Disregarding Rules of the Road: Emergency Vehicles Finish Behind Road Work Vehicles

By Karen M. Richards

In 1957, the legislature created a uniform set of traffic regulations by enacting what is now "Title VII—Rules of the Road" of the Vehicle and Traffic Law.[1] Although this statute provides that "it is a traffic infraction for any person to do any act or fail to perform any act" required by Title VII, certain notable exceptions have been carved out.[2] Often the beneficiaries of these exceptions to the rules of the road are municipalities. A Fourth Department decision, affirmed by the Court of Appeals, has dramatically narrowed one of these exceptions.[3]

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Vehicle and Traffic Law § 1103

The first such exception appears in Vehicle and Traffic Law § 1103. Section 1103(a) exempts the "drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state" from the rules of the road.[4] Section 1103(b) further specifies the exception:

> [u]nless specifically made applicable, the provisions of this title… shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation.[5]

When § 1103(b) was originally enacted, it was silent on the standard of care, but in 1974, the legislature added "reckless disregard" language to the statute.[6] The 1974 amendment provides that the provisions of the statute

> shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others.[7]

This language was added "to soften the outright exemption of vehicles engaged in road work from the rules of the road, allowing them to drive at any speed or in any manner 'which suits their fancy, without any prohibition from the Vehicle and Traffic Law.'"[8] It imposed a "minimum standard of care"—reckless disregard—on drivers of such vehicles.[9]

Reckless disregard requires more than a momentary lapse in judgment. As one court stated:

> [It] demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims. It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.[10]

The Joint Legislative Committee that convened to revise the Vehicle and Traffic Law expressed concern about granting vehicles engaged in road work the benefit of the same lesser standard of care enjoyed by emergency vehicles. The committee observed that the "reason for extending emergency privileges to non-emergency vehicles…is not apparent…The danger to highway users and true emergency vehicles is greatly increased by the special status which is unnecessarily given to non-emergency vehicles."[11]

Despite the broad statutory language, courts have narrowly construed the situations in which a municipal defendant is afforded the reckless disregard standard of care. For example, "the exemption turns on the nature of the work being performed (construction, repair, maintenance or similar work)—not on the nature of the vehicle performing the work."[12] In *Guzman v. Bowen*, the plaintiff was allegedly injured when the vehicle she was driving came into contact with a garbage truck owned by the City of New Rochelle.[13] The court noted that "Vehicle and Traffic Law § 1103(b) applies only to vehicles 'actually engaged in work upon a highway,' which is limited to vehicles performing 'construction, repair, maintenance or similar work.'"[14] At the time of the accident, the garbage truck was engaged in ordinary municipal refuse collection, which was not construction, repair, maintenance or similar work. Therefore, the statute was inapplicable and the ordinary negligence standard applied in this action.[15]

To be entitled to the § 1103 exemption, a municipality must also have a responsibility to perform the road work. In *Niro v. Village of Lake George*, the defendant was employed by the Village as acting superintendent of highways.[16] He was permitted to take a village truck to his home in a nearby town because, as the acting superintendent, he was on call 24 hours. While home, he used the village truck to plow his own driveway. After backblading snow from his driveway into the street and then plowing the snow out of the street, he backed up to reenter his driveway and collided with the plaintiff's vehicle, causing injuries to the plaintiff. The court found that the acting superintendent was not acting within the scope of his village employment and neither he nor the Village of Lake George were entitled to the reckless disregard standard of care because they had no responsibility for snow removal in another municipality's territorial limits. His status at the time of the accident "was no different from any private snow removal contractor plowing a client's driveway."[17]

Moreover, § 1103(b) is applicable only if the vehicle was actually performing work on a highway at the time of the accident. In *Hofmann v. Town of Ashford*, the plaintiff sustained injuries when her vehicle collided with a snowplow at an intersection.[18] At the time of the collision, the snowplow driver was not engaged in plowing his assigned route, but rather, was traveling from one part of his route to another by way of a road that he was not responsible for plowing. The sole issue in this case was whether the snowplow driver was actually engaged in work on a highway at the time of the collision. The court reasoned that inclusion of the phrase "actually engaged in work on a highway" indicated that the § 1103(b) exemption applies only when such work was in fact being performed at the time of the accident. It concluded that "[t]he exemption does not apply to a driver who is traveling from one work site to another."[19] Therefore, the standard of care to be applied at trial was ordinary negligence.[20]

