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Tort Law--Violation of a Motor Vehicle Statute May Give Rise to Absolute Immunity (Van Gaasbeck v. Webatuch Central School District No. 1, N.Y. 1968)

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TORT LAW—VIOLATION OF A MOTOR VEHICLE STATUTE MAY GIVE RISE TO ABSOLUTE LIABILITY—A fourteen year old student was fatally injured by an automobile which struck him as he negligently crossed a highway a short distance from where he had been discharged by the driver of defendant's school bus. Although the driver was aware that the child would have to cross the highway, she failed to keep the vehicle halted with signal lights flashing or to instruct him to cross in front of the bus as required by Section 1174(b) of the New York Vehicle and Traffic Law. On appeal by plaintiff from an adverse judgment in the wrongful death action, the New York Court of Appeals *held* that if on a new trial it could be shown that the violation of the statute was the proximate cause of the injury, defendant school district would be absolutely liable and the contributory negligence of decedent would not bar recovery. *Van Gaasbeck v. Webatuch Central School District No. 1*, 21 N.Y.2d 239, 234 N.E.2d 243, 287 N.Y.S.2d 77 (1968).

It is only in the last century that negligence has received recognition as an independent basis for tort liability.[1] Negligence, possibly more than any other legal theory, reflects the philosophy and pulse of an age that has tested and eliminated rash or impractical burdens of responsibility.[2]

As the body of actionable wrongs has evolved, one important development has been the creation of statutory standards of care. In many instances, codification has been a cursory adoption of common-law standards, while in others duties unknown at common law have been imposed. However, the court "may assume that a 'liability' is not 'created' by statute in every case where the statute imposes a new duty or a standard of care different from that required by custom and common law."[3] One major problem created by these statutes in derogation of the common law is whether violation of such a statute is negligence per se, *i.e.*, as a matter of law, or whether it is merely some evidence of negligence to be submitted to the jury.[4] This conflict may be characterized

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[1] *See generally* W. PROSSER, TORTS § 28 (3d ed. 1964); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 365-76 (1951); Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184 (1926). Perhaps the first recovery for negligence in the United States was Brown v. Kendall, 60 Mass. (6 Cuch.) 292 (1850).

[2] *See* Comment, *The Development of New York Negligence Law*, 30 FORDHAM L. REV. 325 (1961), for a discussion of five recent developments which demonstrate New York's changing concept of negligence recovery.

[3] Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 304, 200 N.E. 824, 829 (1936).

[4] A major criticism of the negligence per se rule has been that it introduces an inflexibility into the law which is undesirable since the legislature cannot take into account all the varying circumstances of a particular violation and the resultant accident. Professor James has stated

as one in which those advocating fault as the basis for liability attempt to strike down any inflexible standard, while those whose chief concern is the compensation of accident victims opt for stricter rules of liability.[5]

The majority of American jurisdictions,[6] including New York,[7] have adopted the negligence per se rule. Nevertheless, liability is not without limitation. Proximate cause[8] and lack of contributory negligence[9] remain conditions precedent to recovery, and further qualifications have circumscribed inflexible application of the rule. Thus, for example, statutory violations have been excused where the person injured was not a member of the protected class,[10] where there was customary violation of the statute,[11] and where the statute was unreasonable on its face or as applied, such as when compliance would be impossible,[12] or where there was an emergency.[13] Also, there are frequently situations where the wisdom of obeying a statute is weighed against its prudent violation and it can be found that obedience is the negligent course.[14] Moreover,

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that "it is unrealistic and mechanical to say that reasonable men would blindly obey all the regulatory statutes under all circumstances, and to deprive the jury of its usual and historic function in negligence cases." James, *Statutory Standard and Negligence in Accident Cases,* 11 LA. L. REV. 95, 108 (1950). For further discussion of the controversy see Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361, 368-70 (1932); Comment, *Negligence Per Se—Traffic Violations,* 30 TENN. L. REV. 556, 565-67 (1963).

[5] *See generally* Comment, *Negligence Per Se—Traffic Violations,* 30 TENN. L. REV. 556 (1963).

[6] 2 F. HARPER & F. JAMES, TORTS § 17.6 (1956); W. PROSSER, *supra* note 1, at § 35.

[7] Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920).

