1974, the New York legislature codified the *Dole* apportionment rule by enacting CPLR article 14.³⁸ The Judicial Conference, in recommending passage of the contribution statute, stated:

Because the "*Dole claim*" and this Article, are based upon the contribution model, it is possible to define with some particularity the relationship that must exist between the parties before the right of contribution arises. . . . [I]t can be simply stated that there shall be no right to contribution unless each of the parties from whom it is sought is or was subject to liability for damages for the same harm to the injured party.³⁹

The Judicial Conference emphasized that the requirement of

course of his employment. His administratrix sued Dow, the manufacturer of the chemical, which brought a third-party claim seeking indemnification from the employer alleging that the employer's negligence was "active and primary" and that Dow's actions were "passive and secondary." *Id.* at 146, 282 N.E.2d at 290, 331 N.Y.S.2d at 385.

34. *Id.* at 148, 282 N.E.2d at 291-92, 331 N.Y.S.2d at 387. See *Green Bus Lines v. Consolidated Mut. Ins. Co.*, 74 A.D.2d 136, 426 N.Y.S.2d 981 (2d Dep't 1980). For a discussion of the active-passive test, see note 26 *supra*.

35. The *Dole* court 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. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.

Dole v. Dow Chem. Co., 30 N.Y.2d 143, 148, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

36. The *Dole* court wrote: "There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification." *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386. See *Green Bus Lines v. Consolidated Mut. Ins. Co.*, 74 A.D.2d 136, 426 N.Y.S.2d 981 (2d Dep't 1980).

37. In *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972), the court referred to the rule of *Dole* as one of "relative contribution" which "permits apportionment of damages among joint or concurrent tortfeasors regardless of the degree or nature of the concurring fault." *Id.* at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854.

38. For text of Civil Practice Law and Rules article 14, see note 1 *supra*.

39. TWELFTH ANNUAL REPORT OF THE JUDICIAL CONFERENCE TO THE LEGISLATURE ON THE CIVIL PRACTICE LAW AND RULES (1974), reprinted in [1974] N.Y. Laws 1808 (McKinney).

common liability is "considered essential in a contribution statute."⁴⁰

Although the *Dole* decision was based on indemnity, it profoundly influenced the law of contribution in New York. The *Dole* court clouded the differences between contribution and indemnity; the Court of Appeals, however, has since reaffirmed the distinctions.⁴¹ Contribution now encompasses more claims than in the past. The party against whom contribution is claimed need not have been named in plaintiff's action,⁴² and the amount of contribution is no longer determined by a defendant's pro rata share.⁴³ Rather, a tortfeasor is liable for his equitable share of a judgment.⁴⁴ The fundamental principles of common law indemnity are still viable; a court, however, is no longer limited to an all-or-nothing result based on the active-passive test. The courts may grant full indemnification under traditional indemnification theory, partial indemnification under *Dole*, or none at all.⁴⁵

B. *Parental Immunity from Liability for Negligent Supervision in New York*

In 1969, the Court of Appeals, in *Gelbman v. Gelbman*,⁴⁶ abolished New York's judge-made rule of intrafamilial immunity for nonwillful torts.⁴⁷ The holding exposed family members to

40. That the "Dole claim" is dependent on such a finding is vividly demonstrated in *Margolin v. New York Life Insurance Co.*, 32 N.Y.2d 149 (1973). The Court of Appeals there held that where the injured party sued two alleged tortfeasors, and the jury found only one liable to the plaintiff, that tortfeasor's cross claim for a *Dole* apportionment must fail. . . .

Id. at 1808-09.

41. *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 300 N.E.2d 403, 347 N.Y.S.2d 22 (1973).

42. See note 1 *supra*. Despite these changes, a plaintiff may still collect his full damages from one defendant if the other "apportionment" defendants do not pay. *Kelly v. Long Island Lighting Co.*, 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

43. See note 21 and accompanying text *supra*.

44. See notes 1 & 36 and note 35 and accompanying text *supra*.

45. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). Awards of partial indemnification may be made in worker's compensation cases. Note that *Dole* itself involved a worker's compensation situation. See note 33 *supra*.

46. 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969). In *Gelbman*, the court held that a parent could maintain an action against her 16-year-old son for injuries sustained in an accident during which she was a passenger in a car driven by her son.