There is no doubt that § 1103 affords drivers of road work vehicles, and the municipalities that are vicariously liable for their conduct, a substantial defense to injury-causing conduct that does not comply with the rules of the road. Liability is limited to reckless disregard for the safety of others if they were actually engaged in work on or adjacent to a highway at the time of an accident. However, if the vehicles were not engaged in such work, the lower ordinary negligence standard of care applies.

Vehicle and Traffic Law § 1104

Vehicle and Traffic Law § 1104 does not afford drivers of "authorized emergency vehicles" engaged in an "emergency operation" as much freedom to disregard rules of the road as § 1103 gives to drivers of road work vehicles.[21] In fact, § 1104(b) specifically allows emergency drivers, when engaged in an emergency operation, to disregard only the following rules of the road:

1. Stop, stand or park irrespective of [Vehicle and Traffic Law provisions];
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as doing so does not endanger life or property; and,
4. Disregard regulations governing directions of movement or turning in specified directions.[22]

Notwithstanding the exemptions provided to emergency vehicles in § 1104, the statute further cautions emergency vehicle drivers that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others."[23] Thus, if the conduct causing the accident does not fall within one of the categories of privileged conduct set forth in § 1104(b), the standard of care for determining civil liability is governed by the principles of ordinary negligence.[24]

In 2011, the Court of Appeals in *Kabir v. County of Monroe* analyzed the circumstances under which the reckless disregard standard of care provided in § 1104(e) applies to drivers of authorized emergency vehicles.[25] In *Kabir*, the accident occurred when a police deputy was responding to a radio call of a possible

burglary in progress. He momentarily took his eyes off the road to glance down at his mobile data terminal to ascertain the location of the burglary. When he lifted his gaze, he realized that traffic had slowed, and although he immediately applied his brakes he was unable to stop before rear-ending the vehicle in front of him. Although he may arguably have been involved in an emergency operation, taking his eyes off the road to glance down at his mobile data terminal was not conduct that fell within one of the specified categories of § 1104(b).[26] Thus, the applicable standard for determining the defendants' liability was the standard of ordinary negligence.[27]

In reaching its conclusion, the majority in *Kabir* reasoned that if the legislature wanted to create a safe harbor from ordinary negligence for emergency vehicles, it could easily have done so by structuring § 1104(a) and (b) the same as § 1103(b) to exempt emergency vehicles from all the rules of the road, subject to any statutory exceptions.[28] Inasmuch as the legislature did not see fit to do so, the Court determined that the reckless disregard standard of care in § 1104(e) must be limited to accidents or incidents caused by an authorized emergency vehicle involved in an emergency operation while engaged in one of the four enumerated categories of privileged conduct exempt from the rules of the road.

However, the decision in *Kabir* was not unanimous. Justice Graffeo, in her dissent, in which Justices Ciparick and Smith concurred, wrote:

> By concluding that the conduct of a driver of an emergency vehicle involved in an emergency operation should be assessed under the reckless disregard standard of care under Vehicle and Traffic law § 1104(e) only when the driver is engaged in one of the activities privileged in section 1104(b), the majority reads a limitation into section 1104(e) that I believe is unworkable, incompatible with our precedent and unwarranted given the language in the statute.[29]

Prior to *Kabir*, cases were dismissed even though the injury-causing conduct of the driver was not listed in § 1104(b). For example, in *Hughes v. Chiera*, a case where the facts closely resemble those in *Kabir*, a police officer driving a patrol car responded to an emergency operation following his receipt of a police dispatch.[30] While replacing the microphone into its holder, he looked down, and the patrol car rolled into the intersection where it collided with another vehicle. The municipal defendants established as a matter of law that the officer's conduct did not rise to the level of reckless disregard, and accordingly, the Fourth Department reversed the lower court's denial of summary judgment. Post-*Kabir* it would appear that the courts must deny any similar motions.