[8] *See, e.g.,* Falk v. Finkelman, 268 Mass. 89, 168 N.E. 89 (1929) (illegal parking held not to be the cause of injury to pedestrian when fire truck collided with parked car); Marland Ref. Co. v. Duffy, 94 Okla. 16, 220 P. 846 (1923).

[9] Prosser, *Contributory Negligence as Defense to Violation of Statute,* 32 MINN. L. REV. 105, 113 (1948).

[10] Di Caprio v. New York Cent. R.R., 231 N.Y. 94, 131 N.E. 746 (1921), where a statute requiring railroad right of way to be fenced was construed as designed to protect the owners of domestic animals from loss. Therefore, plaintiff could not recover for the wrongful death of his child who had wandered onto defendant railroad's unfenced tracks.

[11] Dugan v. Fry, 34 F.2d 723 (3d Cir. 1929).

[12] Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946).

[13] Chase v. Tingdale Bros., 127 Minn. 401, 149 N.W. 654 (1914).

[14] Phillips v. Davis, 3 F.2d 798 (3d Cir. 1925) (compliance with auto-headlight dimmer ordinance negligent where conditions dictated use of bright beams); Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939) (failure of pedestrians to obey statute requiring that they walk against traffic not negligence where traffic conditions made compliance imprudent); Walker v. Lee, 115 S.C. 495, 106 S.E. 682 (1929) (driving on wrong side of road not negligence where compliance with statute would have certainly caused collision).

in some jurisdictions there is a trend to confine negligence per se to statutes and regard breaches of ordinances as evidence of negligence only.[15]

Despite a liberal trend[16] with respect to the application of the negligence per se rule, there are situations in which an even stricter standard of liability has been applied, *i.e.*, where the violation of a statute gives rise to absolute liability. The cases imposing absolute liability are primarily limited to the areas of labor law and child employment. The courts have consistently stated that, for the violation of a statute to impose absolute liability, the statute must be intended to protect a definite class of persons from a definable hazard which they are themselves unable to avoid.[17] However, to articulate the standard is less difficult than to apply it, and these criteria do not appear precise enough to allow one to easily distinguish such statutes. The language of statutes which have been held to give rise to absolute liability often do not themselves appear to mandate that result when compared with statutes which have been construed otherwise. Therefore, the rationale for finding that a particular statute imposes absolute liability for its violation must apparently be sought elsewhere, perhaps in the social policy underlying its enactment.[18]

In *Karpeles v. Heine*,[19] plaintiff, a child of thirteen, was injured while operating an elevator in violation of New York's Labor Law[20] which prohibited such operation by anyone under sixteen. Rejecting the defense of contributory negligence, the Court stated that "[p]ublic policy requires that a recovery . . . shall not be defeated by the very negligence, lack of care and caution that the statute was designed to prevent and make impossible, by prohibiting the employment of such a child in such a capacity."[21] The Court did not consider the age of the child alone, however, but stressed the dangers of the undertaking and the risks of employment in such occupations as well.

It is not merely youth which makes it difficult to appreciate danger. It may be the character of the hazard itself. Thus, in *Schmidt v. Merchants Despatch Transportation Co.*,[22] absolute

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[15] Rotter v. Detroit United Ry., 205 Mich. 212, 171 N.W. 514 (1919); Utica Mut. Ins. Co. v. Mancini & Co., 9 App. Div. 2d 116, 192 N.Y.S.2d 87 (4th Dep't 1959) (dictum).

[16] James, *Statutory Standard and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950). For a prediction of the trend in the future see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 396-97 (1951).

[17] Keonig v. Patrick Constr. Corp., 298 N.Y. 313, 317, 83 N.E.2d 133, 134 (1948), *citing* RESTATEMENT OF TORTS § 483 (1934).

[18] Prosser, *supra* note 9, at 122.

[19] 227 N.Y. 74, 124 N.E. 101 (1919).

[20] N.Y. LAB. LAW § 133(3).

[21] 227 N.Y. at 80, 124 N.E. at 103.

[22] 270 N.Y. 287, 200 N.E. 824 (1936).

liability for injuries to employees was imposed on an employer who failed to provide air filtration equipment of a capacity required by statute. The Court stated that the legislature had determined that defendant must shoulder the special responsibilities of being an employer, and that his conduct would not be judged in terms of the traditional reasonable man standard. Apparently underlying this rationale was the judgment that someone must accept hazardous employment, and it is society's obligation to help minimize the risks. Therefore, if the defenses of contributory negligence and assumption of risk were available to an employer, such a statute would be ineffective as an incentive for employers to minimize job hazards. Without such an interpretation, the only alternatives available to a workman faced with dangerous conditions would be to quit his job or depend upon ineffective penal sanctions for employer non-compliance.