47. This rule was first established in *Sorrentino v. Sorrentino*, 248 N.Y. 626, 162

tort liability for "acts which if done by one ordinary person to another would be torts."⁴⁸ This ruling, in conjunction with the subsequent *Dole*⁴⁹ decision and the revision of the contribution statute, created the possibility of third-party claims against a parent. A tortfeasor, potentially liable for injuries to a child, could seek contribution or apportionment from a parent based on his negligent supervision of his child.

The Court of Appeals, in *Holodook v. Spencer*,⁵⁰ recognized this problem⁵¹ and held that a child has no cause of action against a parent for negligent supervision.⁵² The court reasoned, therefore, that a tortfeasor sued for injuries to the child cannot claim contribution or apportionment from the parent.⁵³ The court was concerned with the potential impact of *Dole* on the parent-child relationship and reasserted New York's "policies of promoting family harmony."⁵⁴ This exception to the *Gelbman* rule was based on several considerations: vulnerability to suit might result in parental reluctance to prosecute actions on behalf of the child; liability for contribution might cause in-

N.E. 551 (1928). The court reaffirmed the rule in *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942), which recognized the wide range of discretion afforded to parents in the rearing of their children, and in *Badigian v. Badigian*, 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961), which announced that the intrafamilial immunity rule is necessary to preserve family harmony and "[is] a concept that cannot be rejected without changing the whole fabric of our society, a fundamental idea that is at the bottom of all community life." *Id.* at 474, 173 N.E.2d at 719, 215 N.Y.S.2d at 36-37.

Sorrentino, Cannon, and Badigian involved suits brought by a child against his parent for personal injuries sustained in an automobile accident. *Gelbman* involved a parent's suit against her child for injuries sustained as a result of the child's negligent operation of a motor vehicle. Although the situations were similar, the result in *Gelbman* was different.

48. See *Smith v. Sapienza*, N.Y.L.J., Jan. 30, 1981, at 28, col. 1 (N.Y. Ct. App. Jan. 15, 1981).

49. *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). See notes 33-37 and accompanying text *supra*.

50. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). *Holodook* was a consolidation of three cases. In the main case, a child who darted out from between two parked cars was hit by an automobile. The father, individually and on behalf of his child, sued the driver. Defendant sought *Dole* apportionment or contribution by impleader and counterclaim; he alleged that the parents had been negligent in supervising the child, and that their negligence contributed to the cause of the accident.

51. *Id.* at 51, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

52. *Id.*

53. *Id.* at 44-45, 324 N.E.2d at 342-43, 364 N.Y.S.2d at 866.

54. *Id.* at 48, 324 N.E.2d at 344, 364 N.Y.S.2d at 869. See cases cited in note 47 *supra*.

trafamilial strife; and since the family is regarded as an economic unit, recovery from the parent would diminish the child's recovery.⁵⁵

C. *A Parent's Duty to Third Parties to Protect Them from Harm Resulting from his Child's Misuse of a Dangerous Instrument*

Ordinarily, a parent is not liable for his child's torts; the parent and child are considered separate legal beings.⁵⁶ At common law⁵⁷ and in New York,⁵⁸ however, a parent has a duty to protect third parties from harm caused by a child's possession, operation or use of a dangerous instrument which the parent negligently entrusted to the child. A parent is assumed to have the power to control his child; he has a duty to exercise that power for the protection of others.⁵⁹ There is no precise defini-

55. *Holodook v. Spencer*, 36 N.Y.2d 35, 47, 324 N.E.2d 338, 354, 364 N.Y.S.2d 859, 868-69 (1974). The court also noted the potential for abuse of a negligent supervision claim by estranged parents when one might sue the other on the child's behalf or by the child suing the parent upon reaching the age of majority. *Id.* The court observed that

[o]f the many duties arising from the parent-child relation, only very few give rise to legal consequences for their breach. Parents are obligated in accordance with their means to support and maintain their children—i.e., to furnish adequate food, clothing, shelter, medical attention and education. A parent's failure to observe minimum standards of care in performing these duties entails both remedial sanctions, such as forfeiture of custody, and criminal sanctions. Parents are also obligated to provide proper guidance and guardianship of their children and are vulnerable to legal sanction for failure to meet minimum standards of care, for example, by the excessive infliction of corporal punishment, by the excessive use of drugs or alcohol, or by directing or authorizing a child under 16 to engage in an occupation involving substantial risk of danger to his life or health. Parents are also obligated to supervise their children. Failure to supervise may entail legal consequence where injury to a third party results, for example, under circumstances where a parent negligently entrusts to his child a dangerous instrument, or an instrument potentially dangerous in the child's hands, so as to create an unreasonable risk to others.

