

# Narrowing the Scope of the 'Reckless Disregard' Standard For Emergency Vehicle Operators

It was at about this time last year that we had occasion to review the Court of Appeals then-new case refining the liabilities and defenses of emergency vehicle operators involved in vehicular mishaps.<sup>1</sup> As we stated then, given the vital role of police, fire, ambulance and other first responders in reacting swiftly to emergencies, yet pitted against the high traffic environment of our highways and byways, this subtopic of vehicle liability law has near-daily ramifications for litigants and counsel.<sup>2</sup>

It comes as no surprise, then, that we return to the field this year, as New York's highest state court provides us with its latest declaration, this time on a different aspect of this important subject. Notably, this most recent decision is more divisive, as its dissent points out a number of potential issues in its future application. Given all this, it is more than worthy of the analysis we now commence.

*Kabir v. County of Monroe*<sup>3</sup> starts with a prosaic enough set of facts. Deputy John DiDomenico, a member of the Monroe County Sheriff's Office, was on a routine patrol when he was dispatched to a report of a stolen vehicle. Moments later, he was radioed again, but this time with the more urgent call of a possible burglary. With the greater danger obviously taking priority, DiDomenico acknowledged that he would divert to the second call. However, DiDomenico was not familiar with the location given for the reported burglary.<sup>4</sup> What happened next became the crux of the instant case.

DiDomenico had not yet engaged his lights or siren, since he was unsure of which direction he should head. His patrol car was travelling at about 25 to 30 miles per hour in the left hand lane of a two lane road. Needing the address and cross-streets, the deputy looked down for two to three seconds at his data terminal. When he looked up, traffic in his lane had slowed, and although he immediately applied his brakes, he nevertheless rear-ended the vehicle in front of him, driven by Yasmin Kabir.<sup>5</sup> The inevitable litigation followed, with Kabir as plaintiff and the deputy and Monroe County as the titular defendants.

At trial, in addition to the above facts, Kabir testified that she had stopped for a red light, and was just starting to move ahead slowly when the deputy's vehicle struck her from behind.<sup>6</sup> A simple and commonplace enough set of circumstances, to be sure.

In the proceedings below, the trial court granted summary judgment in favor of the defendants, finding that Kabir has not raised the issue of whether DiDomenico had acted with the "reckless disregard" which triggers liability for emergency vehicle operators when acting in an emergency, as found in New York Vehicle and Traffic Law Section 1104.<sup>7</sup> A closely divided Fourth Department reversed, on the grounds that the "reckless disregard" standard did not apply here.<sup>8</sup> This appeal followed.

Affirming the Appellate Division, the New York Court of Appeals ruled that the "reckless disregard" standard of

care found in Vehicle and Traffic Law Section 1104 only applies when the operator of an emergency vehicle is involved in an actual emergency operation and is engaging in the specific conduct which the statute exempts from the normally applicable rules of the road.<sup>9</sup> In contradistinction, New York's highest court held that "[a]ny other injury-causing conduct of such a driver is governed by the principles of ordinary negligence."<sup>10</sup>

Writing for the Court, Judge Read commenced with a pithy analysis of the relevant statute. Section 1104 of New York's Vehicle and Traffic Law (the "VTL") was enacted well over fifty years ago, in order to bring our state into greater conformity with modern traffic regulations. Section 1104 (b) accords a number of privileges to drivers of emergency vehicles, including the right to pass red lights and stop signs, exceed speed limits, and so forth, the prerequisite of course being that they are involved in emergency situations.<sup>11</sup>

Judge Read then turned to the linchpin of the *Kabir* decision; Section 1104 (e) cautions that the operator of an emergency vehicle is not otherwise relieved from the duty to exercise due care when driving normally, and is in no event excused from liability for injuries or damages resulting from his or her own "reckless disregard for the safety of others" when driving under emergency conditions.<sup>12</sup> Put another way, subdivision (e) establishes a significantly higher threshold of "reckless disregard" before imposing liability upon emergency vehicle operators, assuming they are in fact engaged in the actual emergency driving actions stipulated within the text of Section 1104.<sup>13</sup>