These alternatives were discussed in *Koenig v. Patrick Construction Corp.*,[23] where the Court found the plaintiff was faced with the necessity of working with the equipment supplied by the employer or not working at all. New York Labor Law Section 240 provided that someone employing or directing another to perform labor, or repair or clean a building, must furnish ladders which have "safety shoes" to prevent slippage. The plaintiff, who himself had placed the improperly equipped ladder against the window, was thrown from it and injured when it slipped. The Court held that contributory negligence was not a proper consideration with statutes of this content and purpose, even though the danger of using such a ladder was easily foreseen and the plaintiff had been found contributorily negligent by the jury. It was further contended that the statutory language, "shall furnish," imposed a flat and unvarying duty on employers. The Court did not, however, explain how this statute differed from others imposing obligations upon employers in substantially identical terms. Rather, it relied on the principle that the plaintiff was an employee, a member of a specific class that needed special protection, and that the statute had to be liberally construed to accomplish its intended purpose. The Court indicated the limitations of such a construction and indicated that the statute would not be construed to impose absolute liability if the ladder had hit a passerby, or even another workman, since such persons would be outside the class for whose special benefit the statute was designed.

By 1963, the rationale in the labor area had become sufficiently clear to allow the court, in *Galbraith v. Pike & Son, Inc.*,[24] where an employee fell to his death from a ladder not meeting statutory specifications, to tersely state: "In this situation, the statute is

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[23] 298 N.Y. 313, 83 N.E.2d 133 (1948). *See also* Major v. Waverly & Ogden, Inc., 7 N.Y.2d 332, 165 N.E.2d 181, 197 N.Y.S.2d 165 (1960).

[24] 18 App. Div. 2d 39, 238 N.Y.S.2d 263 (4th Dep't 1963).

plainly applicable to [the defendant] and he is subject to absolute liability for any violation. . . ." [25]

However, even in the labor area there is evidence that the imposition of absolute liability is not without limit. In *Utica Mutual Insurance Co. v. Mancini & Sons*,[26] plaintiff's assignor was injured when an improperly shored-up trench collapsed around him. The court held that the violation of the safety rules of the Board of Standards and Appeals [27] neither created absolute liability nor constituted negligence per se, but was to be considered evidence of negligence only. Although the Labor Law provided that "rules and regulations of the Commission shall have the force and effect of law and shall be enforced in the same manner . . . ," [28] the court reasoned that the mere legislative declaration that a rule of a delegated body should have the same effect as law was not a strong indication that absolute liability was to be imposed. Therefore, the workman's contributory negligence was a proper element for consideration even though the rationale that a particular class was being protected from a readily definable hazard still seemed applicable.

The reluctance of the courts to extend the doctrine of absolute liability beyond the labor and child employment areas is illustrated by the decision of the Supreme Court of Minnesota in *Dart v. Pure Oil Co.*[29] There, a can of gasoline, improperly labeled kerosene in violation of state statutes, exploded and killed the plaintiff's deceased. After extensive consideration, the court held that the statute was for the protection of the general public and not for the plaintiff as a member of any special class. Therefore, contributory negligence was available as a defense to the action.

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[25] *Id.* at 43, 238 N.Y.S.2d at 267. It is interesting to compare the 19th century *laissez-faire* attitude expressed by the New York Court of Appeals in Knisley v. Pratt, 148 N.Y. 372, 42 N.E. 986 (1896), which refused to construe an employee safety statute to impose absolute liability. The Court was of the opinion that it would be unwise to adopt such a policy which would have the effect of depriving an employee of the opportunity of taking a job with obvious risks in order to obtain increased wages, or of securing a job in the first place in a field others might not be willing to enter. This trend, as noted, has obviously changed. The imposition of absolute liability coincides historically with the other extreme measures that were necessary to afford men humane and safe working conditions.

[26] 9 App. Div. 2d 116, 192 N.Y.S.2d 87 (4th Dep't 1959).

[27] The Board of Standards and Appeals has the power to provide standards for the protection of workmen under Section 241 of the New York Labor Law.

[28] N.Y. LAB. LAW § 241.