In another case decided prior to *Kabir*, *Palmer v. City of Syracuse*, a police officer was responding to a radio call to assist another police officer.[31] As the assisting officer approached an intersection with lights and sirens activated, his direction of travel had a red stop light. He stopped before entering the intersection, then inched forward into the lane but collided with the plaintiff's vehicle. The municipal defendants successfully demonstrated that this conduct did not amount to the reckless disregard for the safety for others, and the case was dismissed against them. It is unlikely the court would have made the same decision following *Kabir.*

In a post-*Kabir* case, *LoGrasso v. City of Tonawanda*, the conduct of the vehicle was similar to that in *Palmer*, and yet, the court in *LoGrasso* held that the reckless disregard standard, the standard applied in *Palmer*, did not apply.[32] In *LoGrasso*, the plaintiff allegedly sustained injuries when the vehicle he was driving was struck by a police vehicle being driven by a detective. While engaged in an emergency operation, the detective stopped and looked both ways before entering the intersection and striking the plaintiff's vehicle. Since stopping and looking both ways before entering into the intersection was not specific conduct exempted from the rules of the road, the Fourth Department concluded that the detective's injury-causing conduct was governed by the principles of ordinary negligence. Thus, the caution exercised by the detective worked in favor of the plaintiff, but against the detective.

Similarly, in another post-*Kabir* case, the conduct in question was also governed by ordinary negligence principles. In *Gonzalez v. City of New York*, a fire truck being driven to the scene of an emergency collided with a van, injuring one of its passengers.[33] The driver of the fire truck had stopped at an intersection and was turning right with the traffic light in his favor when the collision occurred. The court found that the fire truck driver "was not stopping, standing or parking in violation of the rules of the road, proceeding past a red signal or stop sign, speeding, or proceeding in the wrong direction or making an unlawful turn"—conduct permitted by § 1104(b). Accordingly, it ruled that his conduct was not governed by the reckless disregard standard of care in Vehicle and Traffic Law § 1104(e).[34]

By contrast to *LoGrasso* and *Gonzalez*, the injury-causing conduct in *Spencer v. Astralease Assoc., Inc.*, decided after *Kabir*, was privileged.[35] As the vehicle driven by the infant plaintiff's mother proceeded through an intersection with a green light in her favor, it was struck by an ambulance responding to an emergency situation. "The evidence established that [the ambulance driver] activated his siren and emergency

lights prior to the accident and hit the ambulance's air horn several times and slowed his rate of speed as he approached the intersection."[36] He thus had a qualified privilege to proceed through the red light because Vehicle and Traffic Law § 1104(b)(2) provides that the driver of an authorized emergency vehicle, such as an ambulance, may, after slowing down, proceed past a steady red signal. Accordingly, the court found that since there was no evidence that the ambulance driver acted with reckless disregard for the safety of others during an emergency operation, the owner of the ambulance and the driver of the ambulance were entitled to summary judgment.

The decisions in *LoGrasso*, *Gonzalez*, and *Spencer* underline the concerns voiced by Justice Graffeo in *Kabir*:

> The majority's new rule is also inconsistent with the public policy underlying section 1104 because it creates an unjustifiable distinction that extends the protection of qualified immunity only to police, fire or ambulance personnel who speed, run a red light or violate a handful of other traffic laws while responding to emergency calls. Thus, the majority holding has the perverse effect of encouraging conduct directly adverse to the public policy of requiring emergency responders to exercise the utmost care during emergency operations.[37]

The result of *Kabir* is that an emergency responder who chooses to follow the rules of the road and exercises caution when proceeding to an emergency is now faced with the possibility that the exercise of caution may give rise to civil liability under the ordinary negligence standard. On the other hand, if a driver of an emergency vehicle engages in conduct permitted by § 1104(b), conduct inconsistent with the rules of the road, he may not be liable unless he acts in reckless disregard for the safety of others.