Id. at 44-45, 324 N.E.2d at 342-43, 364 N.Y.S.2d at 866 (citations omitted).

56. W. PROSSER, *supra* note 25, at 871. See *LeSavage v. Freedman*, 100 Misc. 2d 857, 860, 419 N.Y.S.2d 1018, 1021 (1979). But see N.Y. GEN. OBLIG. LAW § 3-112 (McKinney 1980) (limited liability of parents or certain legal guardians having custody of an infant for malicious and destructive acts of such infant).

57. W. PROSSER, *supra* note 25, at 872. See Frankel, *Parental Liability for a Child's Tortious Acts*, 81 DICK. L. REV. 755, 759 (1977).

58. See, e.g., *Steinberg v. Cauchois*, 249 A.D. 518, 293 N.Y.S. 147 (2d Dep't 1937); *Beekman Estate v. Midonick*, 44 Misc. 2d 11, 252 N.Y.S.2d 885 (Sup. Ct. 1964).

59. W. PROSSER, *supra* note 25, at 872. See also *Carmona v. Padilla*, 4 A.D.2d 181,

tion of a dangerous instrument; instead, a court will consider the circumstances of the case.⁶⁰ A court will examine such factors as the child's propensities,⁶¹ his age and intelligence,⁶² and his past misuse of the instrument,⁶³ as well as the inherent danger of the instrument.⁶⁴ This rule has been applied where the parent knew or should have known that the instrument was likely to cause harm to others.⁶⁵ Thus, courts have allowed actions against a parent for his child's misuse of matches,⁶⁶ a motorized bicycle,⁶⁷ a baseball bat,⁶⁸ a bow and arrow,⁶⁹ and a B-B gun.⁷⁰

II. *The Court's Opinion in Nolechek v. Gesuale*

In *Nolechek*, a divided Court of Appeals⁷¹ allowed the defendant to seek contribution from the parent even though the parent owed no duty to his child.⁷² The court considered allowing a child a cause of action against his parent for the negli-

183, 163 N.Y.S.2d 741, 743 (1st Dep't 1957).

60. See *Carmona v. Padilla*, 4 A.D.2d 181, 183, 163 N.Y.S.2d 741, 743 (1st Dep't 1957).

61. *Steinberg v. Cauchois*, 249 A.D. 518, 519, 293 N.Y.S. 147, 149 (2d Dep't 1937).

62. *Masone v. Gianotti*, 54 A.D.2d 269, 273, 388 N.Y.S.2d 322, 324 (2d Dep't 1976).

63. *Agnesini v. Olsen*, 277 A.D. 1006, 100 N.Y.S.2d 338 (2d Dep't 1950).

64. *Heritage Mut. Ins. Co. v. Hunter*, 63 A.D.2d 200, 201-02, 406 N.Y.S.2d 625, 626 (3d Dep't 1978).

65. See *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D. 114, 312 N.Y.S.2d 1018 (2d Dep't 1970).

66. *Agnesini v. Olsen*, 277 A.D. 1006, 100 N.Y.S.2d 338 (2d Dep't 1950) (cause of action allowed for a fire started by a four-year-old with a known propensity to light matches).

67. *Lalomia v. Bankers & Shippers Ins. Co.*, 35 A.D.2d 114, 312 N.Y.S.2d 1018 (2d Dep't 1970) (a motorized bicycle operated by a twelve-year-old collided with an automobile causing his death and that of the automobile driver).

68. *Zuckerberg v. Munzer*, 277 A.D. 1061, 100 N.Y.S.2d 910 (2d Dep't 1950) (cause of action allowed for assault with a baseball bat by an eight-year-old child whose parent knew of the child's violent tendencies).

69. *Carmona v. Padilla*, 4 A.D.2d 181, 163 N.Y.S.2d 741 (1st Dep't 1957) (cause of action permitted against a grandparent who allowed her young grandchild to play with a bow and arrow, thereby injuring another child).