Next, we see for the first time the schism within the Court of Appeals in rendering this decision. Judge Read faults the dissent for applying the provisos of Section 1104 (e) to any conduct of emergency drivers which cause injury. In sum, she characterizes the dissent as taking the view that the "reckless disregard" exception is broadly applicable to driver conduct, and is not at all tethered to the remainder of Section 1104.<sup>14</sup>

That is not what the statute decrees, however. There is a specific linkage, finds *Kabir*, between the "reckless disregard" protection of subdivision (e) and the rest of Section 1104. Judge Read wrote that the protective umbrella of "reckless disregard" is only triggered when the emergency vehicle operator is exercising one of the emergency driving privileges enumerated in subdivision (b). Implicitly, the majority found the dissent's interpretation errs by viewing the "reckless disregard" proviso in significant isolation from its peers.<sup>15</sup>

Judge Read found no basis in the text of Section 1104 for a global exemption for the totality of emergency driver conduct; rather, the "reckless disregard" standard solely encompassed the subset of specific actions which, in normal circumstances, violate the ordinary rules of the road. Moreover, the application of the "reckless disregard" gatekeeper for imposing liability is set into motion only when these violative acts are undertaken while the operator is truly engaged in an actual emergency.<sup>16</sup> Parenthetically, New York's highest court found that its view as announced today placed it in great conformity with its brethren, who have long held that the laws of emergency vehicle operation work to give emergency

operators only limited shelter from liability, while leaving in place ordinary rules of negligence for all non-emergency driving.<sup>17</sup>

Continuing, the *Kabir* majority invoked critical principles of statutory interpretation in rendering its decision. Judge Read pointed out that New York's lawmakers "certainly knew how to create the safe harbor from ordinary negligence" reflected in the "reckless disregard" limitation of Section 1104 (e). Yet by not replicating this exemption elsewhere in the relevant law, this evinced a legislative intent to maintain a narrow focus.<sup>18</sup>

The court also found the statute's legislative history to be most revealing here, as material gathered from its promulgation by the legislature demonstrated that the lawmakers clearly intended an inextricable connection between the "reckless disregard" limitation and specified actions undertaken by drivers in true emergency situations. "This discussion [found in the legislative history] confirms that these provisions are interrelated" and the "reckless disregard" exception is not independent of the driving privileges accorded in Section 1104 (b).<sup>19</sup> Essentially, Judge Read indicated that, had the lawmakers wished to go further, they could have; but since they did not, the Court of Appeals would not, by judicial fiat, usurp those boundaries.<sup>20</sup>

To be sure, the majority pointed out why this was a case of first impression. The far more prevalent use of Section 1104 (b) is where the emergency vehicle operator, while in the midst of an emergency operation, breaks the speed limit or runs a red light, and this nominally illegal conduct results in injury to a third party. In short, noted Judge Read, Section 1104 (b) "exempts the conduct most likely to lead to a motor vehicle accident severe enough to prompt a lawsuit."<sup>21</sup> In the case at bar, DiDomenico was not undertaking any of the actions exempted by Section 1104 (b), for example, speeding or running lights. Of paramount importance to its decision here, the *Kabir* majority recognized that the deputy had not yet actually commenced emergency action recognized by statute, but was merely performing routine actions preparatory to an emergency maneuver.

Sensing this, at least in part, is what gave the dissent pause, the *Kabir* majority acknowledged that the lower courts of our state have sometimes had difficulty in ascertaining the exact parameters of the "reckless disregard" exception.<sup>22</sup> Notwithstanding, the majority still found it logical and consistent to honor the durable bonds between subdivisions (b) and (e) of the statute, to wit, that "reckless disregard" protection of the latter proviso only comes into play when emergency drivers are exercising the driving privileges delineated in the preceding statutory subpart. Historically, Judge Read opined, the "touchstone of our analysis" in such cases has been this statutory interplay, as so carefully crafted by the legislature.<sup>23</sup>