[29] 323 Minn. 526, 27 N.W.2d 555 (1947).

In support of the *Dart* decision, Dean Prosser has stated:

> In nearly all automobile cases, in nearly all railway cases, in many street railway cases, in many cases arising out of the condition of premises or the sale of goods or fires or explosions or unusual events of any kind, the action is founded upon the defendant's violation of a statute. In fact it is safe to say that today negligence actions are very much in the minority in which there is not some claim of violation of a statute, ordinance or regulation. Viewed in this light the contention [that absolute liability should be adopted] was no less than a challenge to the entire doctrine of contributory negligence and a proposal for its abolition in the majority of negligence cases.[30]

Furthermore, he indicated that when the legislature adopts a standard of care, an examination will usually reveal that it is merely an extension of common-law negligence. For example, even absent a statute, driving on the right side of the road would be the accepted standard of care.[31] Rarely is the nature of the wrong changed by codification. The legislature merely removes any doubts as to what negligent conduct might be. When the legislature goes beyond existing law, one should look to the area of tort liability it most closely resembles and probably it will be apparent that it is just a natural development of reasonable standards. As for the contention that the plaintiff in *Dart* was of a class unable to exercise self-protective care, Dean Prosser noted that such cases are usually limited to statutes fixing the age of consent and child labor acts. Here there is strong legislative intent found by the courts to impose strict liability. This intent is found from the particular hazards and social problems being dealt with and from the very character and obvious purpose of the statute. Social conditions, extreme hazards, and the concept that "the cost of the product shall bear the blood of the workman" have shaped the exceptions.

In *Major v. Waverly & Ogden, Inc.*,[32] it is arguable that the statute breached tended to protect a particular class of persons from a hazard they could do little to avoid. There, the defendant had failed to provide adequate lighting and a handrail on a stairway as provided in the state building code.[33] The plaintiff, who had been watching television while at a friend's home, got up "in a rush" to go to the bathroom but opened the wrong door by mistake, stepped into the improperly lighted hallway and plunged down a flight of stairs. It could not reasonably be said, thought

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[30] Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 106 (1948).

[31] *Id.* at 110.

[32] 7 N.Y.2d 332, 165 N.E.2d 181, 197 N.Y.S.2d 165 (1960).

[33] N.Y. EXECUTIVE LAW §§ 374-374(a).

the Court, that the statute disclosed an intent to create liability where none heretofore existed. In the Court's opinion, the primary purpose of the statute "was not to impose an unvarying duty for the protection of a particular class against a defined hazard" but rather to provide performance standards "thereby reducing excessive construction costs which the Legislature found threatened 'the health, safety, welfare, comfort and security of the people of the state.'" [34]

The Court showed reluctance to go beyond general standards of negligence and impose absolute liability.

> Were we to hold otherwise in this case, and fashion the liability for which plaintiff contends, we would be setting precedent for manifold statutory liabilities not only as to violations of the Executive Law but as to violations of countless other statutes as well, such as by way of illustration, the Vehicle and Traffic Law. There would be danger indeed that our common law of negligence would be substantially recast.[35]

The cases involving injuries to children while under the supervision of school authorities have usually applied common-law negligence standards, notwithstanding the accompanying violation of a statute. In *Ohman v. Board of Education*,[36] it was declared that a state statute acknowledging liability for negligence of a teacher in the supervision of pupils did not depend on standards other than common-law negligence and that a teacher was held only to the same standard of care required of a prudent parent. Here, the teacher's absence from the room at the time of the accident was non-negligent and was not the proximate cause of the injury to the plaintiff's eye by a thrown pencil.

More recently, in *Decker v. Dundee Central School District*,[37] lack of playground supervision required by statute [38] gave rise to

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[34] 7 N.Y.2d at 335, 165 N.E.2d at 183, 197 N.Y.S.2d at 167. It might be argued that the statute did not have as its sole objective the reduction of costs but rather sought to allow cost reduction in a manner consistent with reasonable health and safety standards. Section 374 of the New York Executive Law provides that the Buildings Code Commissioner is authorized to make rules and regulations relating to construction and installation of equipment, including provisions for safety and sanitary conditions.

[35] 7 N.Y.2d at 335, 165 N.E.2d at 183, 197 N.Y.S.2d at 168.

[36] 300 N.Y. 306, 90 N.E.2d 474 (1949).

