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Car Accidents With Pedestrians: Conflict in the Departments

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Cases involving injuries to pedestrians are staples of New York civil litigation, especially in the five boroughs of New York City. New York is a crowded and busy city and is, like the Sinatra song says, "a city that doesn't sleep." As such, pedestrians and motor vehicles frequently come into contact with each other.

Several statutes govern the conduct of both motor vehicles and pedestrians on the streets of the City of New York, including provisions of the New York State Vehicle and Traffic Law (NY VTL) and the New York City Department of Transportation Traffic Rules and Regulations (NYC TRR).

A key liability issue in cases involving pedestrians as injured plaintiffs is whether or not the pedestrian was in a crosswalk at the time of the accident. The legal rights and duties of pedestrians and drivers differ depending on whether or not the pedestrian was in a crosswalk at the time of the accident.

Vehicle and Traffic Law

The applicable provisions of the NY VTL are embedded in the New York Pattern Jury Instruction (PJI) Jury Charge (PJI 2:75). This instruction, titled "Motor Vehicle Accidents—Pedestrian Crossing Highway," states in relevant part as follows:

If you decide that AB [the pedestrian] was within a crosswalk at the time of the accident, you must consider §1151 of the Vehicle and Traffic Law, which provides:

(a) When traffic-control signals are not in place or not in operation *the driver of a vehicle shall yield the right of way*, slowing down or stopping if need be to so yield, *to a pedestrian crossing the roadway within a crosswalk*

(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

If you decide that CD [the driver] failed to yield the right of way as required by the statute, *you must find that CD was negligent*...If you decide that AB violated the statute by suddenly walking or running into the path of the vehicle, making it impractical for CD to yield the right of way, *you will decide that plaintiff was negligent*...

If you decide that AB was not within a crosswalk at the time of the accident, CD was still required to use reasonable care under the circumstances to avoid hitting AB, and you must decide whether CD did use reasonable care. In considering the question of AB's negligence, you must consider §1152 of the Vehicle and Traffic Law, which provides:

"(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway."

The statute does not prohibit a pedestrian from crossing the roadway outside a crosswalk, but requires a pedestrian crossing outside a crosswalk to yield the right of way to a motor vehicle that is likely to strike her. If you find that AB failed to yield the right of way as required by the statute, *you must find that AB was negligent*. [emphasis added]

The instruction requires the jury to find either that the defendant-driver or the plaintiff-pedestrian was negligent depending upon whether the plaintiff was inside of or outside of a crosswalk at the time of the accident.

The charge affirmatively instructs jurors who find drivers have violated §1151 of the VTL that they "must" find such drivers negligent.

The liability tables are turned though if the pedestrian is crossing the street outside of the crosswalk. The PJL charge again instructs jurors that they "must" find such a pedestrian negligent if they find that the pedestrian was outside of the crosswalk at the time of the accident. These legal standards are straightforward, and the charge gives jurors clear directions about what they should do after they have found the facts about whether the plaintiff-pedestrian was in or out of the crosswalk at the time of the accident, as well as the facts about the defendant-driver's behavior.

Traffic Rules and Regulations

These clear directions get muddled, however, when the NYC TRR gets added to the deliberative mix. The NYC TRR rules also provide legal standards applicable to pedestrians and drivers on the streets of New York City. NYC TRR Section 4-04(b)(1), headlined "pedestrians," states:

Right of Way In Cross Walks

Operators to yield to pedestrians in crosswalk. When traffic control signals or pedestrian control signals are not in place or not in operation, the operator of a vehicle shall yield the right of way to a pedestrian crossing a roadway within a crosswalk when the pedestrian is in the path of the vehicle or is approaching so closely thereto as to be in danger.

NYC TRR Section 4-04(b)(2) states:

Pedestrians shall not cross in front of oncoming vehicles. [N]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the operator to yield.

NYC TRR Section 4-04(c)(2) states:

No pedestrian shall cross any roadway *at an intersection* except within a crosswalk.
[emphasis added]

NYC TRR Section 4-04(c)(3) states:

No pedestrian shall cross a roadway except at a crosswalk on any block in which traffic control signals are in operation at both intersections bordering the block.

As can be seen, NYC TRR §4-04(b)(1) mirrors closely NY VTL 1151(a). NYC TRR 404(b)(2) is almost identical to NY VTL 1151(b).

The problems of clarity arise when judges decide to charge both the NYC TRR and PJI 2:75, or to substitute one standard for another either on their own initiative or at the request of one of the parties.¹

The relevant instruction from PJI 2:29 directs that if the jury finds a party has violated a provision of the NYC TRR, the jury "may" find that violation as "some evidence of negligence," as opposed to a definitive finding of negligence as they are instructed to do if they find either the driver or the pedestrian violated the relevant provision of the NY VTL.

A jury finding of a violation of the standard of care imposed by the NY VTL requires that the jury make a finding of negligence per se. In following the instruction of PJI 2:75 the jury's job is reasonably simple: Find the facts as adduced at trial, then apply the law applicable to both drivers and pedestrians pursuant to the NY VTL to those facts. In contrast, a finding by the jury of a violation of the relevant provisions of the NYC TRR does not require the jury to make an affirmative finding of negligence, but rather requires only conditionally that the jury "may" apply that finding as "some evidence of negligence," clearly a different and lesser standard.