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Finally, the majority succinctly addressed a parade of horrors set out by the dissent. Despite this forecast of supposed practical problems once the lower courts endeavor to apply this new landmark, Judge Read did not share the dissent's pessimism. Quite the opposite, she affirmed that *Kabir* was straightforward, holding, at bottom, that the Section 1104 (e) "reckless disregard" standard applies when determining liability for damages suffered from the operation of an emergency vehicle when the vehicle is, in fact, engaged in an actual emergency endeavor made privileged by subdivision (b) of that same law. Conversely, and quite simply,

the banner of an ordinary negligence review. Henceforth, warned Judge Graffeo, two immediate problems would be engendered by reviewing the actions of emergency vehicle operators on a moment to moment basis, as *Kabir* seemingly demands.<sup>26</sup>

First, this decision might have "the perverse effect of encouraging conduct" detrimental to public safety.<sup>27</sup> "Police officers, firefighters or ambulance drivers who manage to obey traffic signals or travel within the speed limit are out of luck if they are involved in an accident. Their conduct will be assessed under the ordinary negligence standard," making it easier to assess liability against them.<sup>28</sup> Judge Graffeo hypothesized that emergency vehicle operators would actually be encouraged to break traffic laws, their

provided much to ponder.

In light of all the above, we now turn to our analysis. To be sure, while we find the majority holding to be the better reasoned, we nevertheless acknowledge that the learned dissent points out a number of pragmatic issues that will most assuredly compel the Court of Appeals to refine the *Kabir* doctrine in the near future.

As for the majority, its strongest feature is that one cannot fault its adherence to the canons of statutory construction. *Kabir* is, first and foremost, a worthy example of the "plain meaning" doctrine. The majority takes the exempted actions of emergency drivers as precisely worded by the statute, and then admits only those clearly stated exclusions under the protective umbrella of the higher "reckless disregard" standard for liability.

The majority rightly points out that the legislature knew how to craft such exclusionary language, and it is not the place of the courts to usurp legislative choices. Indeed, this evinces judicial restraint on the part of the Court of Appeals, which should be lauded for refusing to rewrite the existing statutory language.

Next, and although not invoked by name, the majority essentially employs the *expressio unius* doctrine here, that is, the deliberate expression of one thing in a statute necessarily means the exclusion of something else. The fundamental holding of *Kabir* is that the lawmakers specifically linked the "reckless disregard" standard to certain actions that might be taken by emergency operators; in doing so, the legislature excluded from the statute's purview any unlisted actions emergency drivers might take. For all intents and purposes, that is *expressio unius* at work. Certainly, this is another reason to applaud the majority's rationale in *Kabir*.

Given such evident merit, we truly cannot fault the majority in *Kabir*. It is a fundamentally sound decision, reached upon the proper application of basic rules of statutory construction. For these reasons, among others, we cannot agree with the dissent. But we can and should acknowledge at least one of its relevant points.

Judge Graffeo's dissent does give us pause, with regard to its concern for the factfinding issues that will now confront juries (and the jurists instructing them). In some notable examples, Judge Graffeo illustrates the difficulties in ascertaining the junctures where non-privileged actions by emergency drivers become privileged, and *vice versa*. Such turning points are of no small moment, for as these factual transitions are made, the standard of liability changes from the ordinary to the far more demanding "reckless disregard" standard. No doubt,

Judge Graffeo is correct in her forecast of some "growing pains" as *Kabir* takes its place in New York's jurisprudence.

At the end of the day, *Kabir* is a well reasoned and just decision, correctly applying the higher threshold of "reckless disregard" only to actions of emergency drivers specifically carved out by statute. Applying a statute's plain meaning and avoiding judicial peradventure is unequivocally the right call. And while we do not fully share the differing view of the dissent or its gloomy forecast, we do concur that the new *Kabir* doctrine shall need refinement in the years to come. And since that might be sooner than we think, we look forward to revisiting this matter with you this time next year.