[37] 4 N.Y.2d 462, 151 N.E.2d 866, 176 N.Y.S.2d 307 (1958). *See also* Lopez v. City of New York, 4 App. Div. 2d 48, 163 N.Y.S.2d 562 (2d Dep't 1957), *aff'd mem.*, 4 N.Y.2d 731, 148 N.E.2d 909, 171 N.Y.S.2d 860 (1958) (injury to child in unsupervised swing area gave rise to common-law negligence liability notwithstanding violation of statute).

[38] N.Y. EDUC. LAW § 1709(16) provides, *inter alia*, that it should be the duty of the Board of Education of every Union Free School District to "employ such persons as may be necessary to supervise, organize, conduct

liability, but on common-law negligence grounds. There, a ten year old girl was injured during school hours while jumping off a bleacher in the school playground. There was no teacher supervision as required by Section 1709 of the Education Law.[39] That section is not a detailed description of what constitutes supervision but states that "adequate supervision" must be provided. It is interesting to note that the Court held that the complete lack of supervision in this case constituted only negligence. Thus, the violation of a statute which was apparently intended as protection for a limited class, *i.e.*, school children, from their inability to protect themselves was not construed to effect absolute liability. This type of case, thought the Court, was one in which contributory negligence of the child is a proper consideration for the jury.[40]

At common law, absent governmental immunity, school districts were bound to provide students with reasonably safe conditions under which to study.[41] Transportation is merely a natural extension of what the school districts feel they should provide to children as society advances and becomes more complex. However, as the school district assumes greater responsibility, it must do so with care. *McDonald v. Central School District No. 3 Romulus*[42] contains an interesting discussion of both statutory duty and common-law negligence. An action was initiated against the bus driver and the school district for injuries sustained by the plaintiff while crossing in front of a school bus. The statutory predecessor of Section 1174 of the New York Vehicle and Traffic Law required that a school bus halted for the discharge of children remain standing with signal lights flashing until they crossed in front of the bus and safely reached the opposite side of the street and that an overtaking automobile stop behind a standing school bus. However, the bus driver failed to make sure that an overtaking vehicle had halted before signaling the children to cross, and one child was injured when the driver of the auto failed to stop. Although liability of the school district might have been predicated solely on

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and maintain athletic, playground and social center activities. . . ." This has long been construed to impose a duty to supervise. *See* Miller v. Board of Educ., 291 N.Y. 25, 50 N.E.2d 529 (1943).

[39] N.Y. EDUC. LAW § 1709(16).

[40] In order that a child not be contributorily negligent in New York, he must only exercise the degree of care which is reasonable for a child of similar experience and intelligence under the circumstances. Camardo v. New York State Ry., 247 N.Y. 111, 159 N.E. 879 (1928). However, where an infant is held non sui juris, his failure to meet the standard will not bar recovery. *See generally* 41 N.Y. JUR. *Negligence* §§ 65-67 (1965).

[41] *See* Annot., 86 A.L.R. 2d 535-38 (1962).

[42] 179 Misc. 333, 39 N.Y.S.2d 103 (Sup. Ct. 1941), *aff'd mem.*, 264 App. Div. 943, 36 N.Y.S.2d 438 (4th Dep't 1942), *aff'd mem.*, 289 N.Y. 800, 47 N.E.2d 50 (1943).

the employee's breach of the statutory duty of care,[43] the court relied on the jury's finding that the bus driver had been negligent in not anticipating that the approaching car would fail to stop. Liability was based on the unreasonableness of the bus driver's reliance upon the fictitious assumption that the driver of the other car would obey the law.

In the principal case, the defendant's bus driver violated Section 1174(b) of the New York Vehicle and Traffic Law. Plaintiff's deceased and his companion were not instructed to cross in front of the halted bus although the driver knew they had to cross the highway. Instead, the bus pulled away and the children were left to cross the road on their own. Since the school district's negligence had been established and was not disputed,[44] the Court of Appeals considered the question of whether the fourteen year old decedent's contributory negligence was available as a defense. Judge Scileppi, joined by Judge Breitel, writing for the Court,[45] noted that the doctrine of absolute liability has been applied most often where there were violations of employee safety statutes and conceded that " 'obviously not every statute which commands particular conduct is within this principle.' " [46] The Court relied heavily on the *Koenig* rule,[47] and reiterated that statutes "designed to protect a definite class from a hazard of definable orbit, which they themselves are incapable of avoiding," should give rise to absolute liability. In analogizing the statute here to labor statutes held to impose strict liability, the Court stated that the language "shall instruct" evidenced an intent to impose a strict and unvarying duty. After noting the distinct considerations inherent in the labor safety statutes, *i.e.*, unavoidable hazards and lack of choice due to the economic necessity of plying a livelihood, the Court nevertheless thought it logical to extend absolute liability to the transportation statute in question. Student bus riders comprise a definite class which could be considered in need of protection from themselves since they are not capable of taking the proper precau-

