Criminalizing Negligence in the New York City Administrative Code

By Mark S. Yagerman and Max Bookman

Fundamental to any negligence action is a showing that the defendant's conduct fell below the degree of care that a reasonable person would exercise under the circumstances.[1] For centuries, accident cases have been evaluated by juries and triers of fact as to whether a particular action was negligent, within the meaning of the long-established common law definition.[2]

Because negligence by its very definition amounts to unintentional conduct, the legal remedy for an accident victim is rarely, if ever, found in the criminal arena. To the contrary, an individual who has been injured by another's negligence is entitled to recover money damages against the wrongdoer in a civil proceeding.[3] For all the criticism of this system that has been levied, the undeniable truth is that the remedy of money damages for negligence victims is the bedrock of our civil justice system, having been carried over from British common law.[4]

The latest addition to the New York City Administrative Code promises to fundamentally upend these most basic and long-established concepts of negligence in an unprecedented manner.

Newly enacted Section 19-190 of the New York City Administrative Code, a critical element of the present mayoral administration's much-publicized policy vision of reducing traffic fatalities to zero, provides in pertinent part "any driver of a motor vehicle who fails to yield to a pedestrian or person riding a bicycle when such pedestrian or person has the right of way....and whose motor vehicle causes contact with a pedestrian or person riding a bicycle and thereby causes physical injury, shall be guilty of a misdemeanor."[5]

The penalty for a violation of Section 19-190 is a fine of no more than $250, imprisonment for no more than thirty days, or both.[6]

The standard for the imposition of Section 19-190's penalties does not turn on a showing of recklessness, wantonness, or any intentional conduct, nor does it require a showing of clear and convincing evidence that the driver failed to yield to the pedestrian or bicyclist in the crosswalk.[7] To the contrary, a criminal penalty is attached to the driver for merely acting without due care for failing to yield when the pedestrian or bicyclist was in the crosswalk and had the right of way.[8]

Laudable as the aspiration of eliminating pedestrian traffic injuries may be, Section 19-190 seeks to accomplish that goal through a draconian measure: the criminalization of negligence. This is unprecedented, as it blurs the line between tort and criminal law.

Distinction Between Negligence and Crime

Equally ancient and enduring as the elements of negligence is the basic common law threshold for criminal conduct. For time immemorial, courts have insisted that an individual's mental status, or *mens rea*, meet some level of intentionality in order to constitute criminally culpable conduct.[9]

As was written nearly a century ago, "there can be no crime large or small, without an evil mind. It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offense is the wrongful intent, without which it cannot exist."[10] This principle is regularly reaffirmed by the United States Supreme Court, as it was as recently as June 2015.[11]

Although the level of required intentionality varies from crime to crime (e.g., purposely, knowingly, recklessly), the common thread that weaves all crime together is that there must be *some* intentional conduct.[12] Moreover, proof of criminal conduct must be "beyond a reasonable doubt," as opposed to the civil "preponderance of the evidence" standard.[13]

The *mens rea* requirement of some minimal level of intentionality is supported by any of the four traditionally recognized policy justifications for criminal punishment.[14] One well-recognized purpose for prosecuting crime is strictly punitive; levying "just punishment" of the actor in the spirit of Hammurabi's Code.[15] Deterrence is an additional goal; punishing those who commit crime discourages others from engaging in the same conduct in the future.[16] Third is incapacitation; removal of the criminal actor from society makes the public safer.[17] Fourth is rehabilitation; providing the criminal with an opportunity to make amends and reform himself.[18]

Whichever of the four traditional justifications, the trigger for criminal punishment is intentional conduct. None of these justifications makes any sense without intentionality. How can one be deterred from conduct she did not intend to do in the first instance? Is society truly safer if someone who had an accident is incarcerated? Will a monetary fine reform the driving of someone who drove carefully to begin with?

The criminalization of unintentional conduct is why Section 19-190 is incongruent with our most basic understanding of what crime is. Section 19-190 advances none of the goals of punishing crime. Instead, it merely criminalizes accidents.

Policy Concerns

Advocates of Section 19-190 claim that the statute will make pedestrians safer by acting as a deterrent.[19] But that view is misguided.

Any New Yorker is familiar with aggressive drivers who turn though crowded crosswalks in a manner that appears to invite injury. Yet advocates of Section 19-190 fail to recognize that existing criminal law already addresses drivers who operate their vehicle in a reckless (as opposed to merely negligent) manner.[20] Any driver who turns through a crosswalk while intentionally disregarding the safety of others can and should be punished under existing law prohibiting reckless driving.