70. *Lichtenthal v. Gawoski*, 44 A.D.2d 771, 354 N.Y.S.2d 267 (4th Dep't 1974) (cause of action allowed against the parent of a child who injured plaintiff's son with a B-B gun).

71. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978). Judge Breitel wrote the majority opinion in which Judges Jason, Jones and Wachtler joined. Judge Gabrielli and Judge Fuchsberg wrote separate concurring opinions. Judge Cooke dissented.

72. *Id.* at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

gent entrustment of a dangerous instrument.⁷³ Judge Breitel viewed this proposal as "neither analytically persuasive nor practically sound," however, and reaffirmed the *Holodook* rationale allowing broad parental discretion in child-rearing;⁷⁴ permitting a child to use instruments such as power tools, motorcycles or automobiles is a proper exercise of parental judgment.⁷⁵

The court sustained defendants' counterclaim for contribution based on the parent's breach of an independent duty to protect the defendants from foreseeable harm caused by the child's misuse of a dangerous instrument.⁷⁶ The court stated that this independent duty is analogous to the duty found in cases involving worker's compensation,⁷⁷ in which a defendant may claim contribution or indemnity from the employer despite plaintiff employee's inability to sue the employer directly.⁷⁸ Emphasizing that parental liability arises from a duty owed to third parties and not from a duty to protect his child, Judge Breitel reasoned:

However the children are raised, there must be respect for the hazards created for third parties. Parents are permitted to delegate to their children the decision to participate in dangerous activities, but they are not absolved from liability for harm incurred by third parties when the parents as adults unreasonably, with respect to such third parties, permit their children to use dangerous instruments.⁷⁹

The court acknowledged that physical harm is ordinarily associated with tort injury; it concluded, however, that liability for damages is also harm for which the parent ought to be responsi-

73. *Id.* at 337-38, 385 N.E.2d at 1271-72, 413 N.Y.S.2d at 344.

74. *Id.* For discussion of *Holodook*, see notes 50-55 and accompanying text *supra*.

75. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 338, 385 N.E.2d 1268, 1271, 413 N.Y.S.2d 340, 344 (1978).

76. *Id.* at 341-42, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

77. *Id.* at 339, 385 N.E.2d at 1272-73, 413 N.Y.S.2d at 345. See *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938); *Briscoe v. Williams*, 50 A.D.2d 883, 377 N.Y.S.2d 163 (2d Dep't 1975). See note 45 *supra*.

78. N.Y. WORK. COMP. LAW §§ 10-11 (McKinney 1965). See text accompanying notes 90-91 *infra*.

79. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 339, 385 N.E.2d 1268, 1272, 413 N.Y.S.2d 340, 344-45 (1978).

ble.⁸⁰ The court wrote, "A parent who entrusts an infant child with a dangerous instrument creates a danger to all society. It would be repulsive to permit, under the guise of protecting intrafamily relations, such a parent to escape all liability to a 'concurrent' tort-feasor who suffers financial harm. . . ."⁸¹

In his concurring opinion, Judge Gabrielli pointed out that "the well-established rule under *Dole* . . . precludes the counterclaim unless we also recognize the existence of a cause of action by the child against the parent."⁸² He favored creating an exception to *Holodook*⁸³ by allowing a child a cause of action against his parent "[w]here the instrument given to the child is so obviously capable of causing harm to the child that the parental behavior can be classified as wanton, willful, or gross negligence."⁸⁴

Judge Fuchsberg, concurring in result only, criticized the majority for reaffirming *Holodook* and stretching the principles of foreseeability and proximate cause.⁸⁵ He advocated instead an approach which would answer "the broad question at the heart of negligence law: What would an ordinarily reasonable and prudent person—taking into account the parent-child relationship—have done in similar circumstances?"⁸⁶ Judge Fuchsberg reasoned that a "reasonable care under the circumstances" standard would be in harmony with general tort law principles and would recognize the special nature of the parent-child relationship.⁸⁷

Judge Cooke agreed with the court's treatment of *Holodook* but dissented strongly on the issue of contribution.⁸⁸ He stated

80. *Id.* at 339, 385 N.E.2d at 1272-73, 413 N.Y.S.2d at 345.

81. *Id.* at 341, 385 N.E.2d at 1274, 413 N.Y.S.2d at 346.