Conflicting Rulings

The issue gets cloudier when we factor in the conflicting rulings of the Appellate Division from the First and Second Departments on these questions. There is a definite split between the First and Second Departments on the issue of which standard to apply, the NY VTL or the NYC TRR.

In Cumming v. Camara, 66 A.D. 3d 515 (1st Dept. 2009), the First Department specifically held that the NYC TRR superseded the NY VTL.

In *Cumming*, the plaintiff was crossing a street outside of a crosswalk at around 3:45 a.m. and was struck by a taxi. Plaintiff had testified at trial that he was drunk at the time of the accident, saw the taxi in the distance as he started to cross the street, and was aware that the taxi had a green light. The jury issued a verdict for the defense on liability. The plaintiff challenged this verdict on appeal, asserting that "the court gave an erroneous jury charge concerning the failure to yield the right of way."

Plaintiff presumably had argued that he was entitled to the lesser standard embedded in the NYC TRR that his apparent failure to yield the right of way was "some evidence of negligence" rather than affirmative evidence of negligence as the NY VTL requires. The First Department in *Cumming* unanimously affirmed the jury's verdict holding that:

[a]lthough the Court improperly charged the jury on pedestrians crossing a roadway, under a provision of the Vehicle and Traffic Law *that was superseded* by the Rules of the City of New York...the error was harmless because it did not bear upon an issue reached by the jury. The improper charge related exclusively to plaintiff's duty of care in entering upon the roadway. The verdict was based on a finding that the driver was not negligent. Therefore, the jury never reached the question of plaintiff's negligence.

Id. at 516 [emphasis added].

While it did not reverse the verdict, the First Department clearly stated that the NYC TRR supersedes the provisions of the NY VTL. To date, there is no subsequent history for the Cumming case, either positive or negative, and it remains good law.

The Second Department reached a different conclusion on the same question in Collazo v. Metropolitan Suburban Bus Authority, 68 A.D. 3d 803 (2d Dept. 2009) decided in the same year as the Cumming decision.

In *Collazo*, after trial, a jury found for the defendant on the liability question in a case involving a pedestrian crossing in a crosswalk and a defendant driver disobeying a steady red light.² The trial court granted the plaintiff's motion to set aside the jury verdict and for a new trial on liability. The plaintiff had made a post-trial motion to set aside the verdict on two grounds: (1) that the verdict was against the weight of the evidence, and (2) that the verdict should be set aside in the interests of justice because the court erred in instructing the jury that if it found the defendant bus driver had violated the NYC TRR it could consider such violation some evidence of negligence while the court also instructed the jury that if the defendant driver violated NY VTL 1111(d)(1) [regarding obedience to a red light] this constituted negligence, and that this was confusing.

The trial court granted plaintiff's motion on the first ground but rejected the plaintiff's challenge to the jury instructions.

The Appellate Division affirmed, but not on the ground that the trial court found. The Appellate Division found that the trial court had erred in setting aside the verdict as against the weight of the evidence, holding that the jury had appropriately resolved conflicting versions of the accident in the defendant's favor. The court found, however, that the trial court's jury instructions were confusing, and, confusing enough to warrant setting aside the verdict and the granting of a new trial. In so finding the court held that:

...the court's instructions to the jury that a violation of the New York City Traffic Regulations could be considered some evidence of negligence, while a violation of Vehicle and Traffic Law §1111(d)(1) constitutes negligence, was confusing, given that the regulation and statute are essentially consistent, and warranting setting aside the verdict and granting a new trial. *In the absence of express statutory language providing that a local regulation controls over a state statute, and where, as here, the regulation and statute are essentially consistent with each other, the statute controls.* Moreover, a violation of a state statute constitutes negligence as a matter of law. Therefore, the Supreme Court should have granted that branch of the plaintiff's motion which was to set aside the jury verdict in the interest of justice and, at the new trial the trial court should instruct the jury that a finding that [the defendant] violated Vehicle and Traffic Law §1111(d)(1) constitutes negligence and should not make any reference to New York City traffic regulations.

Id. at 804 (emphasis added).

The *Collazo* case also remains good law and has not to date been questioned or reversed.

Conclusion

Until this conflict is resolved, cases involving drivers and pedestrians will proceed to trial with differing legal standards depending on whether the case is brought in the First or the Second Department of the Appellate Division. Attorneys for plaintiff-pedestrians may want to factor in these standards when considering which county to file their case in. Attorneys for defendant-drivers may want to consider a change of venue, if available, for their clients to the Second Department where clear standards of negligence applicable to both plaintiff-pedestrians and defendant-drivers apply.

Endnotes:

1. Pursuant to PJI 2:29 which allows for the plaintiff to ask the jury to consider whether the defendant violated a city ordinance or regulation. PJI 2:29 states: "Plaintiff claims that the defendant violated a (city ordinance, regulation). If you find that the defendant violated the (ordinance, regulation), you may consider the violation as some evidence of negligence, along with the other evidence in the case, provided that such violation was a substantial factor in bringing about the occurrence."

2. Plaintiff's attorney in the Collazo case, Joseph R. Crafa, provided the brief on behalf of the plaintiff-pedestrian to this author. The case itself is silent on the facts.

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