Conversely, not all drivers who turn through crosswalks do so recklessly. Nevertheless, accidents in crosswalks may occur even though the operator of the vehicle was driving with all appropriate care. Those drivers who strike pedestrians accidentally, lacking any intentional disregard for the safety of others, will not be deterred, as they possess no intentionality in need of deterrence in the first place.

Further, Section 19-190 promises to complicate the civil litigation of auto accidents.

First is the vexing issue of the impact of the criminal violation on a subsequent civil proceeding. Built into Section 19-190 is an exception that the section is not violated if "the failure to yield and/or physical injury was not caused by the driver's failure to exercise due care."[21] Unpacking the triple-negative in the ordinance's drafting, the language provides that only those drivers who did not exercise reasonable care are guilty of the violation.

It requires no stretch of the imagination to envision how this will play out in practice. A driver collides with a bicyclist in an intersection, and is cited by the police for a misdemeanor violation of Section 19-190. Invariably, the driver will plead guilty in return for merely paying the fine instead of risking jail time. By the time the subsequent civil personal injury proceeding commences, there may be a judicial admission by the defendant for violating Section 19-190 including the "failure to exercise due care" provision. Even the most cursory search of personal injury practitioners' websites reveals the excitement of the plaintiff's bar for this statute.

Simply put, in order to avoid jail time, the defendant will have already admitted to acting unreasonably under the circumstances, and will have done so in a judicial proceeding with stakes comparable to, if not higher than, the subsequent civil litigation.

The unanticipated consequences of these inevitable developments are as numerous as they are difficult to conceive. Perhaps a proliferation of motions for summary judgment on liability on the grounds of an admission of "failure to exercise due care" in a plea deal.[22] *In limine* motion practice as to the admissibility of the criminal record at the civil trial. Moreover, insurance coverage issues may be abound, as criminal conduct may be uninsurable as a matter of public policy.[23]

Additionally is the question of punitive damages. Punitive damages are generally reserved for conduct that is "wanton, recklessness, and grossly negligent."[24] For intentional torts such as battery, punitive damages are recoverable. Will punitive damages be standard in crosswalk negligence cases now? Like criminal conduct, punitive damages are uninsurable as a matter of public policy.[25]

Moreover, Section 19-190 also creates the potential for upsetting existing law pertaining to dispositive motion practice. Under present appellate authority, a plaintiff is not entitled to summary judgment unless she makes a showing of not only the defendant's negligence, but her own lack of fault.[26] Now, it will be no short leap for plaintiffs' counsel to argue that Section 19-190 entitles their clients to a presumption of their lack of fault.

Finally, enforcement of Section 19-190 places an unfair burden on public workers, such as sanitation drivers and MTA operators, who serve the public by driving on a daily basis, yet have already been dragged out of their vehicles and arrested for simple traffic accidents. Indeed, as recently as February 2015, a 24-year veteran MTA bus driver was arrested pursuant to Section 19-190, at the scene of an accident with a pedestrian in the crosswalk, without any allegation of reckless driving.[27]

Conclusion

Our civil justice system is well-equipped to make whole a pedestrian or bicyclist injured in a crosswalk by a driver's negligence. Moreover, our criminal justice system is already equipped to punish and deter those who drive recklessly. By placing mere negligence into the criminal arena, Section 19-190 opens the door to unprecedented havoc in the administration of civil justice, while simultaneously accomplishing none of the goals that criminal law seeks to achieve. Possibly well-intentioned as the Vision Zero initiative may be in theory, its codification is simply a misguided foray into the criminalization of negligence.