82. *Id.* at 342, 385 N.E.2d at 1274, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring). For a discussion of *Dole v. Dow Chem. Co.*, see notes 33-36 and accompanying text *supra*.

83. See note 55 and accompanying text and text accompanying note 74 *supra*.

84. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 342, 385 N.E.2d 1268, 1274-75, 413 N.Y.S.2d 340, 347 (1978) (Gabrielli, J., concurring).

85. *Id.* at 345-46, 385 N.E.2d at 1276-77, 413 N.Y.S.2d at 349 (Fuchsberg, J., concurring).

86. *Id.*

87. *Id.* at 346, 385 N.E.2d at 1277-78, 413 N.Y.S.2d at 349-50 (Fuchsberg, J., concurring).

88. *Id.* at 347, 385 N.E.2d at 1278, 413 N.Y.S.2d at 350 (Cooke, J., dissenting). Judge Cooke said, "Because such a holding marks a sudden, unexplained departure from prior

that according to CPLR 1401 there can be no contribution absent "common liability."⁸⁹ Judge Cooke argued that the worker's compensation analogy relied on by the majority is not authority for allowing a claim for contribution;⁹⁰ the worker's compensation law is merely a statutory replacement for the employer's liability to the employee.⁹¹

Further, Judge Cooke criticized the majority for creating a new tort cause of action by their holding that a parent breaches a duty to a third party when that party's only injury is exposure to liability.⁹² Judge Cooke contended, "[A]n action to recover such damages has never been cognizable in our legal system, and runs contrary to the settled principle that a negligent breach of duty does not give rise to a liability unless it proximately causes injury."⁹³

Judge Cooke was also concerned that allowing a defendant to counterclaim might result in a parent's failing to prosecute his child's cause of action.⁹⁴ Judge Cooke concluded that the court's decision singled out for special treatment the parent of a handicapped child, by placing another burden on that parent.⁹⁵

V. Analysis

While the *Nolechek* court endeavored to reach a just result, its decision presents several analytical problems. By allowing defendants' counterclaim, the court departed from contribution

well-reasoned decisions, I must dissent." *Id.*

89. *Id.* at 348, 385 N.E.2d at 1278, 413 N.Y.S.2d at 350-51.

90. *Id.* at 348-49, 385 N.E.2d at 1278, 413 N.Y.S.2d at 351. See note 45 and text accompanying note 77 *supra*.

91. N.Y. WORK. COMP. LAW §§ 10, 11 (McKinney 1965).

92. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 349, 385 N.E.2d 1268, 1279, 413 N.Y.S.2d 340, 351 (1978) (Cooke, J., dissenting).

93. *Id.*

94. *Id.* at 349, 385 N.E.2d at 1279, 413 N.Y.S.2d at 351-52.

95. *Id.* at 350, 385 N.E.2d at 1279, 413 N.Y.S.2d at 352.

"The parent of a blind or crippled or retarded child has burdens enough without being singled out for a special additional monetary liability which the parents blessed with normal children would not confront. *** A rule which would carve out a special exception for the parent already stricken with the burden of a seriously handicapped child, not to ease that parent's path but to place yet another obstacle on it, lacks compassion."

Id. (quoting N.Y. CIV. PRAC. LAW § 3019, C3019:42 at 253 (McKinney 1974)).

principles. As Judges Cooke⁹⁶ and Gabrielli⁹⁷ noted, *Dole v. Dow Chemical Co.*⁹⁸ and its progeny, New York's contribution statute⁹⁹ and its legislative history¹⁰⁰ are in agreement that a party may claim contribution only from a person who has breached a duty owed to the injured party. This requirement of common liability goes to the heart of a contribution claim, since contribution is a sharing of liability. The majority, however, never mentioned any of these contribution principles; neither did they cite CPLR 1401. Dismissing the issue, Judge Breitel stated, "It matters not that the parent would not be liable to his child in an action for personal injuries; the financial harm suffered by the third party results from a legally cognizable breach of duty different in kind from any moral breach of duty to the child."¹⁰¹

Neither was the majority's analogy to the worker's compensation cases appropriate. An employer owes a duty of care to his employee; the worker's compensation law merely defines the employee's remedy.¹⁰² As the *Nolechek* majority reaffirmed, a parent owes no duty to protect his child from harm caused by negligent supervision or negligent entrustment of a dangerous instrument. Thus, the analogy is unsound.