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[43] It is interesting to note that the *McDonald* court speculated as to whether it would be safer to leave the children to their devices and allow them to wait until the bus had driven away so that they could see the traffic without obstruction. 179 Misc. at 336, 39 N.Y.S.2d at 106.

[44] The lower court had found, however, that the child's contributory negligence was a defense to the common-law action against the driver of the automobile which struck him, and that finding was not disturbed by the Court of Appeals which affirmed the dismissal as to him.

[45] It should be noted that the Court based its decision on absolute liability for statutory violation despite the fact that only common-law negligence had been pleaded. Relying on Diemer v. Diemer, 8 N.Y.2d 209, 168 N.E.2d 654, 203 N.Y.S.2d 829 (1960), the Court stated that if a pleader states facts making out a cause of action, it matters not whether he gives it a name.

[46] 21 N.Y. 2d at 244, 234 N.E.2d at 245, 287 N.Y.S.2d at 80 (1968).

[47] Koenig v. Patrick Construction Corp., 298 N.Y. 313, 83 N.E.2d 133 (1948) (discussed in text accompanying footnote 23).

tions to cross a road safely. It is well known that children are "unaware of and disregard dangers which are apparent to adults." [48] There was also an absence of choice since the Education Law requires that children go to school until they are sixteen, and many must travel by bus. Accordingly, the bus driver and the school district were held absolutely liable and contributory negligence was not available as a defense. Only the issue of proximate cause was remanded to be determined at a new trial.

Judges Bergan and Keating concurred in part and dissented in part without opinion, stating only that they would have also granted a new trial as to the driver of the automobile which struck the deceased.

In an opinion by Judge Van Voorhis, the three dissenters agreed that absolute liability had been imposed in a limited class of actions which were created by statute. However, the dissent urged that they were not aware of one case involving motor vehicles and pedestrians which had given rise to more than a cause of action in negligence. It was noted that statutes commanding a duty of care generally do not give rise to absolute liability unless such a provision is implied. Judge Van Voorhis thought that the majority's view would make it easy to say that every time a statute prescribes particular care it is enacted for the protection of a particular class, be it motorists in a particular traffic situation or children and adults crossing the street. The dissenters reasoned that the statute was merely a codification of the school district's common-law responsibility to use reasonable care through its agents, which includes adequate supervision and rules for the protection of the children. Such a codification should not change the concept of liability but should merely provide a standard by which negligence may be determined. Finally, where the negligence standards are retained, a child, in order to avoid contributory negligence, would only be required to exercise that degree of care reasonably to be expected for his age and degree of development.[49]

The precise effect of the instant case on the attitude of the New York courts toward construing statutes commanding a duty of care to impose absolute liability is somewhat difficult to evaluate due to the lack of written opinions from Judges Bergan and Keating. Both voted to reverse as to all defendants, apparently dissenting from the Court's determination that a new trial as to the driver of the automobile would serve no useful purpose. However, since no reasons were presented for their position, it is not clear to what extent, if at all, these two judges agree that the absolute liability doctrine is apposite here. There remains the possibility that some unstated ground, such as an erroneous charge by the trial judge,

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[48] 21 N.Y.2d at 245, 234 N.E.2d at 246, 287 N.Y.S.2d at 81.
[49] *Id.* at 249, 234 N.E.2d at 249, 287 N.Y.S.2d at 85.

motivated them to concur in ordering a new trial as to the bus driver and the school district. Furthermore, since both sides of the absolute liability issue were clearly articulated by the opposing opinions, the failure of Judges Bergan and Keating to voice themselves on the question militates against confidently asserting that they support the absolute liability rationale. Therefore, it is possible that only two judges on the Court of Appeals favor imposition of absolute liability for a violation of Section 1174(b) of the Vehicle and Traffic Law, and one can only speculate on whether the instant case truly marks a readiness on the part of the New York Court of Appeals to expand the scope of the doctrine beyond traditional areas of application.