Conclusion

Road workers are exempt from following the rules of the road and are liable for conduct that evinces a reckless disregard for the safety of others. Emergency responders, on the other hand, who must make split-second decisions when responding to an emergency, are held to the reckless disregard standard only if their conduct falls within very limited statutorily enumerated exemptions. As dissenting Justice Graffeo wrote in *Kabir*, "Because road workers are exempt from all of the provisions of the Vehicle and Traffic law (except DWI and DWAI), the end result [of the majority's decision in *Kabir*] is that the 'reckless disregard' standard will be applied to virtually all accidents involving vehicles engaged in road work but only a subset of accidents involving emergency responders."[38]

"Unless the legislature amends § 1104 to comport more closely to the language in § 1103, municipalities may find that the injury-causing conduct of their emergency vehicle drivers could potentially result in costly liability to the municipalities."

Following *Kabir*, cases that might previously have been dismissed against a municipality are now being tried, giving plaintiffs the opportunity to prove that they sustained a "serious injury" within the meaning of New York's No-Fault Law as a result of a collision with an authorized emergency vehicle. Unless the legislature amends § 1104 to comport more closely to the language in § 1103, municipalities may find that the injury-causing conduct of their emergency vehicle drivers could potentially result in costly liability to the municipalities.

Endnotes

1. Vehicle and Traffic Law § 1100; *Riley v. County of Broome*, 95 N.Y.2d 455, 461, 719 N.Y.S.2d 623, 625 (2000).
2. Vehicle and Traffic Law § 1101.
3. *Kabir v. Cnty. of Monroe*, 16 N.Y.3d 217, 920 N.Y.S.2d 268 (2011).
4. Vehicle and Traffic Law § 1103(a).
5. Vehicle and Traffic Law § 1103(b). For purposes of this article, the hazard vehicles, motor vehicles, persons, teams, and other equipment mentioned in Vehicle and Traffic Law § 1103(a) and (b) are referred to collectively as "road work vehicles."
6. *Kabir*, 16 N.Y.3d at 239.
7. Vehicle and Traffic Law § 1103(b).
8. *Riley v. County of Broome*, 95 N.Y.2d 455, 465, 719 N.Y.S.2d 623, 628 (2000), *quoting* Mem. of Senator Frank Padavan, Bill Jacket, L. 1974, ch. 223, at 4.
9. *Id.* at 466, *quoting* Padavan Mem., *op. cit.*, at 4.
10. *McLeod v. State*, 8 Misc. 3d 1009(A) (N.Y. Ct. Cl. 2005) (citations omitted).
11. *Riley*, 95 N.Y.2d at 467-468 (citations omitted).
12. *Id.* at 464.
13. *Guzman v. Bowen*, 38 A.D.3d 837, 837, 833 N.Y.S.2d 548, 548 (2d Dep't 2007).
14. *Id.* (citations omitted).
15. *Id.* at 838.
16. *Niro v. Village of Lake George*, 299 A.D.2d 689, 689, 749 N.Y.S.2d 589, 589 (3d Dep't 2002).
17. *Id.* at 690.
18. *Hofmann v. Town of Ashford*, 60 A.D.3d 1498, 1498, 876 N.Y.S.2d 588, 588 (4th Dep't 2009), *leave denied*, 64 A.D.3d 1200 (2009).
19. *Id.* at 1499.

20. *Id.* . By contrast, in *McLeod v. State*, 8 Misc. 3d 1009(A) (N.Y. Ct. Cl. 2005), the court found that a snowplow was actually engaged in work on a highway. In this case, when the snowplow was stopped at the traffic light, the plow and wing plow were raised off the ground and no plowing was taking place and no salt or sand was being dispensed. The claimants contended that, under these circumstances, there was a question of fact as to whether the snowplow was actually engaged in work on a highway. However, because the snowplow driver was in the middle of a plowing and salting "run" while stopped at the traffic light, the court found that as a matter of law he was actually engaged in work on a highway for purposes of § 1103(b).