One of the principal problems presented by the *Nolechek* decision is the court's failure to distinguish between contribution and indemnity.¹⁰³ The applicability of the "independent duty" rationale used by the court is questionable in a contribution context. This rationale has traditionally been a basis for in-

96. *Id.* at 348, 385 N.E.2d at 1278, 413 N.Y.S.2d at 350-51 (Cooke, J., dissenting).

97. *Id.* at 342, 385 N.E.2d at 1274, 413 N.Y.S.2d at 347 (Gabrielli, J., concurring).

98. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

99. See N.Y. CIV. PRAC. LAW art. 14 (McKinney 1976). See also note 1 *supra*.

100. See text accompanying notes 39-40 *supra*.

101. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 339, 385 N.E.2d 1268, 1272, 413 N.Y.S.2d 340, 345 (1978). But cf. Judge Breitel's opinion in *Rogers v. Dorchester Assocs.*, 32 N.Y.2d 553, 564, 300 N.E.2d 403, 409, 347 N.Y.S.2d 22, 31 (1973). "The rule of apportionment applies when two or more tort-feasors have shared, albeit in various degrees, in the responsibility by their conduct or omissions in causing an accident, in violation of the duties they respectively owed to the injured person." *Id.*

102. See notes 77-78 and accompanying text *supra*; see *Briscoe v. Williams*, 50 A.D.2d 883, 883, 337 N.Y.S.2d 163, 164 (2d Dep't 1975).

103. The court initially stated the issue as whether the defendants could "seek indemnity or contribution." *Nolechek v. Gesuale*, 46 N.Y.2d 332, 336, 385 N.E.2d 1268, 1270, 413 N.Y.S.2d 340, 343 (1978).

demnification,¹⁰⁴ not contribution. One interpretation of the court's decision is that the defendants are entitled to indemnification rather than contribution. *Dole* and the contribution statute preserve a right to implead one who is or may be liable for indemnification in whole or in part.¹⁰⁵ Understood in this fashion, Judge Breitel's analysis is more logically consistent, preserves intact the *Holodook* rule, and respects the distinctions between contribution and indemnity. Judge Breitel, however, failed to articulate clearly an indemnification analysis.¹⁰⁶

Further, it is not clear that the parent actually breached this "independent duty" as defendants' "injury" was liability for damages, not injury to his person or property.¹⁰⁷ Judge Breitel apparently expanded tort damages concepts to include economic detriment. Traditionally, recovery for financial loss of this sort has been allowed under contract or quasi-contract theories and not under tort theory. By allowing the third party to claim tort liability as a damage, the court appears to be creating a new cause of action in tort.¹⁰⁸ The court did not deal with this problem adequately when it stated that "[i]t may not be concluded, as a matter of law, that the risk of a third party's tort liability to an injured child is not a foreseeable risk to such third parties when a parent has negligently entrusted the child with a dangerous instrument."¹⁰⁹ This logic assumes that potential monetary liability is a cognizable basis of a claim in tort and ignores the issue of proximate cause.

While the court may have achieved an equitable result in the particular circumstances of this case, the decision creates the possibility of future inequities. If the injured child survives, a

104. See *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972); *Westchester Lighting Co. v. Westchester County Small Estates Corp.*, 278 N.Y. 175, 15 N.E.2d 567 (1938).

105. See N.Y. CIV. PRAC. LAW §1404 (McKinney 1976), *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 149, 282 N.E.2d 288, 292, 331 N.Y.S.2d 382, 387 (1972).

106. Judge Cooke stated that the court's opinion rested on contribution under *Dole*. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 347, 385 N.E.2d 1268, 1278, 413 N.Y.S.2d 340, 350 (1978) (Cooke J., dissenting).

107. See *Lampman v. Cairo Cent. School Dist.*, 81 Misc. 2d 395, 366 N.Y.S.2d 579 (Sup. Ct. 1975).

108. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 349, 385 N.E.2d 1268, 1279, 413 N.Y.S.2d 340, 351 (1978).