Endnotes

1. *See* NY Pattern Jury Instructions ("PJI") 2:10 ("Common Law Standard of Care—Negligence Defined: Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.").
2. *See, e.g.*, Weaver v. Ward, 80 Eng. Rep. 284 (King's Bench, 1616) (the accidental discharge of a musket properly gives rise to a cause of action in tort).
3. *See* BMW of North America v. Gore, 517 US 559 (1996).
4. Mark A. Geitsfeld, *Compensation as a Tort Norm*, New York University Law and Economics Working Papers, Paper 350 (2013).
5. *See* NYC Admin. Code Sec. 19-190(a), (b).
6. *Id.*
7. *Id.*
8. *Id.*
9. "*Mens rea*," from the Latin maxim "*actus reus non facit reum nisi mens sit rea*," translates, "an act does not make one guilty without a guilty mind." *See* Eugene J. Chesney, *Concept of Mens Rea in the Criminal Law*, 29 Am. Inst. Crim. L. & Criminology 627 (1938-1939).
10. Brown, *Criminal Law*, 9 ed., 287 (1930).
11. *See* Elonis v. United States, 575 US __ (2015) ("[A] reasonable person standard is a familiar feature of civil liability in tort law, but is inconsistent with the conventional requirement for criminal conduct—awareness of some wrongdoing..." because such a standard "reduces [criminal] culpability on the all-important element of the crime to negligence.") (internal quotations omitted); *see also* United States v. Balint, 258 US. 250 (1922) (as a general rule, a "guilty mind" is "a necessary element in the indictment and proof of every crime.").
12. *See, e.g.*, Model Penal Code § 2.02, General Requirements of Culpability.
13. *Compare* NY Criminal Jury Instructions ("CJI") 6:20 ("A reasonable doubt is an honest doubt of the defendant's guilt for which a reason exists based upon the nature and quality of the evidence") *with* PJI 1:60 ("preponderance means the greater part of the evidence.").
14. *See* United States v. Taveras, 424 F. Supp. 2d 446 (EDNY 2006) ("the four classic justifications for punishment are just deserts [just punishment], deterrence, incapacitation, and rehabilitation."), *citing* Federal Sentencing Guidelines, 18 U.S.C. § 3553(a)(2) (sentencing court shall consider need to "provide just punishment," "afford adequate deterrence," "protect the public from further crimes of the defendant," and "provide the defendant with needed educational or vocational training...").
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *See* Office of the Mayor, Press Release, *Mayor de Blasio Signs Package of Life-Saving Traffic Safety Bills*, June 23, 2014, *available at* www1.nyc.gov/office-of-the-mayor/news/301-14/mayor-de-blasio-signs-package-life-saving-traffic-safety-bills ("'We have promised the people of this city that we will use every tool we have to make streets safer. Today is another step on our path to fulfilling that promise, and sparing more families the pain of losing a son, a daughter, or a parent in a senseless tragedy...' said Mayor Bill de Blasio.").
20. *See* NY Penal Law § 120.20 ("A person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."). Reckless driving is regularly prosecuted under § 120.20 in New York courts high and low. *See, e.g.*, People v. Goldstein, 12 NY3d 295 (NY 2009) (driving vehicle in pedestrian area of a construction zone); In re Richard B., 111 AD2d 166 (2d Dept. 1985) (reversing vehicle from driveway across sidewalk in vicinity of pedestrian); People v. Chaney, 163 AD2d 617 (3d Dept. 1990) (reversing vehicle in the path of a pedestrian); People v. Simpson, 99 AD2d 555 (2d Dept. 1984) (recklessly driving a vehicle towards a pedestrian police officer); People v. Smith, 76 Misc 2d 867 (Just.Ct. Spring Valley 1973) (recklessly driving a vehicle towards a police officer).
21. *See* NYC Admin. Code § 19-190(c).
22. *See* Grayes v. DiStasio, 166 AD2d 261 (1st Dept. 1990) ("A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue."); Ucar International Inc. v. Union Carbide Corp., 2004 WL 137073 (SDNY 2004) (plea of guilty by a criminal defendant is an admission of guilt of the substantive crime, as well as an admission to each of the elements charged); People v. Thomas, 53 NY2d 338 (NY 1981) (plea of guilty is an admission of factual guilt).
23. *See* Litrenta v. Republic Ins., 245 AD2d 344 (2d Dept. 1997), *citing* Allstate Ins. Co. v. Mugavero, 79 NY2d 153 (NY 1992) ("in general, it is contrary to public policy to insure against liability arising directly against an insured from his violation of a criminal statute.").
24. *See* PJI 2:278.
25. *See* Home Ins. Co. v. American Home Prods. Corp., 75 NY2d 196 (NY 1990) ("New York public policy precludes insurance indemnification for punitive damage awards.").
26. *See, e.g.*, Maniscalco v. New York City Tr. Auth., 95 AD3d 510 (1st Dept. 2012).
27. *See* ABC News, *MTA Bus Drivers Believe They are Unfairly Targeted by Vision Zero*, February 17, 2015, *available at* 7online.com/traffic/mta-bus-drivers-believe-they-are-unfairly-targeted-by-vision-zero/522369/.

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