The adoption of some means to insure that children can safely cross the road on their way home from school is a natural extension of the attempt to provide safe transportation for school children. However, this attempt has been construed as more than just another undertaking to set a standard of care, and has become instead an undertaking to insure against all accidents, regardless of the contributing factors. Certainly it is commendable to protect children from their own lack of judgment. However, the economic and social implications which led to the imposition of absolute liability in the labor law field are absent in the context of student transportation. Protection of school children does not spring from the foundation of inhumane and cruel working conditions that were an outgrowth of our industrial revolution. Is the school district of such a nature that it must necessarily bear the full liability for all student injuries? Employers, unlike school districts, bear the losses of production since they can most easily spread them. This prevents labor and our growing economy from grinding to a halt in order to undertake the unrealistic and impossible task of removing all potential work hazards. It is the philosophy of the time that the injured workman be able to seek quick and certain recovery from the inevitable accidents of production. It is necessary to retain flexibility in our labor force which is to face the daily dangers. It is equally important, however, to retain the flexible standard of negligence in most other areas of potential liability so that the risk of economic loss will not outweigh the possible rewards of otherwise socially productive action.

The rationale for changing the standard of liability in the area of student transportation seems weak. First, the statutory language appears too ambiguous a legislative directive to justify destruction of the important defense of contributory negligence. Second, the hazard to be avoided here appears no more precisely defined than the hazard that faces all pedestrians and most children of the plaintiff's age the rest of the time that they are not under the watchful eye of the school bus driver as they cross a rural highway or bicycle along a country road. In short, the application of absolute liability in this area seems no more apposite

than in other areas now governed by common-law negligence theories.

What seems really at issue is the child's inability to protect himself from the hazards of traffic. Is it, however, that a child is unable to protect himself at all, or is it merely that he is unable until reaching a certain age and degree of maturity? In the majority of instances, children might well be unable to safely cross unassisted and having the bus driver's aid is a reasonable alternative to having older children help the younger ones or having mothers meet the bus. However, it is one thing to say that a statute is designed for the beneficial purpose of getting children home safely, but quite another to say that where the statute is breached each child should not exercise whatever caution seems reasonable for his age. This is not a harsh request and will not in any way relieve the school authorities of their duty to exercise reasonable care to protect their charges. It merely asks that if a youth, be he fourteen or eighteen, finds himself in a position where it is necessary to cross a highway, and is injured in so doing, the jury should be allowed to decide if he took safety precautions in a manner commensurate with his ability. It is submitted that where a child, especially one of high school age, fails to exercise that degree of care which is reasonably to be expected of him under the circumstances, it is inequitable to place the entire burden of that failure on the school authority. Even as to younger children there seems to be no reason to draw an arbitrary age line beyond which no exercise of care can reasonably be expected. Rather than treat the school district as an insurer, concepts of fault should play a role in determining its liability.

Another danger of unnecessarily protecting a certain class is the potential imposition of absolute liability for every breach of a statutory duty. As Dean Prosser has noted, the imposition of absolute liability in all but limited areas would be no less than a challenge to our entire negligence standard. If absolute liability is to be the consequence of violation of Section 1174(b) of the New York Vehicle and Traffic Law, it would seem logical to extend the doctrine to at least all statutes which contemplate the protection of school children from everyday hazards. This approach would seem to discredit the line of cases represented by *McDonald*.[50] Indeed, the logic of the instant case might well be extended to cases involving violation of safety statutes by common carriers who are already subject to a higher standard of care with respect to their passengers than is usually required.

It may well be that the growing concern of our society with the compensation of accident victims regardless of fault requires

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[50] McDonald v. Central School Dist. No. 3 Romulus, 289 N.Y. 800, 47 N.E.2d 50 (1943).

that the traditional concept of contributory negligence as a bar to recovery be discarded where the wrong complained of involves the breach of a statutory standard of care. It certainly seems within the province of the legislature to make such a judgment since it is responsible for translating prevailing community values into law. However, absent an unambiguous indication of legislative intent to impose absolute liability, it is suggested that the courts exercise caution before deciding to abandon traditional tort concepts. Possibly, a fourteen year old should be required to look both ways before crossing an established highway. No less can be expected of our courts.