109. *Id.* at 340, 385 N.E.2d at 1273, 413 N.Y.S.2d at 345.

potential contribution claim against the parent may have several undesirable results. A parent's fear of a counterclaim for contribution may result in his failure to prosecute actions on his child's behalf.¹¹⁰ Moreover, if the parent does sue on his child's behalf and is liable for contribution, his liability will ultimately diminish the child's recovery, since the family is generally a single economic unit.¹¹¹ This result appears to benefit defendants and their insurance companies at the expense of the child. The family will also undergo emotional strain. Additionally, occasions could arise in which such a cause of action could be used abusively.¹¹² The *Holodook* court considered these factors in holding that a child has no cause of action against his parent for negligent supervision. By permitting the contribution claim in the dangerous instrument situation, the *Nolechek* court allows the defendant to do indirectly what the child cannot do directly.

The *Nolechek* decision reflects the difficulty of harmonizing the *Holodook* rule with the court's reluctance to allow the parent to benefit from that immunity. Although the decision to entrust a dangerous instrument is an element of parental discretion, the *Nolechek* court implied that the parent had abused this discretion.¹¹³ The court was especially anxious to limit the parent's recovery since the parent, and not the deceased child, would have been benefitted.¹¹⁴ These particular facts should have influenced the court to limit its ruling to this case rather than to formulate a general principle.

The court could have used other means to reach a fair result in *Nolechek*. It could have adhered to the letter of the contribution statute and dismissed the defendant's counterclaim as failing to state a cause of action. The court could thus have avoided the assumption of the legislature's prerogative. This result

110. "To . . . allow a tort-feasor to 'recover' for a parent's lapse of judgment where the injured child himself cannot recover directly, can have no effect but to discourage parents' active prosecution of their children's claims for fear of being held personally liable." *Holodook v. Spencer*, 43 A.D.2d 129, 137, 350 N.Y.S.2d 199, 206 (3d Dep't 1973). If the parent has no liability insurance, this deterrent will be stronger.

111. See note 55 and accompanying text *supra*.

112. See notes 50-55 and accompanying text *supra*.

113. See text accompanying note 81 *supra*.

114. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 341, 385 N.E.2d 1268, 1274, 413 N.Y.S.2d 340, 346 (1978).

would have been equitable. Under New York law,¹¹⁵ the culpable conduct of the decedent and the parties would have been considered by the trier of the facts in determining the defendants' final liability.¹¹⁶

Alternatively, the court could have made an exception to the *Holodook* rule, recognizing a child's cause of action against his parent for willful, wanton or gross negligence. This would allow recovery by the child and would "establish a minimal standard of care below which no one should be permitted to fall."¹¹⁷ This exception could be justified on the ground that the parent has temporarily abdicated his parental responsibilities and is no longer deserving of immunity.¹¹⁸ A defendant's claim for contribution would then be consistent with the statutory requirements. While this proposal would raise the same problems examined in *Holodook*,¹¹⁹ a court could find that willful, wanton or gross parental negligence shifts the balance in favor of parental liability and justifies this alternative.¹²⁰

The court could have gone even further and abolished the *Holodook* rule. Recognizing a child's cause of action against his parent for negligent supervision under a "standard of reasonable care under the circumstances"¹²¹ would result in consistent ap-

115. If a cause of action accrued before Sept. 1, 1975, the effective date of the comparative negligence statute, N.Y. CIV. PRAC. LAW art. 14-A (McKinney 1976), contributory negligence could be pleaded as a defense. In *Nolechek*, the cause of action arose on Sept. 30, 1973.

116. In fact, defendants had pleaded Scott's negligence as an affirmative defense in their answer. Answer of Defendants ¶ 9, Exhibits at 34.

117. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 343, 385 N.E.2d 1268, 1275, 413 N.Y.S.2d 340, 347 (1978) (Gabrielli, J., concurring).

118. The courts of other jurisdictions have relied on this rationale. See, e.g., *Cowgill v. Boock*, 189 Or. 282, 218 P.2d 445 (1950); *Hoffman v. Tracy*, 67 W.2d 31, 406 P.2d 323 (1965).

119. See note 55 and accompanying text and text accompanying notes 110-112 *supra*.

120. Courts might prefer to limit this exception to wanton or willful conduct. One writer has proposed a standard of "reckless disregard" which would hold a parent liable for negligent supervision if his conduct is "more than a mistake resulting from inexperience or mere thoughtlessness, inadvertence, or simple inattention. In order to be entitled to contribution under this standard, the defendant must prove that the parents failed to adequately supervise their child despite an immediate foreseeable risk of injury." Note, *Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability*, 12 U. CAL. D. L. REV. 828, 843 (1979).