21. Vehicle and Traffic Law § 101 defines authorized emergency vehicles as ambulances, police vehicles or bicycles, correction vehicles, fire vehicles, civil defense emergency medical service vehicles, blood delivery vehicles, county emergency medical services vehicles, environmental emergency response vehicles, sanitation patrol vehicles, and hazardous materials emergency vehicles and ordinance disposal vehicles of the armed forces of the United States. Vehicle and Traffic Law § 114-b defines an emergency operation as: "The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service."

22. Vehicle and Traffic Law § 1104(a) and (b). *See also Ayers v. O'Brien*, 13 N.Y.3d 456 (2009) (holding "that the reckless disregard standard of liability does not apply in determining the culpable conduct of the operator of an emergency vehicle when he or she is the individual bringing the action.").

23. Vehicle and Traffic Law § 1104(e).

24. *Kabir*, 16 N.Y.3d at 220.

25. *Id.*

26. *See Chessey v. City of New York*, 88 A.D.3d 625, 931 N.Y.S.2d 502 (1st Dep't 2011) (recognizing that to invoke the reckless disregard standard, the driver of an emergency vehicle must be engaged in both an emergency operation and one of the four types of conduct enumerated in the statute); *see also Starkman v. City of Long Beach*, 106 A.D.3d 1076 (2d Dep't 2013) (finding Vehicle and Traffic Law §1104(b) did not apply where the police officer acknowledged that, at the time he struck the plaintiff, he was "not aware of any emergency situation that needed to be addressed").

27. *Kabir*, 16 N.Y.3d at 231.

28. *Id.* at 225.

29. *Id.* at 231.

30. *Hughes v. Chiera*, 4 A.D.3d 872, 872, 772 N.Y.S.2d 772, 772 (4th Dep't 2004). While *Hughes* was being litigated, Ms. Richards was an Assistant Corporation Counsel III for the City of Syracuse and was involved in the litigation of this case. In *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 555, 664, N.Y.S.2d 252, 254 (1997), decided prior to *Kabir*, the officer struck and killed a teenager riding a bike. At the time of the collision, the officer was glancing down from the road momentarily to turn on his emergency lights. The court stated, "At any rate, even if officer Pilat were negligent in glancing down, this momentary lapse in judgment does not alone rise to the level of recklessness required of the driver of an emergency vehicle in order for liability to attach." *Id.* at 557. In *Kabir*, Justice Graffeo discussed *Szczerbiak* and wrote, "Although the officer's act of 'glancing down' was not conduct enumerated in Vehicle and Traffic Law § 1104(b), we nonetheless applied the reckless disregard standard to that conduct in determining whether that act could give rise to liability, concluding that it did not meet the heightened standard of liability as a matter of law." *Kabir*, 16 N.Y.3d at 280. Judge Graffeo further stated that the act of the deputy in *Kabir* was similar conduct that did not rise to the level of reckless disregard as a matter of law. *Id.*

31. *Palmer v. City of Syracuse*, 13 A.D.3d 1229, 1229, 787 N.Y.S.2d 802, 802 (4th Dep't 2004).

32. *LoGrasso v. City of Tonawanda*, 87 A.D.3d 1390, 1390, 930 N.Y.S.2d 129, 129 (4th Dep't 2011), *reargument denied*, 90 A.D.3d 1539 (2011).

33. *Gonzalez v. City of New York*, 91 A.D.3d 582, 582, 936 N.Y.S.2d 892, 892 (1st Dep't 2012).

34. *Id.*

35. *Spencer v. Astralease Assoc., Inc.*, 89 A.D.3d 530, 530, 932 N.Y.S.2d 480, 480 (1st Dep't 2011); *see Nikolov v. Town of Cheektowaga*, 96 A.D.3d 1372 (4th Dep't 2012) (stating that "the use of the siren and / or emergency lights is not required for police vehicles to obtain the benefit of the statute [see § 1104[c]])."

36. *Id.* at 531.

37. *Kabir*, 16 N.Y.3d at 231.

38. *Id.* at 240.

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