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1. See Sabino & Sabino, "Emergency Vehicle Operators Protected from Liability," 59 Nassau Lawyer 7 (June 2010), analyzing *Ayers v. O'Brien*, 13 N.Y.3d 456 (2009).
2. Sabino at 17.
3. \_\_\_ N.Y.3d \_\_\_, (February 17, 2011) (slip op.). All citations hereinafter are to the slip opinion, as available on the Court of 4. Appeals official website.
4. *Kabir* at 2-3.
5. *Kabir* at 3.
6. *Id.*
7. *Kabir* at 4. See 21 Misc.3d 1107 (Sup. Ct. Monroe Cnty).
8. *Kabir* at 4. See 68 A.D.3d 1628 (4th Dept. 2009).
9. *Kabir* at 1 (emphasis supplied).
10. *Id.*
11. *Kabir* at 6-7, quoting N.Y. V.T.L. § 1104(b) (McKinney's). Section 1104 (c) adds the additional conditions that the operator engage the lights and sirens of the emergency vehicle before exercising these privileges. *Kabir* at 7, quoting N.Y. V.T.L. § 1104(c).
12. *Kabir* at 7, quoting N.Y. V.T.L. § 1104(e).
13. *Kabir* at 7-8.
14. *Kabir* at 8.
15. *Id.*
16. *Kabir* at 8-9.
17. *Kabir* at 9 n.5 (citing cases).
18. *Id.*
19. *Kabir* at 10-13.
20. *Kabir* at 10-13.
21. *Kabir* at 13.
22. *Kabir* at 15.
23. *Kabir* at 16, citing *Scarinen v. Kerr*, 84 N.Y.2d 494, 499-500 (1994).
24. *Kabir* at 17-18.
25. As with so many cases, *Kabir* will continue. Indeed, the Court of Appeals specifically noted that the plaintiff still had to prove in the trial court that she sustained a "serious injury" within the meaning of New York's No-Fault Law. *Kabir* at 5 n.2.
26. *Kabir*, dissent at 6 (Graffeo, J.).
27. *Kabir*, dissent at 1-2 (Graffeo, J.).
28. *Kabir*, dissent at 4-5 (Graffeo, J.).
29. *Kabir*, dissent at 18 (Graffeo, J.).
30. *Kabir*, dissent at 16 (Graffeo, J.).
31. *Kabir*, dissent at 17 (Graffeo, J.).
32. *Kabir*, dissent at 18 (Graffeo, J.).



"if the conduct causing the accident resulting in injuries and damages is not privileged under [the statute], the standard of care for determining civil liability is ordinary negligence."<sup>24</sup>

The law so refined, and the applicable standard so clarified in its just application, the Court of Appeals entered *Kabir* as its newest landmark in this field, and permitted the case to proceed.<sup>25</sup>

Before moving to our analysis and commentary, the aforementioned dissent in *Kabir* bears mention on a point or two. Authored by Judge Graffeo, it posits concerns about changes *Kabir* will bring about, both on the highways and in the courts.

The gravest concern of the dissent was its belief that *Kabir* would now require the minute parsing of the conduct of an emergency vehicle operator, in order to distinguish actions privileged enough to be encompassed by the "reckless disregard" standard from non-privileged acts that would be subject to analysis under

sole motivation being to obtain the benefit of the "reckless disregard" standard now available only for exercising one of the enumerated driving privileges found in the statute.<sup>29</sup>

Second, Judge Graffeo faulted *Kabir* for promulgating this new rule "without explaining how the standard is to be applied or responding in any way to the practical problems presented by its new rule."<sup>30</sup> Deeming the new landmark to be problematic at best, the dissent emphatically criticized its overriding need for a post-mortem of the actions of the emergency vehicle operator, in order to determine which acts fell within or outside the ambit of the "reckless disregard" maxim. Judge Graffeo embellished a half dozen or more nuanced scenarios to demonstrate her point that it will be no small task for juries to make such determinations.<sup>31</sup> The only certainty, asserted the dissent, is that confusion shall reign unless and until the Court of Appeals revisits these problems in detail.<sup>32</sup> Surely, the dissent