121. *Nolechek v. Gesuale*, 46 N.Y.2d 332, 346, 385 N.E.2d 1268, 1277, 413 N.Y.S.2d 340, 349 (1978).

plication of the law of contribution and equitable consideration of all parties.¹²² Such an approach, however, would significantly encroach on New York's policy of affording the parent broad discretion in child rearing. As the *Holodook* court noted,

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. The result, we believe, would be to circumscribe the wide range of discretion a parent ought to have in permitting his child to undertake responsibility and gain independence.¹²³

Opportunities for abuse¹²⁴ of this cause of action, however, would be more widespread than if the *Holodook* rule were modified.

122. This would make New York one of several states which have abolished the rule of intrafamily tort immunity and allow a cause of action for negligent supervision. These states include: California (*Gibson v. Gibson*, 3 Cal. 3d 914, 476 P.2d 648, 92 Cal. Rptr. 288 (1971)), Hawaii (*Peterson v. City and County of Honolulu*, 51 Hawaii 383, 462 P.2d 1007 (1969)), and South Carolina (*Elam v. Elam*, 268 S.E.2d 109 (S.C. 1980)). Many other states have modified the rule in various ways. For a discussion of the ways courts have treated the doctrine, see *Nocktonick v. Nocktonick*, 277 Kan. 758, 611 P.2d 135 (1980); Note, *Negligent Parental Supervision as Grounds for Contribution in Tort: The Case for Minimal Parental Liability*, 12 U. CAL. D. L. REV. 828 (1979).

123. *Holodook v. Spencer*, 36 N.Y.2d 35, 49-50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 870-71 (1974).

The appellate division observed,

The duty to supervise a child in his daily activities has as its objective the fostering of physical, emotional and intellectual development, and is one whose enforcement can depend only on love. Each child is different, as is each parent; as to the former some are to be pampered while some thrive on independence; as to the latter, some trust in their children to use care, others are very cautious. Considering the different economic, educational, cultural, ethnic and religious backgrounds which must prevail, there are so many combinations and permutations of parent-child relationships that may result that the search for a standard would necessarily be in vain—and properly so. Supervision is uniquely a matter for the exercise of judgment. For this reason parents have always had the right to determine how much independence, supervision and control a child should have, and to best judge the character and extent of development of their child.

Holodook v. Spencer, 43 A.D.2d 129, 135, 350 N.Y.S.2d 199, 204-05 (3d Dep't 1973).

124. See note 55 *supra*.

VI. Conclusion

The *Nolechek* decision is an attempt to harmonize several areas of law to achieve a desired result. In its holding, the court ignores the contribution statute, reinterprets contribution theory, and expands a parent's duty to third parties. This approach abandons the certainty of statute and defined rules of law for the undefined territory of *ad hoc* decisionmaking.

The court's "independent duty" rationale, while recognizing a parent's responsibility to prevent harm from his child's misuse of dangerous instruments, cannot support a contribution claim, as it does not supply the missing link — common liability.¹²⁵ Further, the court's ruling that liability for damages is "injury" presents analytical problems involving the definition of duty and considerations of foreseeability and proximate cause. Practically, the court invites a new range of claims for tort liability, claims it seems unlikely the court meant to encourage.

The court's strict adherence to the *Holodook* rule makes a solution difficult. Abrogation of this rule in favor of a reasonable man standard would be consistent with contribution principles and theories of tort liability. Modification of the *Holodook* rule, allowing a child a cause of action against his parent for wanton, willful or gross negligence, would also be consistent with contribution concepts. This would allow broad protection of parental discretion, while recognizing that certain conduct justifies the parent's loss of immunity.

Such departures remain unlikely, given the court's adherence, in *Nolechek*, to the policies embodied in *Holodook*. While the *Nolechek* court explored these alternatives, ultimately it retreated from any broad revision. Thus, the issues *Nolechek* raised remain unresolved, and its holding should be confined to its "rather unique circumstances."¹²⁶

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125. See note 6 *supra*.

126. *Smith v. Sapienza*, N.Y.L.J., Jan. 30, 1981, at 28, col. 1 (N.Y. Ct. App. Jan. 15, 1981).